

1994

In the matter of the Estate of Mildred C. Meeks,  
deceased. Geroqe F. Naillon v. Robert Gitlin,  
Personal Representative of the Estate of Mildred C.  
Meeks : Brief of Appellee

Utah Court of Appeals

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James D. Gilson; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Appellee.

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

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

UTAH COURT OF APPEALS  
IEF

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

UT

GEORGE F. NAILLON,  
Appellant,

vs.

ROBERT GITLIN, Personal  
Representative of the Estate  
of Mildred C. Meeks,  
Appellee.

DOCKET NO. 940101

Case No. 940101

Priority No. 15

**BRIEF OF APPELLEE ROBERT GITLIN,  
PERSONAL REPRESENTATIVE OF THE ESTATE OF MILDRED C. MEEKS**

ON APPEAL FROM AN ORDER OF FORMAL PROBATE OF WILL AND  
APPOINTMENT OF PERSONAL REPRESENTATIVE AND FROM AN ORDER DENYING  
PETITION TO VACATE OR SET ASIDE SAME, BY THE SEVENTH JUDICIAL  
DISTRICT COURT, CARBON COUNTY, STATE OF UTAH,  
HONORABLE BOYD BUNNELL AND HONORABLE BRUCE K. HALLIDAY

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

Attorneys for Appellee

JEFFREY R. HILL  
HILL, HARRISON & HILL  
Jamestown Square, Suite 200  
3319 North University Ave.  
Provo, UT 84604

Attorneys for Appellant

**FILED**  
Utah Court of Appeals

**MAY 19 1994**

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

Attorneys for Appellee

JEFFREY R. HILL  
HILL, HARRISON & HILL  
Jamestown Square, Suite 200  
3319 North University Ave.  
Provo, UT 84604

Attorneys for Appellant

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### **STATEMENT OF JURISDICTION**

As discussed in part I in the Argument below, the Court of Appeals is without jurisdiction over this appeal inasmuch as Appellant George F. Naillon ("Naillon") failed to file a notice of appeal within thirty days of the November 16, 1992 Order of Formal Probate and Appointment of Personal Representative as required by Rule 4, Utah Rules of Appellate Procedure. Naillon's Rule 60(b) Motion, filed three months later, on February 16, 1993, did not extend the time for filing a notice of appeal and it should not be allowed to be a substitute for an untimely appeal.

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Whether the Court of Appeals should dismiss Naillon's appeal for lack of jurisdiction where he did not file a notice of appeal within thirty days of the Order of Formal Probate and Appointment of Personal Representative and where he seeks appellate review of this Order by appealing the district court's denial of his Petition to Vacate or Set Aside Order. This question of law is to be considered by the Court de novo, under a correctness standard of review. See Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

2. Whether the district court properly exercised its discretion to deny a telephonic request for a continuance by Naillon's California lawyer and by entering the Order of Formal Probate of Will and Appointment of Personal Representative where all interested parties received timely notice of the hearing and where no objections had been made or filed. This question is

reviewed under an abuse of discretion standard. See Hardy v. Hardy, 776 P.2d 917, 925-26 (Utah App. 1989).

3. Whether the district court properly denied Naillon's Petition to Vacate or Set Aside Order where the Petition did not demonstrate excusable neglect for the delay, and where it failed to identify specific evidence that could not have been discovered earlier and which would warrant setting aside the Order. This question is reviewed under an abuse of discretion standard. See Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989).

#### **DETERMINATIVE STATUTES AND RULES**

The following statutes and rules whose interpretation is considered by appellee to be dispositive in this appeal are listed below. (They are reproduced in the addendum to this brief.)

Utah Code Ann. §§ 75-3-401 to -414 (1983) (See Add. A)

Rule 60(b), Utah Rules of Civil Procedure (See Add. B)

Rule 4, Utah Rules of Appellate Procedure (See Add. C)

#### **STATEMENT OF THE CASE**

This is an appeal of the Seventh Judicial District Court's Order of Formal Probate of the Will of the decedent, Mildred Meeks, and the Appointment of appellee Robert Gitlin, as Personal Representative of the estate. (R.15-18, see Add. D.) Naillon also appeals the district court's Order denying his Rule 60(b) Petition to Vacate or Set Aside that Order. (R. 150-51.) Shortly before the scheduled hearing on the Petition for Formal Probate filed by Gitlin, Naillon's lawyer in California

telephoned the court and asked that the hearing be continued so that his client could retain a Utah lawyer to review the probate Petition. The court denied the request for a continuance, noting that the Notice of Hearing had been timely sent and that no protests had been filed. (R. 18, 162-67, see Add. F and G.)

