4-1-2011

Erickson v. McKee Clerk's Record v. 4 Dckt. 38130

LAW CLERK Vol 4 of 6

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

MAUREEN ERICKSON,

Personal Representative, and

Appellant,

VS.

JEROME S MCKEE,

Respondent, and

Appealed from the District Court of the First *Judicial District for the State of Idaho, in and for* Shoshone County *County*

Hon. Fred Gibler *District Judge*

Lloyd Herman

Attorney for Appellant

Charles Dean

Attorney for Respondent

Filed this _____ *day of* _____, *19*__

_____ *Clerk*

By _____ *Deputy*

CAXTON PRINTERS, CALDWELL, IDAHO 83605

38130

SUPREME COURT NO. 38130-2010 DISTRICT COURT NO. CV-2006-40

TABLE OF CONTENTS ..... PAGE NO.

VOLUME I

TABLE OF CONTENTS ..... PAGE NO.

TABLE OF CONTENTS ..... PAGE NO.

SUPREME COURT NO. 38130-2010 DISTRICT COURT NO. CV-2006-40

TABLE OF CONTENTS ..... PAGE NO.

SUPREME COURT NO. 38130-2010 DISTRICT COURT NO. CV-2006-40

INDEX OF RECORD ..... PAGE NO.

VOLUME I

SUPREME COURT NO. 38130-2010 DISTRICT COURT NO. CV-2006-40

INDEX OF RECORD ..... PAGE NO.

VOLUME II

SUPREME COURT NO. 38130-2010 DISTRICT COURT NO. CV-2006-40

INDEX OF RECORD ..... PAGE NO.

SUPREME COURT NO. 38130-2010 DISTRICT COURT NO. CV-2006-40

INDEX OF RECORD ..... PAGE NO.

STORE THIS PEH FROM FORE

#47

11/25/02

Dear Jerry & Mike

Enclosed are maps, tax statements, etc. on property. Also explanation of reduced rate on timber land. Say they learned us that once you have this they can't take it away. Didn't used to be that way.

Hope these help you to remember how it all goes. Sure helped me.

Maureen would like to selectively log it up on top. She hates to cut a tree as bad as the rest of us. She contacted a forester who shows views and guarantees a clear vista that would not show from road. I walked up with him as much as I could. Can't climb hills like I used to!

Contract are mailed, tax statements, etc. on property. Also explanation of reduced rate on timber land. Say they learned that once you have it they can't take it away. Didn't it used to be that way.

Hope these help you to remember how it all goes. Sure helped me.

Maureen would like to selectively log it up on top. She hates to let a tree as sad as the rest of us. She contacted a forester who shows trees and guarantees a clear yoke that would not show from road. I walked up with him as much as I could. Can't climb hills like I used to!

Will leave it to you two parties figure it out.

Please note that there is no mention of Craig & Sylvia in Mother will. I'd suggest something to explain and not show him the will. Love you all, Ev

COPY
ORIGINAL FILED
FEB 28 2008
THOMAS R. FALLQUIST
SPOKANE COUNTY

#48

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

In the Matter of the Limited Guardianship of Bill E. McKee, An Alleged Incapacitated Person.	No. 08400259-6 PETITION FOR LIMITED GUARDIANSHIP OF BILL E. MCKEE AND ESTATE AND APPOINTMENT OF GUARDIAN AD LITEM

I. ALLEGED INCAPACITATED PERSON

The name, date of birth, age, address of present residence, length of time at residence, post office address, and Social Security number of the Alleged Incapacitated Person are as follows:

1.Name: **BILL EARL MCKEE**

2. Date of Birth/Age: [redacted] **91**

3. Present Residence: **4702 S. Pender Lane, Spokane, Washington 99223**

4. Length of Time at Residence: **February 2007 to present**

5. Post Office Address: _____

6. Social Security No.: [redacted]

II. NATURE AND DEGREE OF ALLEGED INCAPACITY

The nature and degree of the alleged incapacity are as follows:

LLOYD A. HERMAN & ASSOCIATES, P.S.
213 North University Rd.
Spokane Valley, Washington 99206
Phone (509) 922-6600
Fax (509) 922-4720
LloydHerm@aol.com

1. Nature of Alleged Incapacity: **Needs assistance in handling financial affairs**

2. Degree of Alleged Incapacity: **Declared competent, but sometimes confused when dealing with financial affairs, requiring some guidance.**

III. DESCRIPTION/VALUE OF PROPERTY

The approximate value and the description of the property owned by the Alleged Incapacitated Person, insofar as known by the Petitioner, are as follows:

1. Real Property: **4702 S. Pender Lane, Spokane, Washington 99223**
2. Mortgages, Contracts, and Notes: **Reverse Mortgage**
3. Stocks and Bonds: **None**
4. Financial Accounts: **None**
5. Other Assets or Resources: **None**

There are periodic compensation, pension, insurance, and allowances as follows:

1. Social Security Benefits: **$1,630.90**
2. Pension Income: **$562.66**
3. Supplemental Security Income: **None**
4. Other: **None**

IV. EXISTING OR PENDING GUARDIANSHIPS

There ***[is]***[*is not*] an existing or pending guardianship action for the Person [*and*][*or*][*and/or*] the Estate of the Alleged Incapacitated Person as follows:

1. State Where Established: **Idaho**
2. Name of [*Limited Guardian*]: **Craig McKee**
3. Date of Appointment: **2/27/08**
4. Type of Guardianship: **Temporary**

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5. Duration of Guardianship: **90 days**

V. NOMINEE

The name, address, telephone number, date of birth, age, and relationship of proposed Limited Guardian of the Alleged Incapacitated Person are as follows:

1. Name of Nominee: **Maureen Erickson**

2. Address: **4702 S. Pender Lane, Spokane, Washington 99223**

3. Telephone Number: **(509) 443-6127**

4. Date of Birth/Age: [redacted] **61**

5. Relationship to Alleged Incapacitated Person: **Daughter**

VI. RELATIVES

The names and addresses, and the nature of the relationship of the persons most closely related by blood or marriage to the Alleged Incapacitated Person are as follows:

	NAME OF RELATIVE	ADDRESS	RELATIONSHIP
1.	Maureen Erickson	4702 S. Pender Lane Spokane, WA 99223	Daughter
2.	Jerome McKee	830 Laurel Valley Road Thibodaux, LA 70302	Son
3.	Craig McKee	2203 E. Flat Iron Drive Sandy, UT 84093	Son
4.			

VII. CARE FACILITY

The name, address and telephone number of the person or facility having the care and custody of the Alleged Incapacitated Person and the length of time of said care and custody is as follows:

1. Name: **Maureen Erickson**

2. Address: **4702 S. Pender Lane, Spokane, Washington 99223**

3. Telephone: **(509) 443-6127**

4. Length of Time at Facility: **February 2007 to present**

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VIII. REASON FOR LIMITED GUARDIANSHIP

1. The reason for petitioning for limited guardianship is as follows: Petitioner has been the sole caregiver for Bill E. McKee since February 2007 without any assistance from any other family members. She has performed the duties of a caregiver in an exceptional manner, which has been confirmed by Mr. McKee's physicians who have recommended that Mr. McKee remain in the care of Petitioner.

2. The interest of the Petitioner in the appointment is as follows: Petitioner has been the sole caregiver of Bill E. McKee since February 2007. She has cared for him and nurtured him back to health after undergoing open-heart surgery in July 2007. Petitioner has been attempting to obtain dentures for Mr. McKee for several months to aid him in his nutritional health, but has been denied funds to obtain the dentures by an Idaho court appointed conservator, which is causing health issues that are being monitored by Mr. McKee's health care providers. Mr. McKee is happy with his current surroundings and the care he has been receiving by Petitioner, and requests to remain in her care. The conservator has refused to provide adequate funding to properly clothe, feed, and provide health care for Mr. McKee. Mr. McKee has an income of $2,193.56 monthly from retirement and social security, and the conservator will only provide $600 per month to cover all his needs such as medications, food, healthcare, etc., The conservator has continued to legally assault Mr. McKee and Petitioner with legal actions that are running up huge legal bills, out of which there are no funds to pay. The conservator has now placed his Priest Lake, Idaho property on the market for sale to fund her own unnecessary activities. This property was given to Petitioner in February 2007, and is not even part of Mr. McKee's Estate. If Mr. McKee was allowed to have his $2,193.56 income per month, it is more than enough to allow him to remain with Petitioner in his Spokane, Washington home and care for all his needs. Mr. McKee has qualified for Medicaid by giving all his property judiciously to his daughter by court order signed by Judge Ellen Clark. The Petitioner wishes to stop the extraordinary expenses on the McKee Estate and require the unreasonable, unethical, and immoral actions of the conservator to cease, allowing Petitioner to obtain access to Mr. McKee's funds so she can properly care for him and prevent the dissipation of Mr. McKee's property, which has been given/transferred to Petitioner in order to qualify him for Medicaid.

3. Designate whether the appointment is sought as Guardian or Limited Guardian of the Person, the Estate, or both: Limited Guardian

4. Describe all existing Estate planning documents that were previously prepared by the Alleged Incapacitated Person, and their potential to serve as an alternative to guardianship:

Durable General Power of Attorney for all Financial Decisions granted to Garth Erickson, Petitioner's son, on June 28, 2007. Power of Attorney for all Health Care granted to Petitioner on June 28, 2007. Under the direction and advise of Richard Sayre, senior estate planning attorney, litigation has been initiated and completed resulting in a transfer for consideration all of Mr. McKee's property to Petitioner so

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that he now qualifies for Medicaid preserving his estate and preventing Government Medicaid liens against his estate. Because Petitioner has provided him 24-hour care in his own home, application for Medicaid has not been necessary at this time, but he is now Medicaid eligible. He also has entered into a Will giving all of his properties to Petitioner.

5. The following activities have been conducted to determine if a less restrictive alternative to guardianship is reasonably possible: _____

An Idaho Magistrate Court found that a conservator was all that was necessary after a long guardianship hearing was held over the objection of counsel on the grounds that Mr. McKee was not an Idaho resident, but a Washington resident. However, the attorney for Mr. McKee's two sons went back to the Magistrate Court ex parte and on February 27, 2008, and were granted temporary guardianship and ordered him removed from his home in Washington and transferred to a nursing home or assisted living facility in the State of Idaho for an evaluation.

6. Based on this investigation, there is no alternative to guardianship that is appropriate for the following reasons: _____

The court in Idaho determined that a guardianship was not appropriate, and a Conservatorship that was set up has proved to not be in the best interest of Mr. McKee's health and welfare necessitating the need for a temporary guardianship in Washington. A guardianship in Washington would prevent Mr. McKee's forced removal from Washington and placement in a nursing home in Idaho, which is a detriment to Mr. McKee's health as well as his estate.

7. Petitioner *[has]*[***has not***] *[previously][concurrently]* with the filing of this petition presented a Motion to the Court for immediate action under RCW 7.40 to meet any emergency needs of Bill E. McKee.

The Court has *[taken][been requested to take]* the following immediate action(s) with respect to meeting the emergency needs of Bill E. McKee: _____

To grant temporary guardianship in the State of Washington where Mr. McKee resides, preventing removal to another state and placement in a nursing home contrary to his treating physicians recommendations.

IX. AREAS OF ASSISTANCE

1. The nature and degree of the alleged incapacity: _____

Mr. McKee is sometimes confused on financial matters preventing timely payments.

2. The following are specific areas of protection and assistance required: _____

An Order requiring that Mr. McKee's Social Security and retirement checks be sent directly to the Petitioner/Guardian to be used in its entirety for the care of Mr. McKee. A Restraining Order preventing the removal of Mr. McKee from the State of Washington.

3. The duration of guardianship should be as follows: _____

Until further order of the Court.