Three months later, on February 16, 1994, Naillon filed a Petition under Rule 60(b)(1) and (2), Utah Rules of Civil Procedure, to Vacate or Set Aside the Order of Formal Probate and Appointment of Personal Representative. (R. 27-29.) On September 3, 1993, the District Court entered a Memorandum Decision, followed by an Order entered October 12, 1993, denying Naillon's petition. (R. 145-48, 150-51, see Add. H and I.)

On November 10, 1993, Naillon filed a Notice of Appeal of the October 12, 1993 Order. (R. 152-53, see Add. J.) On December 13, 1993, the Personal Representative filed a Motion for Summary Dismissal of Naillon's Appeal on the basis that his unsuccessful Rule 60(b) Motion did not extend the time to file an appeal of the November 16, 1992 Order of Formal Probate. This motion was denied by the Utah Supreme Court on January 25, 1994, with the court deferring its ruling on the issue "until plenary presentation and consideration of the case. Utah R. App. P. 10(f)." (See Add. K.) Also on January 25, 1994, the Utah Supreme Court ordered this case poured-over to the Utah Court of Appeals for disposition.



### STATEMENT OF FACTS

1. On October 19, 1988, the decedent, Mildred C. Meeks, executed her Last Will and Testament, and nominated Robert Gitlin, a long-time friend and neighbor of Ms. Meeks, as personal representative and named him beneficiary of one-half of her estate. (R. 7-11.) Another friend of Ms. Meeks, Carol Schroeder, was named as alternate personal representative and beneficiary of the other half of the estate. (R. 7-8.)

2. Mildred C. Meeks died on August 10, 1992, at the age of 81 years. She was a resident of Carbon County, Utah. (R. 1-2, 16.)

3. At the time of her death, decedent had no surviving spouse, no surviving issue, and no surviving parents. Decedent had one sister who survived her, Star Pelton, who resides in Idaho. (R. 1-2, 17.)

4. Appellant George F. Naillon, a resident of California, is a nephew of the decedent Mildred Meeks by virtue of his being a son of Ms. Meeks other sister, Lucy Naillon, who died in 1965. (R. 2, 17.)

5. On October 27, 1992, Robert Gitlin filed Ms. Meeks' Will with the Seventh Judicial District Court in Carbon County, Utah, together with a Petition for Formal Probate of Will and Appointment of Personal Representative. (R. 1-11.)

6. On November 5, 1992, the district court sent a Notice of Hearing of Mr. Gitlin's Petition to all persons entitled to receive notice under Utah Code Ann. § 75-3-403, including to Naillon. (R. 12-14, see Add. D.) The court's

Notice set the hearing for eleven days later on November 16, 1992, in compliance with Utah Code Ann. §§ 75-3-403 and 75-1-401. (R. 12, see Add. D.)

7. At the beginning of the hearing on November 16, 1992, the Court noted on the record that it had just received a telephone call from an attorney in California who claimed to represent one of the heirs, George Naillon, and who had requested a continuance of the hearing so that Naillon could consult with a local attorney about the probate Petition. (R. 163-64, see Add. G.)

8. During the November 16, 1992 hearing, the court denied Naillon's oral telephonic request for a continuance, finding that the Petition was verified, that the Notice of the hearing had been given in accordance with the rules of procedure, and that no protests had been filed. (R. 18, 162-66, see Add. F and G.)

9. At the end of the November 16, 1992 hearing, the court found that the October 19, 1988 Will that had been filed with the probate Petition was in truth and fact the Last Will and Testament of Mildred C. Meeks, and the court then signed and entered the order granting the Petition for Formal Probate of Will and appointing Robert Gitlin as Personal Representative of the Estate in accordance with the Will. (R. 15-18, 162-66, see Add. E, F, and G.)

10. Three months later, on February 16, 1993, Naillon filed a "Petition to Vacate or Set Aside Order" under Rule 60(b)(1) and (2), Utah Rules of Civil Procedure. (R. 27-29.)