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X. GUARDIAN AD LITEM

1. If a specific Guardian ad Litem is to be proposed, the name, address, and telephone number of the proposed Guardian ad Litem are as follows:

Name Address Telephone

---

2. The reason the specific Guardian ad Litem is proposed is as follows: **To make a determination that Mr. McKee is receiving proper care in the custody of Petitioner.**

3. The knowledge of a relationship of the proposed Guardian ad Litem to parties is as follows: **None at this time until the Guardian ad Litem has done a review of the extra legal proceedings that have been brought in Idaho and ascertains the level of care Mr. McKee has received in his present place of residence in Washington.**

XI. PAYMENT OF FEES

1. The Petitioner proposes that the filing fee in the amount of $*[specify amount]* should be waived for the following reason: **The Petitioner is unemployed and is the unpaid 24-hour caregiver of her father, the proposed ward of the Court.**

2. The payment of Guardian ad Litem's fees should be provided for as follows: **Monthly payments from Mr. McKee's Social Security and retirement checks as set by the Court.**

XII. OTHER

WHEREFORE, Petitioner prays for the following relief (select appropriate statements from the following):

1: ***[A finding that based on the initial investigation by the Petitioner, a reasonable cause exists for appointing an immediate Temporary Guardian for Bill E. McKee pending a report from the Court Appointed Guardian Ad Litem*;**

2. ***[A finding that based on the initial investigation by the Petitioner, a reasonable cause exists for appointing a Guardian ad Litem for Bill E. McKee*;**

3. *[An Order appointing a Guardian ad Litem for the Alleged Incapacitated Person, with such Order to define the duties and authority of the Guardian ad Litem]*;

4. ***[An Order waiving the requirement for a filing fee]*;**

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5. *[An Order designating how the Guardian ad Litem's fees in this matter are to be paid]*;

6. *[A Restraining Order against the Idaho Conservator Shelley Bruna, the two sons Jerome McKee and Craig McKee and their spouses, or any other persons acting on their behalf, including but not limited to their attorney's, officer's of the law, etc., preventing the removal of Mr. McKee from Petitioners home in the State of Washington and from removing him from the State of Washington to Idaho as unconstitutionally ordered by the Idaho Magistrate on February 27, 2008.*

Dated this 28th day of February 2008

Prepared by:

Lloyd A. Herman
WSBA #3245
Attorney for Bill E. McKee

Maureen Erickson
Petitioner and Daughter

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Spokane Valley, Washington 99206
Phone (509) 922-6600
Fax (509) 922-4720
LloydHerm@aol.com

STATE OF WASHINGTON)
) ss.
County of Spokane)

I certify that I know or have satisfactory evidence that Maureen Erickson is the person who appeared before me, and said person acknowledged that *[he][she]* signed this instrument and acknowledged it to be *[his][her]* free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 28th day of February, 2008.

Lynn Worthington

NOTARY PUBLIC in and for the State of Washington, residing in Spokane
MY COMMISSION EXPIRES: 05-01-09

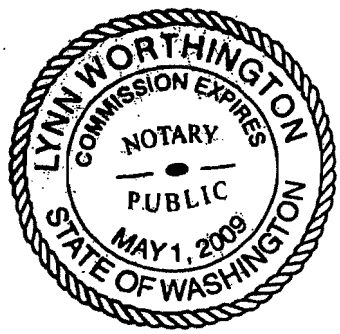

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Exhibit "A"

STATE OF IDAHO
COUNTY OF SHOSHONE / SS
FILED
2008 FEB 27 PM 3 18
PEGGY WHITE
CLERK DIST. COURT
BY _____
DEPUTY

PAMELA B. MASSEY, P.C.
Pamela B. Massey
500 N. Government Way, Suite 600
Coeur d'Alene, Idaho 83814
Telephone: (208) 664-6996
Facsimile: (208) 664-4708
ISB # 7351

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE GUARDIANSHIP OF:	CASE NO. CV 07-120
BILL H. MCKEE	LETTERS OF TEMPORARY GUARDIANSHIP

CRAIG MCKEE was duly appointed and qualified as Temporary Guardian of the above-named incapacitated and protected person on the 27th day of Feb 2008, by the Court.

These Letters are issued to evidence the appointment, qualification and authority of said Temporary Guardian, with the following limitations:

1. The authority of the temporary Guardian is limited to only those powers absolutely necessary, or the least restrictive to the proposed ward, for the immediate health and safety of the alleged ward until a hearing is held.

2. The authority of the temporary Guardian shall be for a period of ninety (90) days from the date hereof. unless terminated sooner by Court order. PBM

WITNESS, my signature and Seal for the Court, this 27th day of Feb, 2008.

Patricia R. McTaggart
Magistrate

STATE OF IDAHO
COUNTY OF SHOSHONE / SS
FILED

2008 FEB 27 PM 3 18

PEGGY WHITE
CLERK DIST. COURT

BY _____
DEPUTY

PAMELA B. MASSEY, P.C.
Pamela B. Massey
500 N. Government Way, Suite 600
Coeur d'Alene, Idaho 83814
Telephone: (208) 664-6995
Facsimile: (208) 664-4708
ISB # 7351

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE GUARDIANSHIP OF:	CASE NO. CV 07-120
BILL E. MCKEE	ORDER FOR PERSONAL SERVICE OUTSIDE OF THE STATE

Upon reading the Affidavit For Personal Service Outside of the State, and it satisfactorily appearing from the Petition for Guardianship filed herein, that a petition for guardianship action exists involving Bill E. McKee, and that Bill E. McKee is a necessary and proper party to said action and is not now within the State of Idaho, and that Bill E. McKee cannot be served within the State of Idaho.

NOW THEREFORE, IT IS HEREBY ORDERED that service of said Order Appointing Physician, Visitor, and Attorney and Order Appointing Temporary Guardian may be made upon Bill E. McKee by personal service outside of the State of Idaho in lieu of service by publication.

DATED this 27th day of February, 2008.

JUDGE MCFADDEN

PAMELA B. MASSEY, P.C.
Pamela B. Massey
500 N. Government Way, Suite 600
Coeur d'Alene, Idaho 83814
Telephone: (208) 664-6996
Facsimile: (208) 664-4708
ISB # 7351

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE TEMPORARY GUARDIANSHIP OF:	CASE NO. CV 07-120
BILL E. MCKEE	ORDER APPOINTING TEMPORARY GUARDIAN

PURSUANT to the PETITION FOR APPOINTMENT OF TEMPORARY GUARDIAN, previously filed herein, BILL E. MCKEE is an incapacitated person, has no guardian, an emergency exists, and no other person appears to have authority to act in the circumstances.

THEREFORE, IT IS HEREBY ORDERED that CRAIG MCKEE be duly appointed as temporary Guardian of BILL E. MCKEE, the incapacitated person.

IT IS FURTHER ORDERED THAT the authority of the temporary Guardian shall be for a period of ninety (90) days from the date of entry of this Order.

The alleged ward shall be served with notice of the appointment of a temporary Guardian within 48 hours of entry of this order.

The Letters of Temporary Guardianship shall indicate the following:

1. The authority of the temporary Guardian is limited to only those powers absolutely necessary, or the least restrictive to the proposed ward, for the immediate health and safety of the alleged ward until a hearing is held.

2. The temporary Guardian will remove Bill McKee from his present housing situation with his daughter, arrange for appropriate care for Bill E. McKee in a skilled care facility or assisted living facility and have Bill E. McKee evaluated for his medical and health care needs.

3. The authority of the temporary Guardian shall be for a period of ninety (90) days from the date hereof. unless sooner terminated by Court Order. PRM 361

ENTERED this 27th day of Feb, 2008.

Magistrate

CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 27th day of Feb, 2008, I caused a true and correct copy of the foregoing ORDER APPOINTING TEMPORARY GUARDIAN to be served to the following:

PAMELA MASSEY
500 N. Government Way, Ste 600
Coeur d'Alene, ID 83814
Attorney for Petitioners
____ U.S. Mail
_X_ Fax (208) 664-4708

Jack Rose
708 W. Cameron Avenue
Kellogg, ID 83837
____ U.S.MAIL
_X_ FAX (208) 786-8005

Harold Smith
P.O. Box 2083
Coeur d'Alene, ID 83814
____ U.S. MAIL
_X_ FAX (208) 664-8885

Mr. Lloyd Herman
213 N University Rd
Spokane, WA 99206-5042
____ U.S. MAIL
_X_ FAX (509) 922-4720

Douglas Oviatt
Owens & Crandall, PLLC
1859 N. Lakewood Dr., Ste. 104
Coeur d'Alene, ID 83814
____ U.S. MAIL
_X_ FAX (208) 667-1939

By: _____
Deputy Clerk

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF: BILL E. MCKEE	CASE NO. AFFIDAVIT OF BILL E. MCKEE

I, BILL E. MCKEE, being first duly sworn on oath, deposes and says:

1. That I am now and, at all times material hereto, a citizen of the United States, resident of the State of Washington, over the age of 18 years, and am competent to be a witness herein.

2. That I was a resident of the State of Idaho for forty years before relocating to Washington State. I don't even intend to go back to Idaho except to visit Maureen and her boys at Priest Lake. By the fact this trial went forward was a huge embarrassment to me.

3. The Government has no damned business in my life. I am competent. I chose my Powers of Attorney for when I am not. Who would have believed that in this country a complete stranger could take my entire Social Security and retirement and refuse to give me enough money for food and teeth?

4. My sons, Jerry and Craig, are trying to use the court to undo my right to have transferred that property (Osburn, ID; Priest Lake, ID; and Spokane, WA) to Maureen. I was competent and my attorney, Peacock, helped me with the

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Spokane Valley, WA 99206
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Fax (509) 922-4720

transfer in January last year (2007). Ask Jerry and Craig if they would like to be my guardian if they have to promise to leave Maureen and her property alone.

5. Craig has not called me once or come to see me since my last surgery last July (2007).

6. I am going to live with my daughter. She has such a good disposition and takes really good care of me and my dog. I have already chosen a retirement home in Seattle for when necessary. I don't have long to live and would like to have some peace in my life. I would rather be dead than have either Jerry or Craig boss me around or take me away from my daughter and her boys.

7. I want the court to get rid of that woman (Shelley Bruna) who is stealing from me and trying to steal from Maureen. I don't trust her and she has caused me to suffer. Besides, I live in Washington. She bounces more checks than I do. She has made my life hell.

DATED this 28th day of February, 2008.

Bill E. McKee

GIVEN under my hand and official seal this 28th day of February 2008.

Lynn Worthington

NOTARY PUBLIC in and for the State of WASHINGTON, residing in SPOKANE

MY COMMISSION EXPIRES: 05-01-09

LYNN WORTHINGTON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES MAY 1, 2009

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213 North University Rd.
Spokane Valley, Washington 99206
Phone (509) 922-6600
Fax (509) 922-4720
LloydHerm@aol.com

5/14/70

Dear Judge McFadden,

I lived in Idaho for forty years. I don't ever intend to go back except to visit Maureen and her boys at Priest Lake. By the fact this trial went forward was a huge embarassment to me.

The Government has no damned business in my life. I am competant. I chose my Power of Attorney for whom I am not.

Who would believe that in this country a complete stranger could take my entire Social Security retirement and refuse to give me enough money for food and etc.

Jerry and Craig are trying to use your court to undue my right to have transferred that property to Maureen, I was compent and my attorney Peacock helps me with the transfer in January last year.

Ask Jerry and Craig if they would like to be my guardian if they have to promise to leave Maureen and her property alone.

Craig has not talked me once or come to see me since my last surgery last July.

I am going to live with my daughter. She has such a good disposition and takes really good care of me and my dog. I have already chosen a retirement home in Seattle when necessary.

I don't have long to live and would like to have some peace in my life. I would rather be dead than have either Jerry or Craig here me around or take me away from daughter and her boys.

I want you to get rid of that woman who is stealing from me and trying to steal from Maureen. I don't trust her and she has caused me to suffer. Besides I love my Washington. She bounces more checks than I do. She has made my life hell.

Sincerely,

Lucille E McKee

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF: BILL E. MCKEE	CASE NO. 0840259-6 AFFIDAVIT OF BILL E. MCKEE

I, BILL E. MCKEE, being first duly sworn on oath, deposes and says:

1. That I am now and, at all times material hereto, a citizen of the United States, resident of the State of Washington, over the age of 18 years, and am competent to be a witness herein.

2. That I was a resident of the State of Idaho for forty years before relocating to Washington State. I don't even intend to go back to Idaho except to visit Maureen and her boys at Priest Lake. By the fact this trial went forward was a huge embarrassment to me.

3. The Government has no damned business in my life. I am competent. I chose my Powers of Attorney for when I am not. Who would have believed that in this country a complete stranger could take my entire Social Security and retirement and refuse to give me enough money for food and teeth?

4. My sons, Jerry and Craig, are trying to use the court to undo my right to have transferred that property (Osburn, ID; Priest Lake, ID; and Spokane, WA) to Maureen. I was competent and my attorney, Peacock, helped me with the

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7. I want the court to get rid of that woman (Shelley Bruna) who is stealing from me and trying to steal from Maureen. I don't trust her and she has caused me to suffer. Besides, I live in Washington. She bounces more checks than I do. She has made my life hell.

DATED this 28th day of February, 2008.

Bill E. McKee

GIVEN under my hand and official seal this 28th day of February 2008.

NOTARY PUBLIC in and for the State of WASHINGTON, residing in SPOKANE
MY COMMISSION EXPIRES: 05-01-09

LYNN WORTHINGTON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES MAY 1, 2009

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213 North University Rd.
Spokane Valley, Washington 99206
Phone (509) 922-6600
Fax (509) 922-4720
LloydHerm@aol.com

4/26/00

Dear Judge McFadden,

I lived in Idaho for forty years. I don't ever intend to go back except to visit Maureen and her boys at Priest Lake. By the fact this had went forward was a huge embarassment to me.

The Government has no dumnad business in my life. I am competent. I chose my Power of Attorney for when I am not.

Who would believe that in this country a complete stranger could take my entire Social Security retirement and refuse to give me enough money for food and teeth.

Jerry and Craig are trying to use your court to undue my right to have transferred that property to Maureen. I was compent and my attorney Pancock help me with the transfer in January last year.

Ask Jerry and Craig if they would like to be my guardian if they have to promise to leave Maureen and her property alone.

Craig has not called me once or come to see me since my last surgery last July.

I am going to live with my daughter. She has such a good disposition and takes really good care of me and my dog. I have already chosen a retirement home in Seattle for when necessary.

I don't have long to live and would like to have some peace in my life. I would rather be dead than have either Jerry or Craig here me around or take me away from daughter and her boys.

I want you to get rid of that man who is stealing from me and trying to steal from Maureen.

I don't trust her and she has caused me to suffer. Besides I live in Washington. She bounces more checks than I do. She has made my life hell.

Sincerely,

Lucie E. McLee

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

IN THE MATTER OF THE GUARDIANSHIP OF: BILL E. MCKEE	CASE NO. AFFIDAVIT OF MAUREEN ERICKSON IN SUPPORT OF A LIMITED GUARDIANSHIP

I, MAUREEN ERICKSON, being first duly sworn on oath, deposes and says:

1. That I am now and, at all times material hereto, a citizen of the United States, resident of the State of Washington, over the age of 18 years, and am competent to be a witness herein.

2. That I am the daughter of Bill E. McKee, who is 91 years of age, and reside with my father at 4702 S. Pender Lane, Spokane, Washington.

3. I moved to Spokane, Washington from California in 1997 so that he could be close to his grandchildren and I could care for him in his advancing years. My mother, Natalie Parks McKee, died in 1994, and there were no other family members residing full time in the area that could provide the care. I chose the Spokane area as there were more opportunities for my children scholastically as well as for their involvement in sports.

4. Since we have moved to the area, my father has spent all holidays with me and my children. My children were very active in sports, and my father attended all their games, including my son Garth's games at the University of Washington. During this time he resided in the State of Idaho. As of January 2007 he no longer owns any property in the State of Idaho and has no interests in the State of Idaho.

LLOYD A. HERMAN & ASSOCIATES, P.S.
213 N. University Road
Spokane Valley, WA 99206
(509) 922-6600
Fax: (509) 922-4720
lloydherm@aol.com

5. Since February 2007, father has been a full-time resident of the State of Washington, where we have co-resided full time at 4702 S. Pender Lane, Spokane, Washington. He is a registered voter in the State of Washington, has an ID card issued by the State of Washington, and all of his attending physicians reside in the State of Washington.

6. I take him to all doctor and dentists appointments, have arranged for his surgeries, provided him with 24-hour care after his various surgeries (which total 27 months), assist him in paying his bills, prepare his meals, wash his clothes, clean his home, care for and exercise his dog, do all the marketing, as well as other various chores.

7. My father had acquired a home is Osburn, Idaho, a cabin at Priest Lake, Idaho, and a home in Spokane, Washington. Because of his advanced age and heart problems, he and I were afraid he may need to qualify for Medicaid. I was under the impression that he could transfer his property to me, which would make him eligible for Medicaid. After the transfers in January 2007, I was informed that there was a 5-year look-back statute in order to qualify for Medicaid. My dad sought the advice of Richard Sayre, a senior law attorney, and he advised that if the property had been given in valid consideration, it would not be considered a gift and he would quality. My dad was anxious to do this prior to his heart surgery that was scheduled for July 2007. Because my dad had misinformed me of my mother's true wishes, I was deprived of my mother's estate of which I was the sole heir. Mr. Sayre advised us that litigation to restore my rights would be valid consideration for the transfer of his properties, and would therefore qualify him for Medicaid. Litigation was initiated and ultimately a judgment was granted passing title of all of his properties to me on January 28, 2008. I have assured by counsel that this will qualify my father for Medicaid.

8. While I was attempting to preserve my fathers estate by qualifying him for Medicaid, my brother, Jerry McKee, brought a guardianship proceeding in the State of Idaho, even though my father was a full-time resident in the State of Washington. Objections were made to the courts jurisdiction because my father was a resident of the State of Washington, which were denied. The guardianship hearing proceed to trial in front of the Magistrate Court in Shoshone County. The Judge ultimately ruled that a guardianship was not needed and granted a Conservatorship on October 31, 2007.

9. The court interpreted my attempts to preserve the estate and qualify my father for Medicaid as attempts to take advantage of my father. This misunderstanding by the court was done even though elder law attorney Lynn St. Louis testified Richard Sayre is a highly qualified senior law lawyer and estate planner, who was fully competent to give proper estate planning advise. I carried out the advise of Richard Sayre in order to qualify father for Medicaid and preserve his estate. Unfortunately this was interpreted to be me taking advantage of my father.

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10. Since the appointment of the Conservatorship, the conservator has tried to prevent me from preserving my father's Osburn, Idaho and Spokane, Washington homes. Because of his lack of funds, both homes were in foreclosure. I took title to the Osburn, Idaho home and refinanced it in my own name preventing it from being foreclosed on without help, guidance, or aide from the conservator or my brothers. The conservator had a lis pendens placed on the property in the middle of the refinancing, and a superior court hearing had to occur forcing her to lift the lis pendens in order to complete the refinancing. My father's Spokane, Washington property was also in foreclosure due to lack of funds, and I sought and was granted a reverse mortgage to save it from foreclosure. While pursuing the reverse mortgage on the Spokane, Washington home, the conservator attempted to change the title of the property from my father to me, preventing him from qualifying. After the intervention of my father's attorney, the Idaho court authorized the procedure, which stopped the conservator from interfering.

11. The conservator has continually refused to allow my father to have the proceeds of his $2,193.56 per month social security and retirement income, and has declared $600 per month is enough to provide for him. The conservator has continually ignored my requests to provide funds for healthcare, and to meet his nutritional needs. The conservator has also been informed that my father needs 24-hour care and that I have been providing adequate 24-hour care for his for the past year. The conservator's actions have resulted in the deterioration of my father's health. See attached Exhibit A, Letter from Dr. Fuhs dated January 14, 2008.

12. My father's attorney, Lloyd Herman, wrote the conservator's attorney the last week of January 2008, and requested that the conservator acknowledge the doctor's letter requesting funds for proper care. The conservator responded with a motion for a hearing to receive direction from the court on how she should expend the funds, and in additional filed a motion to appoint a full time guardian. The attorney for my brothers went to court on February 26, 2008 and applied for and got my brother Craig McKee appointed temporary guardian for 90 days, giving him the authority to take possession of my father and have him medically examined and placed in an assisted living facility. The order does not provide who is going to pay for the costs, and basically provides my brother with the legal indicia to kidnap my father.

13. My brothers have never been involved in the care of my father for the past year, nor have they communicated with him. It is clear from his doctor's letter that he has received proper care under my supervision and is happy and healthy in his present home. I feel that the legal process in Idaho is being used to deprive my father of proper care and a safe and healthy place to live in his own surroundings, and request that the court grant a limited guardianship in Washington to prevent his removal to Idaho, and away from the treatment of his medical providers.

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Phone (509) 922-6600
Fax (509) 922-4720
LloydHerm@aol.com

DATED this 28th day of February, 2008.

MAUREEN ERICKSON

GIVEN under my hand and official seal this 28th day of February 2008.

NOTARY PUBLIC in and for the State of Washington, residing in Spokane
MY COMMISSION EXPIRES: 05-01-09

LYNN WORTHINGTON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES MAY 1, 2009

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213 North University Rd.
Spokane Valley, Washington 99206
Phone (509) 922-6600
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LloydHerm@aol.com

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

IN THE MATTER OF THE GUARDIANSHIP OF: BILL E. MCKEE	CASE NO. 08400259-6 AFFIDAVIT OF MAUREEN ERICKSON IN SUPPORT OF A LIMITED GUARDIANSHIP

I, MAUREEN ERICKSON, being first duly sworn on oath, deposes and says:

1. That I am now and, at all times material hereto, a citizen of the United States, resident of the State of Washington, over the age of 18 years, and am competent to be a witness herein.

2. That I am the daughter of Bill E. McKee, who is 91 years of age, and reside with my father at 4702 S. Pender Lane, Spokane, Washington.

3. I moved to Spokane, Washington from California in 1997 so that he could be close to his grandchildren and I could care for him in his advancing years. My mother, Natalie Parks McKee, died in 1994, and there were no other family members residing full time in the area that could provide the care. I chose the Spokane area as there were more opportunities for my children scholastically as well as for their involvement in sports.

4. Since we have moved to the area, my father has spent all holidays with me and my children. My children were very active in sports, and my father attended all their games, including my son Garth's games at the University of Washington. During this time he resided in the State of Idaho. As of January 2007 he no longer owns any property in the State of Idaho and has no interests in the State of Idaho.

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5. Since February 2007, father has been a full-time resident of the State of Washington, where we have co-resided full time at 4702 S. Pender Lane, Spokane, Washington. He is a registered voter in the State of Washington, has an ID card issued by the State of Washington, and all of his attending physicians reside in the State of Washington.

6. I take him to all doctor and dentists appointments, have arranged for his surgeries, provided him with 24-hour care after his various surgeries (which total 27 months), assist him in paying his bills, prepare his meals, wash his clothes, clean his home, care for and exercise his dog, do all the marketing, as well as other various chores.

7. My father had acquired a home is Osburn, Idaho, a cabin at Priest Lake, Idaho, and a home in Spokane, Washington. Because of his advanced age and heart problems, he and I were afraid he may need to qualify for Medicaid. I was under the impression that he could transfer his property to me, which would make him eligible for Medicaid. After the transfers in January 2007, I was informed that there was a 5-year look-back statute in order to qualify for Medicaid. My dad sought the advice of Richard Sayre, a senior law attorney, and he advised that if the property had been given in valid consideration, it would not be considered a gift and he would quality. My dad was anxious to do this prior to his heart surgery that was scheduled for July 2007. Because my dad had misinformed me of my mother's true wishes, I was deprived of my mother's estate of which I was the sole heir. Mr. Sayre advised us that litigation to restore my rights would be valid consideration for the transfer of his properties, and would therefore qualify him for Medicaid. Litigation was initiated and ultimately a judgment was granted passing title of all of his properties to me on January 28, 2008. I have assured by counsel that this will qualify my father for Medicaid.

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9. The court interpreted my attempts to preserve the estate and qualify my father for Medicaid as attempts to take advantage of my father. This misunderstanding by the court was done even though elder law attorney Lynn St. Louis testified Richard Sayre is a highly qualified senior law lawyer and estate planner, who was fully competent to give proper estate planning advise. I carried out the advise of Richard Sayre in order to qualify father for Medicaid and preserve his estate. Unfortunately this was interpreted to be me taking advantage of my father.