Naillon's Memorandum and Affidavit supporting his Petition claimed that his excusable neglect, and newly discovered evidence, warranted setting aside the November 16, 1992 Order of Formal Probate and Appointment of Personal Representative. (R. 36-53, 116-29.)

11. The Personal Representative moved to dismiss Naillon's Petition on the grounds that (1) the Petition was not timely and substantial prejudice would result if the November 16, 1992 Order was vacated; (2) Naillon had not demonstrated excusable neglect for not filing his Petition earlier; (3) Naillon had failed to identify specific newly discovered facts to justify vacating the November 16, 1992 Order of Formal Probate of Will; and (4) Naillon lacked standing to challenge the Personal Representative's appointment because Naillon is not a beneficiary under the Will and he has no evidence that the Will is invalid or that any other Will exists. (R. 64-106, 130-135.) The Personal Representative also filed a Motion to Strike certain statements in Naillon's affidavit that were made without foundation, and that were his conclusory opinions and suspicions, and were not based on personal knowledge. (R. 107-11.) The Personal Representative also filed an affidavit of Nick Sampinos, Esq., who drafted the decedent's will, who testified that the decedent was of sound mind and not under duress at the time she executed the 1988 Will. (R. 89-92.)

12. On September 3, 1993, the Honorable Bruce K. Halliday of the Seventh Judicial District Court entered a Memorandum Decision, followed by an Order entered October 12,

1993, denying Naillon's Rule 60(b) petition. (R. 145-48, 150-51, see Add. H and I.) The Court did not strike Naillon's affidavit, stating that it was able to ferret out the conclusionary matters and the statements made without Naillon's personal knowledge. (R. 146.)

13. On November 10, 1993, Naillon filed a Notice of Appeal of the district court's October 12, 1993 Order. (R. 152-53, see Add. J.) No notice of appeal has ever been filed by Naillon regarding the district court's November 16, 1992 Order of Formal Probate.

14. Naillon's Docketing Statement and his Brief on Appeal identifies the district court's decision denying Naillon's requested continuance in connection with the November 16, 1993 Probate Order as the subject of his appeal and as one of the two issues presented for appellate review.

#### **SUMMARY OF ARGUMENT**

Naillon's appeal is untimely and it should therefore be dismissed for lack of jurisdiction. The appeal seeks to reopen the district court's Order of Formal Probate of Will and Appointment of Personal Representative. Under Section 75-3-413 of the Utah Probate Code, an order of formal probate can only be modified or vacated within the thirty day appeal time. Naillon sought to revive his untimely appeal or to vacate the probate order by filing a Petition under Rule 60(b) of the Utah Rules of Civil Procedure, and then filing a notice of appeal after that Petition was denied by the district court. This backdoor approach to extend the appeal time should not be permitted. The

Order of Formal Probate was a final, appealable Order on the date it was entered, November 16, 1992. Naillon's appeal was not filed until one year later, on November 10, 1993. It should be dismissed.

Naillon's appeal seeks reversal of two decisions of the trial court on matters that the trial court is given broad discretion: whether to grant a continuance and whether to grant a Rule 60(b) motion to vacate a final order. The requirements of the Probate Code regarding notice, hearing, and contents of a Petition for Formal Probate were followed in all respects by the Personal Representative and by the district Court. Naillon's telephone request for a continuance to get a Utah lawyer did not cast any doubt on the merits of the probate petition. Further, only written objections to the merits of the probate petition would have warranted a further hearing under the Probate Code. The court acted within its sound and experienced discretion in denying the telephone request.

Naillon's 60(b) Petition failed to demonstrate that his neglect was excusable in waiting for three months to bring his concerns about this probate to the attention of the court. Furthermore, his Petition did not contain any newly discovered evidence to justify reconsideration of the Order of Formal Probate. He accuses the Personal Representative of exercising undue influence and fraud upon the decedent without citing specific, detailed facts, that are based on his personal knowledge. Naillon did not bring any competent evidence to the

attention of the trial court to support his Rule 60(b) Petition, and it was therefore appropriately denied by the trial court.