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10. Since the appointment of the Conservatorship, the conservator has tried to prevent me from preserving my father's Osburn, Idaho and Spokane, Washington homes. Because of his lack of funds, both homes were in foreclosure. I took title to the Osburn, Idaho home and refinanced it in my own name preventing it from being foreclosed on without help, guidance, or aide from the conservator or my brothers. The conservator had a lis pendens placed on the property in the middle of the refinancing, and a superior court hearing had to occur forcing her to lift the lis pendens in order to complete the refinancing. My father's Spokane, Washington property was also in foreclosure due to lack of funds, and I sought and was granted a reverse mortgage to save it from foreclosure. While pursuing the reverse mortgage on the Spokane, Washington home, the conservator attempted to change the title of the property from my father to me, preventing him from qualifying. After the intervention of my father's attorney, the Idaho court authorized the procedure, which stopped the conservator from interfering.

11. The conservator has continually refused to allow my father to have the proceeds of his $2,193.56 per month social security and retirement income, and has declared $600 per month is enough to provide for him. The conservator has continually ignored my requests to provide funds for healthcare, and to meet his nutritional needs. The conservator has also been informed that my father needs 24-hour care and that I have been providing adequate 24-hour care for his for the past year. The conservator's actions have resulted in the deterioration of my father's health. See attached Exhibit A, Letter from Dr. Fuhs dated January 14, 2008.

12. My father's attorney, Lloyd Herman, wrote the conservator's attorney the last week of January 2008, and requested that the conservator acknowledge the doctor's letter requesting funds for proper care. The conservator responded with a motion for a hearing to receive direction from the court on how she should expend the funds, and in additional filed a motion to appoint a full time guardian. The attorney for my brothers went to court on February 26, 2008 and applied for and got my brother Craig McKee appointed temporary guardian for 90 days, giving him the authority to take possession of my father and have him medically examined and placed in an assisted living facility. The order does not provide who is going to pay for the costs, and basically provides my brother with the legal indicia to kidnap my father.

13. My brothers have never been involved in the care of my father for the past year, nor have they communicated with him. It is clear from his doctor's letter that he has received proper care under my supervision and is happy and healthy in his present home. I feel that the legal process in Idaho is being used to deprive my father of proper care and a safe and healthy place to live in his own surroundings, and request that the court grant a limited guardianship in Washington to prevent his removal to Idaho, and away from the treatment of his medical providers.

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Phone (509) 922-6600
Fax (509) 922-4720
LloydHerm@aol.com

DATED this 28th day of February, 2008.

Maureen Erickson

MAUREEN ERICKSON

GIVEN under my hand and official seal this 28th day of February 2008.

Lynn Worthington

NOTARY PUBLIC in and for the State of Washington, residing in Spokane

MY COMMISSION EXPIRES: 05-01-09

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213 North University Rd.
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Exhibit "A"

spokane Cardiology
Heart and Vascular Health

Improving the Health of Northwest Communities Since 1969

Pierre P. Leimgruber, MD, FACC
Harold R. Goldberg, MD, FACC
Guy E. Katz, MD, FACC
Bryan E. Fuhs, MD, FACC
Michael A. Kwasman, MD, FACC
Braden W. Batkoff, MD, FACC
Darren C. Hollenbaugh, MD, FACC
John G. Peterson, MD, FACC
Timothy C. Bishop, MD
Janice D. Christensen, MD, FACC
R. Alan Wales, MD, FACC
Gerhard H. Muelheims, MD
Philip R. Huber, MD
Susan J. Alexander, MD
Dieter F. Lubbe, MD, FACC
Mark J. Pirwitz, MD, FACC
Michael N. Whisenant, MD, FACC
Sandra M. Dickey, PA-C
Kimberly A. Nollette, ARNP
Cheryl J. Reeves, ARNP
Joan Corkey-O'Hara, ARNP
Vera H. Talseth, ARNP
Nancy L. Vitello, PA-C

January 14, 2008

Douglas A. Oviatt
Owens and Crandall
1859 N. Lakewood Drive #104
Coeur d'Alene Idaho 83814

RE: Bill McKee
(DOB: [redacted]

Dear Mr. Oviatt,

I have cared for Bill since about 1992, so I have a perspective on both Bill and his family that you may not share. Bill is now unfortunately starting to starve because of the lack of teeth. I don't understand how the situation has gotten to the point that Bill cannot afford dentures, but it sounds like there is a legal problem keeping him from getting dentures and to that end, at least from a medical standpoint for him to get enough calories and get them without having to be more aggressive, I certainly think it would be to his advantage and I would strongly support getting him dentures so that he can chew and eat food.

The second thing is bothersome to me. Bill has done quite well considering that he had open-heart surgery in his 90s and had an aortic valve replaced, and because of this continued loss of weight he has gotten weak enough that I think he is going to need 24-hour care in hopes that he will recover. I honestly think that he is going to need somebody with him and I would certainly like to keep him in the home, it was one of the reasons that we have tried so hard to keep him upright and doing well.

In my experience, Maureen Erickson has done a very nice job of caring for her father. Every time he is here he is well groomed and well kept, and over time had been brought back from what used to be life threatening. I think had he been allowed to have teeth and eat he would even be doing better than he is right now. On a pragmatic level, I am wildly comfortable that the surgery was quite successful. He is certainly lucid. He is still hard of hearing and I don't think aortic valve surgery has ever helped with hardness of hearing, but outside of that he is doing quite well.

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910 W. 5th Ave., Suite 300
Spokane, WA 99204
(509) 455-8820
Fax (509) 838-4978

Valley Office
1215 N. McDonald Rd., Suite 202
Spokane, WA 99216
(509) 922-0136
Fax (509) 922-7976

North Office
318 East Rowan, Suite 240
Spokane, WA 99207
(509) 482-2025
Fax (509) 482-2135

Coeur d'Alene Office
700 Ironwood Dr., Suite 214
Coeur d'Alene, ID 83814
(208) 292-1600
Fax (208) 292-1610

Lewiston Office
2315 8th Street Grade
Lewiston, ID 83501
(208) 746-1383 ext 6841
Fax (208) 298-0727

A practical side of this is very straightforward. Because of the problems that have occurred with getting things paid for, he has not gotten teeth which would help him eat and get better. I honestly am at the point where I am disgusted by the fact that his weight loss can be traced very clearly to the lack of caring and compassion on the conservator's part, Ms. Bruna, to provide adequate funds for replacement teeth. Again, I have seen Bill for many years and I have a perspective on this that I am almost willing to tell you that I think every step along the way that from what I can observe Ms. Erickson has made choices that are better for Bill than almost anybody else involved in his care.

Please feel free to contact me. I will certainly state that to you in either deposition or in a phone call, whichever you need, but at this time I certainly am asking if you could expedite Bill getting teeth and money for food, as well as looking for 24-hour care so that he may remain in his home, which would be his wish. I think that would be the right thing to do in this situation.

Sincerely,

Bryan E Fuhs, MD FACC

BEF 1/9/08
jbf 1/14/08

#49

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

IN THE MATTER OF THE GUARDIANSHIP OF: BILL E. MCKEE	CASE NO. AFFIDAVIT OF BRYAN E. FUHS, MD FACC

I, BRYAN E. FUHS, being first duly sworn on oath, deposes and says:

1. That I am now and, at all times material hereto, a citizen of the United States, resident of the State of Washington, over the age of 18 years, and am competent to be a witness herein.

2. That I am the treating physician of Bill E. McKee, and have cared for him since about 1992. In early spring 2007, I referred him to Dr. Nisco who went on to perform open heart surgery and replaced an aortic valve in July 2007. The surgery was quite successful and he has recovered nicely under the care of his daughter, who not only provided 24-hour care leading up to the surgery, but has provided around the clock care since that time and has been actively involved in his rehabilitation.

3. Mr. McKee needs dentures to allow him to chew and properly digest his food. He also needs additional food supplements to provide him with the calories his body requires to gain weight. He is now unfortunately starting to starve because of the lack of teeth, and the lack of funds to purchase the necessary food his system requires. I honestly am disgusted by the fact that his weight loss can be traced very clearly to the lack of caring and compassion on the conservator's part, Ms. Bruna, to provide adequate funds for his care.

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lloydherm@aol.com

4. I have seen Mr. McKee for several years and I have a perspective on his condition that I am willing to testify to that I think every step along the way at from what I can observe Maureen Erickson has made choices that are better for Mr. McKee than almost anybody else involved in his care. He is always well groomed and well kept, and over time has been brought back from what used to be a life threatening condition. I honestly think that he is going to continue to need somebody with him 24-hours per day and I would certainly like to keep him in the home with his daughter. It was one of the reasons that we have tried so hard to keep him upright and doing well.

5. I believe that if Mr. McKee is forced from his current home, he will suffer medically, physically, and mentally, which will certainly have an impact on his longevity. It would also be detrimental to his condition to remove him from the care of his treating physicians who are so well schooled on the history of his health care needs.

DATED this 4 day of March, 2008.

Bryan E. Fuhs MD

Bryan E. Fuhs, MD FACC

GIVEN under my hand and official seal this 4 day of March 2008.

Lloyd A. Herman

NOTARY PUBLIC in and for the State of Washington, residing in Spokane
MY COMMISSION EXPIRES: 2-26-2012

LLOYD A. HERMAN NOTARY PUBLIC COMMISSION EXPIRES FEBRUARY 26, 2012 STATE OF WASHINGTON

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MICHAEL K. BRANSTETTER

HULL & BRANSTETTER
CHARTERED
ATTORNEYS AT LAW
416 RIVER STREET
P.O. BOX 709
WALLACE, ID 83873-0709

H.J HULL (1888-1975)
ALDEN HULL (1919-1984)
PIATT HULL (1914-1992)

TELEPHONE: (208) 752-1154
FAX: (208) 752-0951

#50

July 27, 2005

Michael F. Peacock
123 McKinley Avenue
Kellogg, ID 83837

Re: Jerry McKee

Dear Mike:

I have been retained by Jerry McKee and he has forwarded me your letter of July 6, 2005. You may communicate with me in the future on the matters set forth in your letter of July 6, 2005.

Please forward me a copy of the holographic Will as soon as possible. Would you also provide me with some explanation of how, where and when the holographic Will was located and who found it. I will then forward that to Jerry for his response.

Thank you.

Very truly yours,

HULL & BRANSTETTER CHARTERED

By: _____
Michael K. Branstetter

MKB/pwk
cc: Jerry McKee

MICHAEL K. BRANSTETTER

HULL & BRANSTETTER
CHARTERED
ATTORNEYS AT LAW
416 RIVER STREET
P.O. BOX 709
WALLACE, ID 83873-0709

H.J HULL (1888-1975)
ALDEN HULL (1919-1984)
PIATT HULL (1914-1992)

TELEPHONE: (208) 752-1154
FAX: (208) 752-0951

February 3, 2006

Michael F. Peacock
123 McKinley Avenue
Kellogg, ID 83837

Re: Bill McKee – OFFER OF SETTLEMENT WITHOUT PREJUDICE

Dear Mike:

This is a follow up to our recent telephone conversation concerning the above matter. You asked that I provide you with further details. This is an Offer of Settlement to resolve all matters in controversy between my client, Jerry McKee, and your client.

Your client has made a number of claims concerning the North Fork River Property. Jerry disputes that any of her claims are valid but in an effort to resolve all matters he has authorized me to make the following offer in settlement of all matters between everyone.

Jerry will sell the North Fork River property. The property may or may not need to be appraised and Jerry will arrange for that if necessary. That expense will be part of the selling expenses. The net proceeds of the sale will be divided in half. Jerry will keep one-half (1/2) and before distribution of the other one-half (1/2) to Bill, the following shall be repaid to Jerry from those proceeds:

- One-half (1/2) of all property expenses incurred since January 1, 2002 – this includes taxes, insurance and selling expenses.
- One-half (1/2) of the capital gains taxes generated by the sale – federal and state.
- One-half (1/2) of the income from the 2002 timber sale. All of those proceeds were previously given to Bill and Maureen. This amounts to a deduction of $5,500.00.
- Reimbursement for all expenses paid by Jerry for Bill since January 1, 2002 to the time of settlement – This can be documented and amounts to approximately $66,000.00.

- All gift taxes that may due as a result of this gift to Bill, if indeed it is labeled as a gift.

Jerry will add one-half (1/2) of all rent received on the property for the last three (3) years to the amount due Bill and/or Maureen. This amount is approximately $675.00.

Jerry disagrees that any parties have any legal interest or claim to the North Fork property and this offer is simply to grand some peace to his father. This is an offer of settlement and may not be used for any purposes except in consideration of the offer. Please let me know your clients' response.

Very truly yours,

HULL & BRANSTETTER CHARTERED

By: Mike
Michael K. Branstetter

MKB/pwk
cc: Jerry McKee

MICHAEL F. PEACOCK
Attorney at Law

123 McKinley Ave.
Kellogg, ID 83837
208-783-1231
Fax 208-783-1232

May 16, 2006

From: Michael F. Peacock

To: Mike Branstetter

RE: McKee - Erickson

your client's response wasn't what I'd call "documentation". Does he have any receipts? Bill says he doesn't think he paid a lot of this because he (Bill) still had money from the sale of property at that time.

Maureen will be sending me her expenses soon, though I think she feels like neither of them should claim value for paying their father's expenses or care or lodging.

#51

STATE OF IDAHO
COUNTY OF SHOSHONE / SS
FILED

2008 MAY 30 AM 9 59

PEGGY WHITE
CLERK DIST COURT
BY Bonnie Johnson
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY FOR SHOSHONE

IN THE MATTER OF THE	)
	) CASE NO. CV-07-120
GUARDIANSHIP OF:	)
	) TRANSCRIPT OF JULY 12, 2007
BILL McKEE	) COURT TRIAL
	)

(July 12, 2007)

BEFORE: THE HONORABLE PATRICK R. MCFADDEN, Magistrate

APPEARANCES: PAMELA B. MASSEY
Attorney for Jerome McKee
Coeur d'Alene, Idaho

JOHN J. ROSE, JR.
Attorney for Bill McKee
Kellogg, Idaho

TRANSCRIBED BY: Kimberly Murphy, Official Transcriber

LYN ST. LOUIS: Called as a Witness for Bill McKee, Having First Been Duly Sworn, Testified as Follows, to-wit:

DIRECT EXAMINATION

BY MR. ROSE:

Q. Please state your name please?

A. My name is Lyn St. Louis.

Q. And spell your last name please?

A. Just like the city. S-T-.-L-O-U-I-S.

Q. And your profession?

A. I am an attorney in the state of Washington, where I was admitted to practice in 1985.

Q. And would you give us a brief synopsis of your, what you have done in the course of your legal career thus far?

A. I graduated from the University of Washington with my Juris Doctor in 1985. I took the bar and was admitted to the bar that year in the state of Washington. My Bar Number is 15348. For the first approximately, 12 years, I worked at a law firm, Lease, Mark, Cook, Martin & Patterson in Seattle, Washington, doing primarily insurance defense. When I, in 1996, I and four other partners from that firm formed our own firm, Gardner, Bond, Trabolce, St. Louis & Clement in Seattle. Which was a firm of approximately 15 lawyers about 40 staff. Last year, well, let me back up

a little bit. During my time at Gardner, Bond I did not only litigation but transition my practice to elder law and in the early 2000's began focusing on elder law. Last year, I left Seattle to move to Spokane and opened up my solo practice, the Law Office of Lyn St. Louis, and my practice is primarily focused on elder law.

Q. Do you belong to any professional organizations? Dealing with elder law?

A. I do. The National Academy of Elder Law Attorneys is the pre-eminent organization for those attorneys interested in practicing in elder law which encompasses not only a estate planning but also the issues that effect the elderly population, social issues, legal issues, and I joined the National Academy of Elder Law Attorneys, I believe it was in 2004. I have been very active in the organization since that, since joining I have attended at least two national conferences every year. I have, I was elected to the Board of the Washington Chapter of the National Academy of Elder Law Attorneys. I am currently the President Elect of the Washington Chapter of Elder Law Attorneys.

Q. Have you come to meet Bill McGee, McKee, excuse me?

A. Yes, I have.

Q. And when did you meet Mr. McKee approximately?

A. It would have been the week prior to June 25, is when, if you don't mind, I have notes that I could refer to to give you specific date. I first met Bill McKee on June 21, 2007.

Q. And what was the purpose of that meeting?

A. The purpose of that meeting was to assist Bill with his legal estate planning matters in terms of his fundamental estate planning documents, durable powers of attorney and health care directive. He was coming up on a surgery and the, there was, it was important that he have in place these fundamental estate planning documents prior to that surgery.

Q. And were some documents prepared by you for Mr. McKee?

A. Yes, I prepared for him his durable power of attorney for finances, durable power of attorney for health care decision, his health care directive or living will and his last will.

Q. Did you, clarify for us this durable power of attorney for finances. That is something that I don't think that we are familiar with or we don't have here in Idaho.

A. Well, I don't know what the term is in Idaho, but I am sure you have some legal document that has that same effect. What it does, is it empowers the attorney in fact, someone, an agent, that Bill appoints to make financial

decisions for him, to assist him. It does not take away any of his powers to make those decisions but it does allow another individual to also make or act for him that attorney in fact, is, does have a fiduciary obligation to act only in Bill McKee's best interest.

Q. Now, in the course of preparation of these documents, did you meet with Mr. McKee?

A. Yes, I did.

Q. And could you give us an indication of how much time you spent with Mr. McKee?

A. Well, it was over the course of an initial meeting, a follow up conversation and then two subsequent meetings. So in total, maybe and speaking with Bill, was certainly over an hour, an hour and half...No, it was probably closer to a two hour time frame in total.

Q. Were you aware that, or after you got to meet Mr. McKee, were you aware that this proceeding was going on?

A. Yes, I was.

Q. And what knowledge did you have of this proceeding?

A. Well, I was aware of this proceeding by a phone call from another attorney in Spokane, Carol Hunter, to whom a Maureen Erickson (phonetic) had gone to seek assistance with the guardianship and Carol had referred Bill McKee to me because she considered Maureen to be her client and thus

would not be able to assist Bill in that, because of the conflict, the potential conflict of interest. So, Carol Hunter who is an esteemed elder law attorney called me and stated that the, Bill McKee, was subject to a guardianship in Idaho but that she believed that in her opinion that powers of attorney documents could be drafted and would I meet with him and accept him as my client. So, that is how Bill came to me.

Q. Did the fact that this guardianship was proceeding, did that raise any flags for you?

A. Indeed. Indeed.

Q. What type of concerns were you...

A. Well, obviously if there is a guardianship pending, there is a good faith belief that Bill is in need of a guardian. Otherwise, this suit would not have been filed. And so, the question that I needed to determine, was whether or not I would be able to draft any documents for him. If a client does not have competency or legal capacity under the law, my ethical duties would have prohibited me from preparing these documents.

Q. Did you do anything to assess Bill's competence?

A. What I did, yes, I did was, initially...

Q. Okay. Were you guided by anything in assessing Bill's competence?

A. I was guided by my knowledge that I have obtained

as an elder law attorney. The issue of diminished capacity is a prevalent matter when you are working in elder law. It is something that you are always looking out for as obviously as everyone ages, the elderly population, you know, there's dementia, there's diminished capacity. So, I have been trained through seminars as to diminished capacity. Through that training, I was aware of a book published by the American Bar Association, Commission on Law and Aging, and the American Psychological Association together published a book called Assessment of Older Adults with Diminished Capacity...A Handbook for Lawyers. So, this is a book that I turned to in the situation where I am concerned that there might be diminished capacity.

Q. So what did you do with Bill and how did it fit into the criteria that you were being guided by?

A. One of the key things that when you are meeting with a client who may have diminished capacity is to meet with them alone. It is not unusual for a family member to drive the elderly client to my office, many elderly people don't drive. So, his daughter, Maureen Erickson, drove him to my office and initially my meeting was with both of them so that Bill would become comfortable with a new place, being in a lawyer's office which lots of people are very uncomfortable in lawyer's offices. But after the initial greeting, you know, how are you, you know, that sort of

thing, then you need to ask the family member to leave and meet solely with the elder client so that I can have an one on one with him and do what, it is not a medical assessment by any means, I am a lawyer, not a doctor. But to do an assessment nonetheless as to whether or not he is understanding what is going on. What sort of level of capacity does he have.

Q. And what did you do with Bill?

A. Well, I met with Bill and this would have been on June 21, for quite some time after the initial meeting where he, Maureen and I met. And I asked him lots of questions. Bill is quite a talker and was very willing to tell me a lot of things about his past, where he was born, where he grew up. I asked him about his children. I asked him about where he worked. I asked him about the guardianship. There were, I spent at least 20 minutes just kind of sitting back and listening to what he was telling me about his history and, you know, getting a sense of where he was at mentally.

Q. Was there anything in that or did he, was he able to respond to your various questions about his background and his past?

A. He was. He was. One of the things with, you know, elderly clients is that they can often talk to you about, you know, where they were born, where they grew up,

their first job, those sorts of things. Those are really set and clear in their minds. But, he was also clear on what was going on currently. He could identify for me who the president was. He could tell me what the date was. He could tell me where he lived and that he lived with Maureen and that he had been living with her since sometime around the beginning of the year. He was familiar with the guardianship proceeding and that his son, Jerome, was seeking guardianship over him. He was well aware, oh, and beyond that, here is a man who is needing to undergo a serious medical surgery, a heart valve replacement, he knew that that was coming up. He knew that he needed a heart valve replacement. He was definitely aware of what was going on in my opinion. There were some particular, I have to give you the cavia (phonetic), I am not a medical doctor but I have dealt with enough elderly people that there are some tests that I do to find out, you know, how with it is the client. And I did some of those with Bill as well.

Q. And what did you do?

A. Well, one of the tests is you ask the client to count backwards from a hundred subtracting sevens. My husband laughs at me because he says that he can't even do that and he is no where near elderly. But I asked Bill to do that and he counted back 100, 93, 86, 79, 72, then he said 66, and said what am I subtracting? And I said, seven.

And he said, 59 and 53. Well, you can see that that is not absolutely perfect but initially it was and that mental acuity I thought was significant. It's not all by itself, it just one little piece. But that coupled with the other information he was able to provide me did impress me. I asked him another question about well, when he had retired. He told me he had lots of jobs. He told me about various jobs, working at Boeing. He told me that he never flew for Boeing but he had been a pilot. I asked him well, when did you retire? And he kind of looked and he struggled with that. He couldn't tell me initially and then he said, well, it must of been 65. I was born in '16, so 1981. If you seen what he did, he did, he did another mathematical calculation. He must have been age 65, he said, when he retired if he was born in '16, that means he retired in 1981. Again, he is demonstrating the acuity of his mental faculties by that sort of process.

Q. Did you know or did he tell you what his profession was?

A. Well, he told me that he had worked for Boeing. He didn't, I didn't ask him a lot of questions about what his jobs were thereafter. He stated that he was on the road a lot. He traveled. That his wife got used to that. But I did not ask him as to what his what they were over the years, his professions.

Q. Did you learn that he was an engineer?

A. He said that he worked for Boeing. So, I should have known that from, well, he worked for Boeing.

Q. I am sorry, I didn't mean to interrupt you.

A. Oh, no, that's fine. But he clearly an (inaudible) in his brain. How that was working, the mathematical.

Q. Was there any other questioning that you did to give yourself an idea as to his competence?

A. Well, I asked him about the guardianship proceeding. And, you know, he did exhibit quite a bit of animosity towards Jerome and towards the fact that this guardianship was pending. He also told me that, about the, I think he said, two occasions where he was kidnaped. He said pirated and he explained to me that he had been driven to the airport by his daughter-in-law from Sandpoint to the airport in Spokane and felt that he was being compelled to go. He told the daughter-in-law that he didn't want to go further. He told me that he got on the airplane, went to Salt Lake City. At which time, he got off there and that his son, Craig, at his request, drove him back to Spokane. This, a lot of the conversation, he clearly had the animosity towards his son, Jerry and, not so much towards Craig, but Craig in that he was, Bill said siding with Jerry.