#### ARGUMENT

##### I. Naillon's Appeal is Untimely and Should be Dismissed

Appellant George Naillon seeks appellate review of the district court's Probate Order of November 16, 1993, yet no timely notice of appeal has been filed with respect to that Order. Further, Naillon's February 16, 1993 Petition under Rule 60(b) did not extend the time for filing a Notice of Appeal. This appellate Court, therefore, is without jurisdiction to consider Naillon's appeal.

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"). An "order admitting a will to probate in the course of formal testacy proceedings is a final order for purposes of appeal." Estate of Christensen v. Christensen, 655 P.2d 646, 648 (Utah 1982). The "time allowed for appeal" is thirty days. Utah R. App. P. 4(a).

Naillon's Rule 60(b) Petition to Vacate was not filed within thirty days of the November 16, 1992 formal probate order as required by Utah Code Ann. § 75-3-413. Instead, it was filed two months late, on February 16, 1993. Even if Naillon's Rule

60(b) Petition was timely, it did not extend the time for an appeal. See Utah R. App. P. 4(b) (only timely post-judgment motions under rules 50(b), 52(b), and 59 extend the time for appeal); Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843, 845 (1970); Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845, 847 (1955). As the Utah Supreme Court stated in Fackrell v. Fackrell, 740 P.2d 1318, 1319 (Utah 1987), a Rule 60(b) motion "does not save this appeal and prevents us from reaching the merits of the trial court's original order. A Rule 60(b) motion does not extend or toll the thirty-day period in which appeals in the original action must be filed."

Without a timely notice of appeal, the appellate court is without jurisdiction over the appeal. Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843, 845 (1970). Naillon's appeal of the district court's Order entered October 12 denying his Rule 60(b) Petition to Vacate or Set Aside Order is a transparent attempt to appeal the November 16, 1992 Order. Naillon's Docketing Statement, and the issues and arguments made in his brief on appeal, demonstrates that he is seeking appellate review of the November 16, 1992 hearing and Order. As set forth above, he should have filed his "Petition to Vacate or Set aside Order" no later than thirty days after the court's Order was entered.

Naillon should not be permitted to use Rule 60(b) to circumvent the thirty-day time limit specifically prescribed by in Section 75-3-413 of the Probate Code or as a substitute for filing a timely appeal. See Laub v. South Central Utah Tele. Assoc., 657 P.2d 1304, 1306 (Utah 1982) ("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 the Court does not dismiss Naillon's appeal as untimely, and considers the merits of his arguments about the November 16, 1992 Order of Formal Probate, precedent would be made that the thirty day appeal time can be avoided or extended by at least another three months. Under Naillon's approach, a party who files a Rule 60(b) Motion within three months after an otherwise final, appealable order, and who thereafter files an appeal within thirty days of the denial of that Order, may get the appellate court to review the merits of the trial court's original order. This back door approach to revive untimely issues for appeal is contrary to Section 75-3-413 of the Probate Code, and the Rules of Civil and Appellate Procedure, and it should not be condoned by the Court.

II. The District Court Properly Denied the Telephonic Request for a Continuance by Naillon's California Lawyer

The Utah Probate Code sets forth specific procedures to be followed in admitting a will into formal probate and for the appointment of a personal representative to administer the affairs of the decedent's estate. These procedures were followed in all respects by Mr. Gitlin and by the district court. See Utah Code §§ 75-3-401 to -414, reprinted at Addendum A.

On October 27, 1992, Mr. Gitlin filed the Petition for Formal Probate of Will and Appointment of Personal Representative. (R. 1-11.) The Petition contained all the information required under the Probate Code for the Will to be



formally probated, including the names and addresses of all known heirs, beneficiaries, and interested persons, and the original Last Will and Testament of the decedent. See Utah Code Ann. §§ 75-3-401 and -402. On November 5, 1994, Notice of the hearing on the Petition was mailed by the clerk of the court to all persons listed in the Petition, including to Naillon. (R. 12-14, see Add. D.) The Notice was mailed "at least ten days before the time set for the hearing," in accordance with Utah Code §§ 75-3-403 and 75-1-401.

Mr. Naillon did not file or make any objection with the court to justify not accepting the decedent's Will into probate. The Utah Probate Code requires that written objections be made: "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." Utah Code Ann. § 75-3-404 (emphasis added). A telephone request for a continuance of a duly noticed hearing is not provided for in the Probate Code, and such a request is insufficient to warrant scheduling the matter for trial as Naillon suggests on appeal. (Appellant's Brief at 10.) Furthermore, Naillon's telephone request, which was made right before the hearing was scheduled to start, did not include any claim that the Will offered by Gitlin was invalid, that the Notice of hearing was improper, or that the Petition was defective in any respect. (R.163.) Rather, Naillon's lawyer simply sought a continuance of the duly noticed hearing to enable his client more time to consult a local attorney about the Petition. (Id.)

Given these circumstances, the district court acted in accordance with the Probate Code in ordering the formal probate of the Will and appointing Mr. Gitlin as personal representative. Utah Code Ann. § 75-3-409. Naillon cannot reasonably contend that this was an abuse of discretion by the court. See Hardy v. Hardy, 776 P.2d 917, 925-26 (Utah App. 1989) (whether to grant continuance rests in sound discretion of trial court). The court simply followed the procedures outlined in the Code; Naillon did not.

III. The District Court Properly Denied Naillon's Rule 60(b) Motion to Vacate or Set Aside the Order of Formal Probate

The Utah Supreme Court has stated the following with regard to judicial review of 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). The Utah Supreme Court has also said that "the district court judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment." Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986).

Naillon asserted excusable neglect and newly discovered evidence as the bases for his Rule 60(b) Petition to Vacate or Set Aside the November 16, 1992 Order of Formal Probate. Neither

basis had merit and Naillon's Rule 60(b) was properly denied by the district court. (R. 145-48, 150-51.)

(1) Naillon Did Not Demonstrate Excusable Neglect

Naillon argued before the district court, and again argues on appeal, that he did not raise his concerns about this probate earlier because he could not find a Utah attorney who was willing to help him. This may explain why he did not have a Utah lawyer appear in person at the November 16, 1992 hearing, but it does not explain why he did not come to Utah himself to be present at the hearing, or why he did not file any document with the court identifying reasons why the Will should not be probated. Naillon did neither of these things and has offered no reasonable explanation to explain this neglect. "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).

Naillon's contention that he contacted thirteen attorneys who would not appear on his behalf (Appellant's Brief at 9) is more of an indication as to the lack of merit of his case than an indication that his neglect was excusable. Naillon's Affidavit states that he contacted all these attorneys before the November 16, 1992, hearing, not afterwards. (R.49-50.) There was no indication in Naillon's 60(b) Petition or in his Affidavit to justify why he could not have presented his concerns about this estate 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 the information could not have been

gathered and presented within thirty days after the hearing. In short, Naillon failed to establish that his neglect in bringing his concerns to the attention of the court in a timely manner was excusable.

(2) No Evidence was Presented by Naillon to Warrant Setting Aside the Probate Order

Perhaps the most compelling reason to affirm the district court's exercise of discretion in denying Naillon's Rule 60(b) Motion is the reason given by Judge Halliday in his Memorandum Decision: "the Court finds the Affidavit [of George F. Naillon] to be insufficient to give rise to a justifiable reason for setting aside the original Order of Judge Bunnell." (R. 146-47.) The court explained further:

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 the 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.

(R. 147-48.)

In Naillon's Brief on Appeal, he again alludes to having recently discovered "evidence of duress, undue influence, fraud and other issues which negate the initial findings of the Court." Appellant's Brief at 12. Noticeably absent from these invidious, conclusory allegations are any citations to the record of the trial court. "This Court need not, and will not, consider any facts not properly cited to, or supported by, the record."

Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142, 143 (Utah 1978); Utah R. App. P. 24(e). Naillon made these same type of conclusory accusations in his Affidavit filed with his Rule 60(b) Petition, which the district court found unpersuasive (R. 146-48), and which gave rise to the Personal Representative's Motion to Strike. (R.107-111.) The Utah Supreme Court has held that, among other requirements, claims of newly discovered evidence in a Rule 60(b) motion must be supported by "specific, detailed facts," that would justify a trial on the issue raised, not unfounded, conclusory allegations such as Naillon has made here. State v. Musselman, 667 P.2d 1053, 1056-57 (Utah 1983). Given Naillon's untimely and inadequate claims, the district court's sound discretion in denying Naillon's 60(b) Petition should be affirmed.