Q. Did Bill recall some other, or was there, did you discuss other animosities that Bill held towards Jerome?

MS. MASSEY: Objection, your Honor.

THE COURT: Basis?

MS. MASSEY: Outside the scope of this witness' testimony. She testifying to his...

THE COURT: I am inclined to agree. I think she is testifying to matters that go beyond the competency question that seemed to me to be hearsay from Mr. McKee at this time as well. I would ask you to ask another question, Mr. Rose.

Q. All right. Was there any discussion with Bill about recent property transactions he may have made?

A. Yeah, there were. A lot of the time I spoke with Bill was about, you know, what properties did he own and he did describe that he had in the past given or transferred property to Jerome and that he had asked that that be returned. He told me that he had transferred the Priest Lake property to Maureen and that Jerome wanted that property but he did not know why Jerome would want that property. He thought Jerome was set financially and did not need it. He did spend quite a bit of time telling me about a safe deposit box and monies that were in the safe deposit box.

MS. MASSEY: Again, your Honor. I am going to object. We are back to outside of the scope of what she is

testifying to.

THE COURT: Mr. Rose, how do you respond to that?

MR. ROSE: Well, there are statements of Bill that we, I think are treating as statements of a party to the action. There are statements that show that Bill has knowledge of his effects and recollection of what is going on.

THE COURT: I think for that purpose, basically, for establishing Mr. McKee's ability to articulate the issues and the property and the subject, whether that goes to whether he's in need of a conservator or a guardian is appropriate. So, I am going to overrule the objection and allow Ms. St. Louis to testify to those issues. So, go ahead.

A. And what Bill told me was that he was, he felt strongly that there was a safe deposit box that had basically been raided by Jerome. That there was $150,000.00 in that. That there was a collection in that. I didn't take detailed notes as to exactly what was in there. Part of it was, I didn't really care as much about the details. I was simply going for the point of, you know, assessing whether he knew what was going on. And that, his conversations about, you know, what assets he had and what he had transferred helped confirm my conclusion that he did understand what was going on. He was and did have legal capacity to execute the documents that he wanted such that,

you know, the powers of attorney and the health care directive for his upcoming surgery.

Q. Additional property transfers you discussed with Bill, you discussed, you mentioned the Priest Lake and now the safety deposit box. Did you discuss anything about an Osburn home or Spokane home?

A. He believed, yes, I did, and he believed that he had transferred those properties to Maureen is what I understood.

Q. Did you discuss any of the reasoning behind these transfers?

A. No, I did not. I do know from his prior estate planning documents that he brought with him that his 2004 will did give everything to Maureen. So, that, giving property to Maureen would be consistent with his prior despotitive (phonetic) scheme. I am sorry, I need to, your question, if did I discuss, I was aware that either Bill or Bill and Maureen had consulted with another elder law attorney in Spokane for purposes of Medicaid planning. Because I was aware of that I did not want to delve too far into that aspect of elder law because I knew that there was already another attorney, highly qualified, to be addressing the Medicaid planning issues.

Q. And who is that other attorney?

A. That is Dick Sayre of Sayre and Sayre.

Q. And you indicated that, or does that person have any experience in the area to the best of your knowledge?

A. Well, in Spokane, Dick is considered the elder law attorney in terms of his level of knowledge and his level skills. And, in fact, if I were to, I can count on one hand the top elder law attorneys in Washington and he rates right up there.

Q. And what type of assistance is he providing?

MS. MASSEY: Objection, your Honor, she can't testify to...

THE COURT: I will overrule if she knows what assistance he is providing either her through conversations with Mr. McKee or otherwise. I will allow her to answer that.

A. Through conversations with Bill and with Dick Sayer I did call Dick to let him know that Bill had come to see me. Was Dick doing the Medicaid estate planning or Medicaid planning and he told me that he was doing so. Which Medicaid planning is to, planning that one does to make one available or eligible for long term care paid by DSHS in the state of Washington.

Q. Is that a common method for, is that a common thing that elder folks do from what you have seen in your practice?

A. Medicaid planning is something that you always would consider in terms of what your goals are. So, that is

common Medicaid planning.

Q. And...

A. Now, I have to say that not all estate planning attorneys would know that but elder law attorneys would.

Q. Okay. Now, have I missed anything on what went into your considerations on...

A. Yes...

Q. In making Bill...

A. I don't know if you have missed it. I think I have just been...

MS. MASSEY: Objection, your Honor, leading the witness.

THE COURT: I am going to overrule. I will allow her to answer the question. Go ahead.

A. With a client with potential diminished capacity you don't want to get just one snap shot of them, you know. I wanted to make sure that Bill understood what it was in the terms of powers of attorney what they did and his health care directive. So the next day, after I had met with him, I called him on the phone and I know that Bill is hard of hearing and that makes it difficult to communicate; but I was able to communicate with him. I called him, I asked, Maureen answered the phone and I asked that, I didn't mean to be rude, but I asked that she put Bill on the phone and I spoke with him. And I went through the normal pleasantries when you call somebody, how are you doing, that sort of

thing. And then after a couple of minutes of that, I asked Bill do you understand what a power of attorney is. And he said yes, it gives others the right to use my signature. Maureen has had that power for years. That is consistent with the fact that in 2005, I believe, it was either 2004 or 2005, he had executed a power of attorney giving Maureen financial power of attorney. And I asked him about who he would like to be his attorney in fact to make those decisions and he said that Maureen had done it for years so she would be good. But he also referred to Garth, his grandson, and said that, you know, Garth is a business man. Garth has financial acumen, he did not use that word, but he's financially quite capable and that Garth would be good for that. And he told me that he wanted, would like to live with Maureen and that they were considering going to Seattle and to be near the boys and that that would be comfortable for him. I asked him about the medical power of attorney and he said that Maureen would be best for that because she helps me. And he had previously told me about the fact that, what she does for him. You know, she does what, I guess, a daughter would do. He says he does things okay on his own, but Maureen does help with food and with his laundry and that sort of thing. So, then I got the sense that he understood the powers of attorney and it was totally consistent with my conversation the next day, nothing had

changed. He understood what the powers of attorney were, who he was giving them to, and what it would empower them to do. So, I was comfortable with that. So then I go on and I ask him, tell me, let's talk about the health care directive, do you remember what that is. And the terms, health care directive, no he didn't pick up, yeah, this is what it is. But when I said, this tells the doctor what you want them to do and he told me, yeah, I am having a surgery and I said okay, so let's go down this road, Bill. If you, after that surgery, you know, you don't come out of it, you'll never come out of it, and you will always been in that state where you'll never wake up and you would just, you know, a feeding tube or some artificial means to keep you alive, is that what you want? He was adamant, no, I don't want that. Does not want a feeding tube. He says I don't want nothing fake-a-roo. So, it was clear to me that he understood that the fact that he is having a surgery, he is undergoing a serious procedure and he did not want any artificial means to support if there was no hope of him ever recovering. So, then again I asked him the date. He did not give the date right. It was the 22nd and he said it was the 27th. He says, well, I don't have a calendar in front of me when I corrected him. He said that it is summer. He said that the president was George Bush. I sense that he was clearly with it and understanding me during that

conversation. So, that was my second interaction with Bill.

Q. Did you have another one?

A. Um, hum. On June 25, Bill came to my office. Maureen drove him, I think I didn't have, I had very little conversation with Maureen. I asked her to stay in the lobby and then I met with Bill and I went over all of his documents with him to make sure that he, again, to make sure that he, I see that he has that level of understanding what these documents are. He understood that the powers of attorney, the health care directive, but he was confused by the will. I had prepared a will for him because of a prior conversation having to do with a "kidnaping" where he believed that he may have signed a document or a will that was inconsistent with giving everything to Maureen, that that may have been something that he did in the past. So, I had prepared a will for him and this was the first opportunity he had seen the will was on this Monday, June 25, and he did not want to proceed at that time because he hadn't had an opportunity to review these documents. So, that was completely understandable to me. He's, is the first time that he had seen it, said okay, take this home and come back later this week and if you want to sign them at that time, then we'll do that.

Q. And did he come back?

A. On Thursday, June 28, he came back and again I met

with Bill. Maureen, again, was asked to wait in the lobby. He again appeared competent. He understood what date it was. He didn't give me any indication of any confusion and at that time, again, I went over the same sort of thing. You have to go over it and over it again to, I just did that to make sure. He understood the powers of attorney, the health care directive, who he wanted to appoint and he signed them. After that, I sat down with him and I went over the will with him. And he got hung up on the fact that the will mentions Jerome and Craig, doesn't give anything to them, but it says that I have three children. You know, Jerome, Craig and Maureen. And that upset him that he didn't want their names anywhere in the will. I explained to him that it needed to be in the will if it was going, you have to name who, you know, who your children are and he said to me that, you know what, I have done a will in the past, it gives everything to Maureen. I don't need a new will at that time. So, he did not sign the will at that time.

Q. Did he later?

A. He did.

Q. And when was that?

A. Well, that happened actually on July 3. I was not there are the office so my office mate, Darr Grewy (phonetic), who is an estate planning attorney was one of

the witnesses to the will at that time.

Q. So, in consideration of your legal ethics in preparation of these documents and obtaining the client's signature, did you believe that Bill was competent?

A. I did. But again, I am lawyer, and went through all of these assessments but to make sure that I wasn't off base, I didn't think I was, but I also wanted and requested the medical documentation that would confirm my belief that he was competent and so I obtained medical documentation in addition to my own meetings with Bill.

Q. And what medical documentation did you review?

A. That was the affidavit of Terry Spohr which I believe was filed in this matter. I have the, a Brian Fuhs, F-U-H-S, MD, letter of March 9, 2007; Robert Wygert, MD, letter of March 8, 2007; and an April 9, 2007, consultation report from Steven Nisko, MD, who I stand is the heart surgeon and to whom I spoke directly as well.

Q. You did speak directly with the heart surgeon?

A. I did.

Q. And did you have discussion about Bill's competence with the heart surgeon?

A. I did.

Q. And what was that discussion?

A. Well, Dr. Nisko stated to me that, in his belief, that, you know, that Bill had been competent, was competent,

was able to give informed consent for the surgery. So, it is what he had previously written but I also directly received that information from Dr. Nisko. I do want to point out that that was subsequent to the signing of the documents, that I actually spoke with Nisko, so as not to mislead the court on that.

Q. You indicated that, I wanted to clarify, whose, who did Bill appoint to be his financial guardian?

A. Garth, his grandson.

Q. And at what point and time would that financial guardianship document come into play?

A. It is an immediate power of attorney comes into play immediately at the time of signing which is June 28, 2008.

MR. ROSE: I believe that is all of the questions that I have, your Honor.

THE COURT: Thank you. Ms. Massey, questions of Ms. St. Louis?

MS. MASSEY: Yes, your Honor.

CROSS EXAMINATION

BY MS. MASSEY:

Q. Ms. St. Louis, you said, in total you spent about two hours with Bill, is that correct?

A. That would be, actually, that is an underestimate because when I was looking back I saw that my last meeting

with him was an hour, the meeting before that was an hour. I spent about 15 minutes on the phone with him and then maybe 30 minutes initially meeting with him alone, 30 to 40 minutes. So, it is a little bit over a hour, closer to three hours rather than two hours.

Q. In your experience practicing elder law have you seen clients who presented well, you knew who they were and where they were but yet suffered from poor judgement?

A. Did you say elder clients?

Q. Yes.

A. Elder as well as younger clients with poor judgement.

Q. In your experience, you have seen clients who presented well, knew who they were, knew where they were who were vulnerable?

A. Yes.

Q. In your experience, have you seen clients who presented well, who were being exploited?

A. Now, that is a tougher question to answer. Because when you are making a determination of whether they are being exploited you need a much bigger view point. That wasn't my, that wasn't where I was coming from. I was looking at does he understand what is in front of him right now. So, I certainly allow for the possibility that somebody who is competent and understands things may be

exploited unbeknownst to what I am able to see of their life.