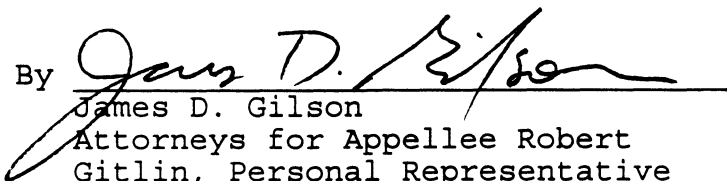
#### CONCLUSION

For the above reasons, the Court of Appeals should dismiss this appeal for lack of jurisdiction. Alternatively, the Court should affirm the district court's Order denying Naillon's Rule 60(b) Petition to Vacate or Set Aside Order of Formal Probate of Will and Appointment of Personal Representative.

DATED this 19 day of May, 1994.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By

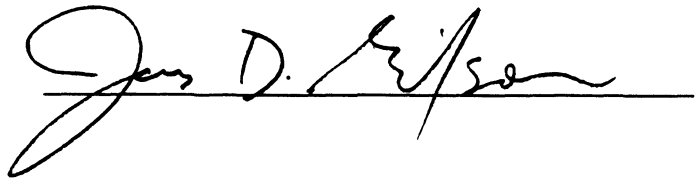
  
James D. Gilson  
Attorneys for Appellee Robert  
Gitlin, Personal Representative  
of the Estate of Mildred C. Meeks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of May, 1994, I caused a true copy of the foregoing Brief of Appellee Robert Gitlin, Personal Representative of the Estate of Mildred C. Meeks, to be mailed, postage prepaid, to the following:

Jeffrey R. Hill, Esq.  
Attorney for Appellant  
HILL, HARRISON & HILL  
Jamestown Square, Suite 200  
3319 N. University Ave.  
Provo, Utah 84604

Ralph W. Rasmussen, Jr., Esq.  
Attorney for Carol Schroeder  
BRADFORD & BRADY  
389 N. University Ave.  
Provo, Utah 84601

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

ADDENDUM INDEX

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Tab A



**75-3-401. Formal testacy proceedings — Nature — When commenced.**

(1) A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in Subsection 75-3-402(1) in which he requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with Subsection 75-3-402(3) for an order that the decedent died intestate.

(2) A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

(3) During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

(4) Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

## **75-3-402. Formal testacy or appointment proceedings — Petition — Contents.**

(1) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:

(a) Requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(b) Contains the statements required for informal applications as stated in Subsection 75-3-301(2) and the statements required by Subsections 75-3-301(3)(b) and (c), and, if the petition requests appointment of a personal representative, the statements required by Subsection 75-3-301(4); and

(c) States whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

(2) If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

(3) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by Subsections 75-3-301(2) and 75-3-301(5) and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by Subsection 75-3-301(5)(b) above may be omitted.

### **75-3-403. Formal testacy proceeding — Notice of hearing on petition.**

(1) Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by Section 75-1-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under Section 75-3-204. Notice shall be given to the following persons: the surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(2) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on the petition shall be sent by registered mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

- (a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;
- (b) By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;
- (c) By engaging the services of an investigator. The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

### **75-3-404. Formal testacy proceedings — Written objections to probate.**

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.

### **75-3-405. Formal testacy proceedings — Uncontested cases — Hearings and proof.**

If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of Section 75-3-409 have been met or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

**75-3-406. Formal testacy proceedings — Contested cases  
— Testimony of attesting witnesses.**

(1) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the state, competent, and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.

(2) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

**75-3-407. Formal testacy proceedings — Burdens in contested cases.**

(1) In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Propponents of a will have the burden of establishing prima facie proof of due execution in all cases, and if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. Except in cases where a presumption is operable, parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. Where one or more presumptions are operable, the ultimate burden of persuasion shall be determined in accordance with the Utah Rules of Evidence.

(2) If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and 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.

**75-3-408. Formal testacy proceedings — Will construction  
— Effect of final order in another jurisdiction.**

A final order of a court of another state determining testacy, the validity, or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

**75-3-409. Formal testacy proceedings — Order — Foreign will.**

After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by Section 75-3-107, it shall determine the decedent's domicile at death, his heirs, and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 75-3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

**75-3-410. Formal testacy proceedings — Probate of more than one instrument.**

If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of Section 75-3-412.

**75-3-411. Formal testacy proceedings — Partial intestacy.**

If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

### **75-3-412. Formal testacy proceedings — Effect of order — Vacation.**

(1) Subject to appeal and subject to vacation as provided in this section and in Section 75-3-413, a formal testacy order under this part, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(a) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice of it, except by publication.

(b) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death, or were given no notice of any proceeding concerning his estate, except by publication.

(c) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.

(d) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under Subsection 75-3-403(2) was made.

(2) If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all the circumstances.

(3) A petition for vacation under either Subsections (1)(a) or (b) must be filed prior to the earlier of the following time limits:

(a) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement.

(b) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 75-3-107 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(c) Twelve months after the entry of the order sought to be vacated.

**75-3-413. Formal testacy proceedings — Vacation of order for other cause.**

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

**75-3-414. Formal proceedings concerning appointment of personal representative.**

(1) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by Section 75-3-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by Subsection 75-3-301(2) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(2) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under Section 75-3-203, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under Section 75-3-611.

Tab B



## **Rule 60. Relief from judgment or order.**

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On 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); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The 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. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Tab C

#### **Rule 4. Appeal as of right: when taken.**

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Tab D

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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NOTICE

Probate No. 923-43

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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

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IN THE MATTER OF THE

ESTATE OF

MILDRED C. MEEKS,

DECEASED.

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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

B. Prossime  
Clerk/Deputy

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

James Brundage  
~~clerk~~/Deputy

Tab E



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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
<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

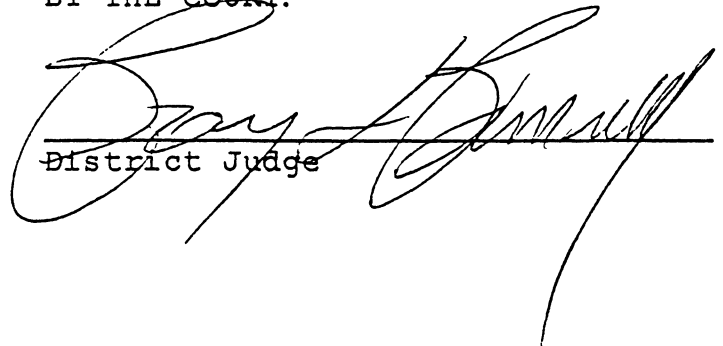
All of the foregoing individuals are adults.

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

Tab F

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

Tab G

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

3                           -o0o-

4   IN THE MATTER OF THE ESTATE   )  
5                           OF                           )  
6   MILDRED C. MEEKS.                           )  
7                           )  
8                           )  
9                           )

Case No. 923700043

ORIGINAL

8                           -o0o-

9  
10                   BE IT REMEMBERED that on the 16th day of November,  
11   1992, the above-entitled matter came on for hearing before  
12   the HONORABLE BRUCE K. HALLIDAY, sitting as Judge in the  
13   above-named Court for the purpose of this cause, and that  
14   the following proceedings were had.

15                           -o0o-

16                           A P P E A R A N C E S

17                           NICK SAMPINOS  
18                           Attorney at Law  
19                           80 West Main, #201  
20                           Price, Utah   84501

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24  
25                           PENNY C. ABBOTT, C.S.P.  
                          3241 SOUTH 4840 WEST  
                          WEST VALLEY CITY, UTAH   84120  
                          PHONE:   966-4862



P R O C E E D I N G S

THE COURT: Let's see, Probate No. 90-23-43,  
matter of the Estate of Mildred C. Meeks.

Mr. Sampinos, I just received a call from an  
attorney in California who claimed to be representing one  
of the heirs that lives in California, claimed he just got  
the notice Friday, although the mailing certificate says it  
went out on the 5th of November.

Let's see, let me get his name off the mailing  
affidavit. Oh, here it is over here. George Frances  
Naylan is the name. The attorney's name is Rod Shepherd,  
and he requested that we give Mr. George Frances Naylan  
time to consult an attorney here about the matter and I--  
well, I told him that I wouldn't do it unless you consented  
because--in other words, the notices have gone out and  
there isn't any written protest on file.