Q. The picture that you got in three hours?

A. Correct. Correct.

Q. Do you do a lot of guardianships, Ms. St. Louis? Do you practice...

A. I do guardianships as well.

Q. Okay. Have you seen guardianships granted when an elderly client presented well but perhaps their reasoning skills and their judgement skills were poor?

A. I really can't answer that question because as you know there is so much more that goes into whether a guardianship would be granted. I don't know Idaho standards but in Washington, you know, we look at are there lesser restrictive alternatives to the guardianship. What other things can be in place to protect the person if they are vulnerable, if they are being exploited. So, I really can't answer that question based on how it is posed.

Q. Well, let me ask you this. When, in your experience, do you normally represent a petitioner or the proposed (inaudible) or have you done both?

A. Both.

Q. Okay. And do you generally like to see more extensive testing than mini mental status exam? Do you like to see a cognitive assessment? Or perhaps a pyscho-social

eval?

A. In a guardianship you certainly need to have the medical assessment by a medical doctor who would offer an opinion as to the level of competency. Definitely. And obviously I don't have that. That is one of the reasons that I turn to the other, to the medical information to (inaudible) what my conclusion had been. But again, I am not, I wasn't doing a guardianship. I am looking at whether this gentleman had the legal capacity to execute those documents and I concluded that, in fact, he did have that capacity.

Q. Okay. When you were meeting with Mr. McKee or talking with Mr. Mckee, did you look at any of his financial records? His financial, bank statements? Anything of that sort?

A. No.

Q. Did you realize that Mr. McKee's fund were co-mingled with those of his daughter's?

A. I don't know if I would say co-mingled, I would not have been surprised by that. But I again, I did not look at any of his bank accounts nor his daughter's bank accounts.

Q. And Ms. St. Louis you testified that you do some Medicaid estate planning, is that correct?

A. Yes.

Q. Are you familiar with the Medicaid eligibility rules in Washington?

A. Yes.

Q. Okay. If there is a resource transfer of less than fair market value is there a penalty period for that?

A. Yes.

Q. Are there exemptions to those resources?

A. Yes.

Q. What are those exemptions?

A. An exemption would be from a single person they can transfer their house to a care giver child who has lived with them for two years and because of that assistance they have been allowed to stay in the home. Again, we are talking about a gift for less than fair market value. A transfer to a sibling who has an ownership interest in the home is another exempted, a transfer to a disabled child or to a minor a child is exempted from the gifting penalty.

Q. Is there an exemption for a transfer to an adult child for less than fair market value because of guilt?

A. Not that I know of.

Q. Thank you. So, if property was transferred to an adult child for less than fair market value for a reason other than one of those that you listed, would an elderly person be Medicaid eligible for long term care?

A. Under your scenario, where it is a gift and that

is the key to your scenario, that, there is not an exemption then there will be a penalty period that is imposed upon the date of the application for however many months the penalty period would run depending on the divisor.

Q. Depending on the fair market value of the property?

A. Um, hum.

Q. What is the divisor in Washington right now, Ms. St. Louis?

A. It is $199.00 per day.

MS. MASSEY: That is all I have, your Honor.

THE COURT: I have a couple questions, Ms. St. Louis before I give Mr. Rose another chance. The documents that you had prepared for Mr. McKee, the power of attorney, the financial power of attorney for Garth, and the medical power of attorney for Maureen, are those both documents that are designed to survive incompetency?

A. Indeed, they are durable powers of attorney.

Q. (By the Court) Okay. So that would apply to a financial one as well as the, what I am more familiar with, the durable power of attorney for health care purposes?

A. Yes.

Q. Okay. So, do they use those frequently in the state of Washington? As opposed to getting into conservatorships and guardianships?

A. Absolutely.

Q. All right. And if you found in your practice that the durable powers of attorney for financial matters, I guess, the surviving contest by family and other relatives to your experience?

A. Yes. As long as their was competency when the document was drafted.

Q. Okay. And they are respected by business entities, banks, and everyone else? For instance, if Garth were in a position to sell property or convey or to obtain Mr. McKee's assets and inventory those things and do the things that would be expected of him. Under that banks and other entities would respect the power of attorney?

A. Yes, under law they are required to. Some banks are more problematic and usually all it takes is a letter to their counsel saying that under our statute when can take you to court for not recognizing it.

Q. Okay.

A. So they are recognized. If they are, in particular, if they are more recent. Staler ones, older ones are more problematic with a bank. A recent document, particularly, when it is notarized and I have these witnesses, well, it will be recognized.

THE COURT: All right. I am going to give Ms. Massey a chance to ask Ms. St. Louis, did you have any other

questions in light of my questions of this witness?

MS. MASSEY: Yes, thank you.

THE COURT: Okay, go ahead.

Q. Ms. St. Louis, are there circumstances where you have seen a durable power of attorney for finances or health care that later, in your opinion, a guardianship and conservatorship was needed to supercede those?

A. I know that there are such cases. I haven't personally seen that but I am aware of them.

Q. Okay. In what circumstances, you haven't seen them, but you are aware of them?

A. Well, usually that is when you involve Adult Protective Services because there is some sort of exploitation involved where there is the attorney in fact is in breach of their fiduciary obligation and taking advantage of the principal.

Q. Thank you. In your practice have you seen adult children who have coached an elderly parent?

A. You are getting to the question of undue influence and that is something that I always look for when a child brings an adult or an elderly person into the office. And that is why I meet with them alone and that is why I meet with them time and time again, maybe when they are not expecting it such as a phone call. You know, as human nature is that we are all susceptible to influence. The

question is whether it is undue influence. And so that was as Bill's attorney that is who I am looking out for. And so that I what I was looking for particularly with his daughter, Maureen, who brought him to me. So that was a consideration, yes. I didn't conclude from my interactions that there existed undue influence but I certainly was aware that that could be an issue.

Q. Have you seen elderly clients who were unduly influenced by an adult child that perhaps, the child didn't, wasn't with the elderly client when you met with them but there would have been repercussions from that child had they left the office and didn't do what that child had wanted them to do?

A. No, but I am sure that that happens. I mean just the nature of family dynamics that I wouldn't been surprised to find that. When you are talking about undue influence, you are balancing what is their vulnerability, their susceptibility, you know. How vulnerable are they. And when you find that somebody is competent, you know, the higher their strength, their mentation, their cognitive skills, the less susceptible they are to that sort of influence.

Q. Ms. St. Louis, in your practice when there is one child who has primary control of an elderly parent and has isolated that parent from the other children, does that

raise red flags for you?

A. Isolation, if it is imposed by the child certainly does. Isolation that is a choice of the parent is another matter. Sometimes parents don't care to interact with certain other children.

MS. MASSEY: I have no further questions, your Honor.

THE COURT: Okay, thank you, Ms. Massey. Mr. Rose, any redirect questions?

MR. ROSE: Just a few, your Honor.

REDIRECT EXAMINATION

BY MR. ROSE:

Q. In your working with Bill, was there anything to suggest that he was being exploited?

A. No, there wasn't and I would ask this question many times without Maureen in the room, do you trust Maureen? Do you trust Garth?

Q. And what was Bill's response?

A. He trusts them.

Q. Was there anything to suggest that he might be this vulnerable adult as Ms. Massey was referring to?

A. You know, he is 90 years old. He was frail physically. He was able to get up and around. He was mentally competent. You know, but again, you know, in all fairness, my, what I was able to see is just this slice of the picture. I wasn't able to go home with them and see

what goes on or see what goes on at other times. So, I can't comment, but in terms of what I saw, no, there was nothing. I just don't want to suggest that I know everything because the court and the witnesses here have much greater knowledge of, on a lot of other areas that I don't have.

Q. In regards to this Medicaid issue, the exemptions for transfer that Ms. Massey spoke of were dealing with exemptions without fair value, is that correct?

A. Correct, yes.

Q. There are other exemptions when there is fair value?

A. Well, if the transfer is for market value, if there is no gift component to it that would not trigger any penalty.

Q. So a settlement of the dispute say between Maureen and Bill for value would not interfere with his ability to collect Medicaid?

A. Correct.

MR. ROSE: That is all I have, your Honor.

THE COURT: Ms. Massey, anything further for this witness?

MS. MASSEY: Yes, your Honor.

RECROSS EXAMINATION

BY MS. MASSEY:

Q. Ms. St. Louis, if there was a dispute between Maureen and Bill, in your opinion, would it be in Bill's best interest to appoint her as a power of attorney?

A. For what, what does the dispute concern?

Q. Financial?

A. Garth does, Garth is his attorney in fact for financial not Maureen.

Q. If a client is in a dispute with an adult child, I guess, in terms of Medicaid eligibility for a reimbursement for their care or may be property that they thought they were entitled to, is it your opinion that that adult child would act in that parent's best interest?

A. Well, that's a tough one to answer. The attorney in fact owes a fiduciary duty to the principal to act in the principal's best interest and not in their own best interest would be my response to that. So, your posing a question where there would be a dispute, I presume, would make impossible to act in the best interest. And, I need to back up. Not only in their best interest but as, when it comes to health care, it's, you know, you need to act according to the wishes of the principal, as you know the wishes of the principal to be.

Q. Have you seen in your practice, have you seen

adult children who held power of attorneys for health care, power of attorneys for finances that did not act in their parents' best wishes?

A. I have not seen that personally though certainly that is the concern always with the power of attorney is that it could be misused.

THE COURT: Is that it then Ms. Massey?

MS. MASSEY: Yes, your Honor.

THE COURT: All right, Mr. Rose, anything further?

MR. ROSE: No, your Honor.

THE COURT: All right. May Ms. St. Louis be excused today?

MR. ROSE: Yes.

MS. MASSEY: Yes.

THE COURT: All right, Ms. St. Louis, you are free to go.

MR. ROSE: Thank you.

MS. ST. LOUIS: Thank you, your Honor.

THE COURT: Next witness, Mr. Rose?

MR. ROSE: Call Garth Erickson.

THE COURT: All right. Mr. Erickson, I will have you come forward and be sworn in.

#52

Shoshone Peggy White

FILED
BENEWAH COUNTY
MICHELE HENNIES, CLERK
2008 JUN 20 PM 2:52
BY: CJR DEPUTY

LLOYD A. HERMAN
LLOYD HERMAN & ASSOCIATES, P.S.
213 N. University Road
Spokane Valley, WA 99206
(509) 922-6600 * fax (509) 922-4720
ISB # 6884
Attorney for Bill McKee

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF: BILL MCKEE, a protected person.	CASE NO. CV 07-120 ORDER TERMINATING CONSERVATORSHIP

The Court, having heard the arguments of counsel and viewed the evidence presented, orders the following:

ORDER

1. The conservatorship over the finances of Bill E. McKee is terminated pursuant to the suggestion of the Washington court.

2. The guardianship over the person of Bill E. McKee shall remain under the jurisdiction of the courts of the State of Washington.

3. The conservator, Shelley Bruna, disclaims any interest in any properties owned by Bill McKee in Idaho and Washington.

4. The conservator, Shelley Bruna, shall immediately turn over all funds belonging to Bill McKee to his attorney, Lloyd A. Herman, as well as any property she may

have in her possession including, but not limited to, the keys to the cabin at Priest Lake and Bill McKee's will.

5. Maureen Erickson and Bill McKee shall notify the Social Security administration and HECLA that Shelley Bruna is no longer the conservator over Bill McKee, and have Mr. McKee's social security and retirement checks sent directly to Bill McKee at 4702 S. Pender Lane, Spokane, Washington. Until such time that the proper changes are made, any checks received by Shelley Bruna shall immediately be forwarded to Bill McKee's attorney, Lloyd Herman.

6. As a result of the termination of the Conservatorship, the conservator, on behalf of Bill McKee, and Maureen Erickson on her own behalf, agree to dismiss with prejudice the action in Shoshone County, CV 07-477.

7. As a result of the termination of the Conservatorship, the conservator, on behalf of Bill McKee, and Maureen Erickson, on her own behalf, agree that the Kootenai County action, CV 08-1329 against Maureen Erickson shall be dismissed with prejudice.