MR. SAMPINOS: Well, and I would pose an objection.  
We've had communication with the Naylan people, the notices  
did go out and we'd like to get this rolling. There's not  
that much involved in this estate, and I'd like to--

THE COURT: Is the--is the petitioner named in  
the will?

MR. SAMPINOS: Yes.

THE COURT: As the personal representative?

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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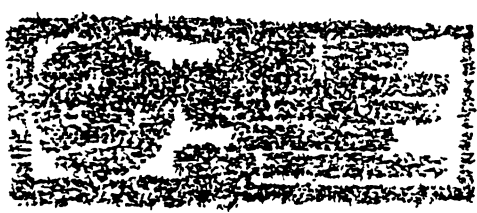
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C E R T I F I C A T E

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

Tab H

FILED

SEP -3 93

SEVENTH DISTRICT COURT  
STATE OF UTAH

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

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

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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

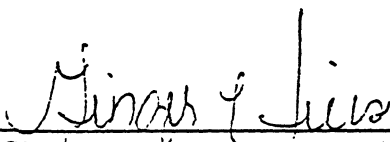
## CERTIFICATE OF MAILING

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:

James D. Gilson  
VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
Attorneys at Law  
50 South Main Street, Suite 1600  
P.O. Box 45340  
Salt Lake City, Utah 84145

Jeffrey R. Hill  
HILL, HARRISON, HILL & FISHER  
Attorneys at Law  
3319 North University Avenue, #200  
Provo, Utah 84604

Ralph W. Rasmussen  
BRADFORD & BRADY  
Attorneys at Law  
389 North University Avenue  
Provo, Utah 84601

  
Secretary

Tab I

OCT 12 93

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

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,

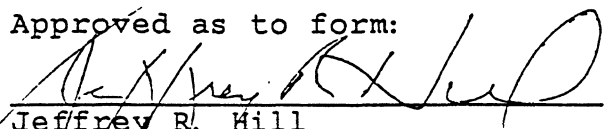
IT IS HEREBY ORDERED that the Motion to Strike the  
Affidavit of George F. Naillon is denied;

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 OCTOBER, 1993.  
~~September~~

  
BRUCE K. HALLIDAY  
District Judge

Approved as to form:

  
Jeffrey R. Hill  
Attorney for George F. Naillon

Tab J

HILL, HARRISON & HILL  
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	)	NOTICE OF APPEAL
	)	
of	)	
	)	
MILDRED C. MEEKS,	)	
	)	
Deceased.	)	Probate No. <u>923700043</u>
	)	

---

Petitioner, George F. Naillon in the above-entitled matter, by and through his attorney of record Jeffrey R. Hill, hereby appeals the Order dated October 12, 1993, denying Petitioner's Petition to Vacate or Set Aside Order. Petitioner appeals from the Order entered by Judge Bruce K. Halliday of the above-entitled District Court to the Utah Court of Appeals.

DATED this 8th day of November, 1993.

  
\_\_\_\_\_  
Jeffrey R. Hill  
Attorney for Petitioner



MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing Notice of Appeal on this 9th day of November, 1993, by first-class U.S. mail, postage prepaid, to the following:

James D. Gilson  
Attorney for Personal Representative  
50 S. Main, Suite 1600  
Salt Lake City, UT 84144

Ralph W. Rasmussen  
389 N. University Ave.  
Provo, UT 84601

  
Secretary

Tab K

IN THE SUPREME COURT  
STATE OF UTAH  
332 STATE CAPITOL  
SALT LAKE CITY, UTAH 84114  
January 25, 1994  
OFFICE OF THE CLERK

---

James D. Gilson  
VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
Attorneys at Law  
50 S. Main, #1600  
P.O. Box 45340  
Salt Lake City, UT 84144

In The Matter of The Estate  
of Mildred C. Meeks.

George F. Naillon,  
Appellant.

No. 930565  
923700043

Appellee's motion to summarily dismiss appeal is this day denied, and the court defers its ruling until plenary presentation and consideration of the case. Utah R. App. P. 10(f).

Upon denial of motion for summary disposition and pursuant to Rule 13 of the Utah R. App. P. the record index on appeal has been filed. The appellant's brief is due March 7, 1994. The record in this case may be withdrawn from the district court only upon written request of the attorney of record.

Geoffrey J. Butler  
Clerk