8. This court hereby permits all outstanding transfers of Bill McKee's real property in the State of Idaho to Maureen Erickson including, but not limited to, the transfer of the Priest Lake State Lease Lot #226 pursuant to State Lease Transfer documents now in the possession of Craig Thompson of the Department of Lands.

9. Bill McKee, Maureen Erickson and her three children agree to sign a Release and Hold Harmless agreement against Shelley Bruna for any actions taken while she was acting as the conservator of Bill McKee's estate.

10. Bill McKee agrees to pay to Shelley Bruna the amount of $2,000. Payments of two hundred fifty dollars ($250) per months will commence one year from the date of this

order, without interest, and shall be secured by Deed of Trust on the home located at 4702 S. Pender Lane, Spokane, Washington.

DONE IN OPEN COURT this ____ day of June, 2008.

_____
MAGISTRATE PATRICK MCFADDEN

Presented by:

Lloyd Herman & Associates, P.S.

By:_____
Lloyd A. Herman, WSBA #3245
Washington Attorney for Bill McKee

Approved as to Form and Content:

By:_____
John J. Rose, Jr., ISB #2094
Idaho Attorney for Bill McKee

By:_____
Douglas Oviatt, ISB #7536
Attorney for Shelley Bruna, Conservator

order, without interest, and shall be secured by Deed of Trust on the home located at 4702 S. Pender Lane, Spokane, Washington.

DONE IN OPEN COURT this 20th day of June, 2008.

MAGISTRATE PATRICK MCFADDEN

Presented by:

Lloyd Hermann & Associates P.S.

By: _____
Lloyd A. Hermann, WSBA #3245
Washington Attorney for Bill McKee

Approved as to Form and Content:

By: _____
John J. Rose, Jr., ISB #2084
Idaho Attorney for Bill McKee

By: _____
Douglas Oviatt, ISB #7556
Attorney for Shelley Stuart, Conservator

ORDER TERMINATING CONSERVATORSHIP - 3

CLERK'S CERTIFICATE OF MAILING

I hereby certify that on the 20th of June, 2008, I caused a true and correct copy of the foregoing ORDER TERMINATIG CONSERVATORSHIP by method indicated below, and addressed to the following individuals:

Lloyd A. Herman Lloyd Herman & Associates, PS 213 N. University Road Spokane, WA 99206	_____US Mail _____Overnight _____Personal Service 4720 __✓__Facsimile 1-509-922-6600
John J. Rose, Jr., Law Offices of John J. Rose, PC 708 W. Cameron Avenue Kellogg, ID 83837	_____US Mail _____Overnight _____Personal Service __✓__Facsimile 1-208-786-8005
Douglas A. Oviatt Owens & Crandall, PLLC 1859 N. Lakewood Drive, Suite 104 Coeur d'Alene, ID 83814	_____US Mail _____Overnight _____Personal Service __✓__Facsimile 1-208-667-1939

CJR
Deputy Clerk

#53

SEP 2 1 2008

THOMAS R. FALLQUIST
SPOKANE COUNTY

(Copy Receipt) (Clerk's Date Stamp)

SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE

In the Guardianship of:

BILL E. McKEE

An Incapacitated Person

CASE NO. 08-400259-6

ORDER APPOINTING
☐ LIMITED
☒ FULL GUARDIAN OF PERSON AND/OR
☐ LIMITED
☐ FULL GUARDIAN OF ESTATE

(ORAPGD) (CLERK'S ACTION REQUIRED)

CLERK'S INFORMATION SUMMARY

Due Date for Initial Personal Care Plan and Inventory: _____
Due Date for Receipt(s) of Funds in Blocked Account(s): _____
Due Date for Report and Accounting: _____
Due Date for Filing Fee: _____
The Clerk Shall Notify the Auditor of Loss of Voting Rights Yes ☐ No X
X Certified Professional Guardian ☐ Non Professional Guardian (training required)

THIS MATTER came on regularly for hearing on a Petition for Appointment of Guardian or Limited Guardian of BILL E. McKEE, the Alleged Incapacitated Person.

☐ The Alleged Incapacitated Person was present in Court;

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☐ The hearing was conducted outside of the courtroom at the location of the Alleged Incapacitated Person;

☐ The Alleged Incapacitated Person's presence was waived for good cause shown other than mere inconvenience, as set forth in the file and reports in this matter;

The Guardian ad Litem was present. The following other persons were also present at the hearing: Tim Mackin, Guardian Ad Litem; Art Toreson, Attorney for Maureen Erickson; Lloyd Herman, Attorney for Bill McKee; John Munding, Attorney for Jerome and Craig McKee; and Maureen Erickson.

The Court considered the written report of the Guardian ad Litem and the Medical/ Psychological/ARNP Report, the testimony of witnesses, remarks of counsel, and the documents filed herein. Based on the above, the Court makes the following:

I.

FINDINGS OF FACT

1. **Notices:** All notices required by law have been given and proof of service as required by statute is on file. Notice, if required, was provided to the Regional Administrator of DSHS pursuant to RCW 11.92.150, but DSHS neither appeared at this hearing nor responded to the Petition.

2. **Jurisdiction:** The jurisdictional facts set forth in the petition are true and correct, and the Court has jurisdiction over the person and/or estate of the Alleged Incapacitated Person.

3. **Guardian ad Litem:** The Guardian ad Litem appointed by the Court has filed a report with the Court. The report is complete and complies with all requirements of RCW 11.88.090.

4. **Alternative Arrangements Made By The Alleged Incapacitated Person:**

☐ The Alleged Incapacitated Person did not make alternative arrangements for assistance, such as a power of attorney, prior to becoming incapacitated.

X The Alleged Incapacitated Person made alternative arrangements for assistance, but such arrangements are inadequate in the following respects: _____

Bill McKee apointed his daughter Maureen Erickson to handle matters concerning his healthcare.

☐ _____ has been acting in a fiduciary capacity for the Alleged Incapacitated Person and should NOT continue to do so for the following reasons:

A conservator was appointed by the Idaho Court to handle Mr. McKee's financial matters. The conservatorship has since been terminated and transferred to the Washington Court for further management. A hearing has been set for September 19, 2008 to address this matter.

5. **Capacity:** The Alleged Incapacitated Person, Bill E. McKee _____, is

X incapable of managing their personal affairs

☐ incapable of managing their financial affairs

X the Alleged Incapacitated Person is in need of a full Guardianship over the

X person ☐ estate

☐ the Alleged Incapacitated Person is capable of managing some personal and/or financial affairs, but is in need of the protection and assistance of a limited Guardian of the

☐ person ☐ estate,

in the areas as follows: Mr. McKee requires assistance with his daily needs, food preparation, transportation, and medical decision making.

6. **Guardian:** The proposed Guardian is qualified to act as Guardian of the Person and/or Estate of the Incapacitated Person. Proposed Guardian's address, phone numbers and email address are as follows:

Address: 4702 S. Pender Lane, Spokane, WA 99224

*Telephone #(s): Business _____ Personal 509-443-6127

E-mail address: None

7. **Guardian ad Litem Fees and Costs:**

☐ The Guardian ad Litem was appointed at ☐ County ☐ estate expense and shall submit a motion for payment of fees and costs pursuant to the local rules.

The Guardian ad Litem has requested a fee of $_____ for services rendered and reimbursement of $_____ for costs incurred while acting as Guardian ad

To be addressed at the next court hearing.

Litem. Fees in the amount of $_____ and costs in the amount of $_____ are reasonable and should be paid as follows:

☐ $_____ by the Guardian from the guardianship estate and/or☐

$_____ by _____ for the following reason(s):

8. Bond: The assets of the Alleged Incapacitated Person:

X Total less than three thousand dollars ($3,000) and no bond is required.

☐ Exceed three thousand dollars ($3,000) and should be placed in a blocked account with an insured financial institution or bonded, unless the guardian is a bank or trust company.

☐ Are to be held by a nonprofit corporation authorized to act as Guardian, and the Court waives any bond requirement.

9. Right to Vote: The Alleged Incapacitated Person X is ☐ is not capable of exercising the right to vote.

II.

CONCLUSIONS OF LAW

1. That ____ BILL E. McKEE _____ is an Incapacitated Person within the meaning of RCW Chapter 11.88, and a

X Full ☐ Limited Guardian of the Person and/or

☐ Full ☐ Limited Guardian of the Estate should be appointed; and that

Maureen Erickson ____ is a fit and proper person as required by RCW 11.88.020 to be appointed. Guardianship of the Estate is pending before this court.

2. That the powers of the Guardian and the limitations and restrictions placed on the Incapacitated Person should be as follows:

☐ The right to vote is revoked.

☐ Other: _____

_____

_____

III.

606

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ORDER

It is hereby ordered:

1. **Prior Power of Attorney:** Any Power of Attorney of any kind previously executed by the Incapacitated Person:

X is not canceled

☐ is canceled in its entirety

☐ is canceled in its entirety except for those provisions pertaining to health care.

2. **Appointment of Guardian:** ____ Maureen Erickson _____ is appointed as

X Full ☐ Limited Guardian of the Person and/or

☐ Full ☐ Limited Guardian of the Estate of _____, and the powers of the Guardian and the limitation and restrictions placed on the Incapacitated Person shall be as set forth in Conclusion of Law 2.

3. **Letters of Guardianship/Limited Guardianship:** The Clerk of the Court shall issue letters of X Full ☐ Limited Guardianship of the Person and/or

☐ Full ☐ Limited Guardianship of the Estate to _____, upon the filing of an oath,

X Verification of Completion of Mandatory Guardian Training or an order waiving training,

☐ Guardianship bond in the amount of $_____ or X bond is waived.

☐ The following account(s) shall be accessible to the Guardian and all other accounts shall be blocked and a receipt of Funds in Blocked Account (Form #37) shall be filed with the court no later than 30 days from the date of this order:

_____

_____

If bond is waived, the Guardian is required to report to the Court if the total assets of the Incapacitated Person reaches or exceeds Three Thousand Dollars. Pursuant to RCW 11.88.100, the Guardian of the Estate shall file a yearly statement showing the monthly income of the Incapacitated Person if said monthly income, excluding moneys from state or federal benefits, is over the sum of Five Hundred Dollars per month for any three consecutive months.

4. Report of Substantial Change in Income or Assets: Within 30 days of any substantial change in the Estate's income or assets, the Guardian of the Estate shall report to the Court and schedule a hearing. The purpose of the hearing will be for the Court to consider changing the bond or making other provision in accordance with RCW 11.88.100.

5. Inventory: Within three months of appointment, the Guardian of the Estate shall file a verified Inventory of all the property of the Incapacitated Person, which shall come into the Guardian's possession or knowledge, including a statement of all encumbrances, liens and other secured charges on any item. A review hearing upon filing of the inventory

☐ is required ☐ is not required.

6. Disbursements: On or before the date the Inventory is due, the Guardian of the Estate shall also apply to the Court for an Order Authorizing Disbursements on behalf of the Incapacitated Person as required by RCW 11.92.040.

7. Personal Care Plan: The Guardian of the Person shall complete and file within three (3) months after appointment a Personal Care Plan which shall comply with the requirements of RCW 11.92.043(1).

8. Status of Incapacitated Person: Unless otherwise ordered, the Guardian of the Person shall file an annual report on the status of the Incapacitated Person that shall comply with the requirements of RCW 11.92.043(2).

9. Substantial Change in Condition or Residence: The Guardian of the Person shall report to the Court within thirty (30) days any substantial change in the Incapacitated Person's condition, or any change in residence of the Incapacitated Person.

10. Designation of Standby Guardian: The Guardian shall file a written designation of a standby Guardian that complies with the requirements of RCW 11.88.125.

11. Authority for Investment and Expenditure: The authority of the Guardian of the Estate for investment and expenditure of the ward's estate is as follows: _____

_____

_____

12. Duration of Guardianship: This Guardianship shall continue in effect:

☐ until _____ [date]; OR

X until terminated pursuant to RCW 11.88.140;

☐ the necessity for the Guardianship to continue shall be periodically reviewed.

13. Discharge/Retention of Guardian ad Litem:

☐ The Guardian ad Litem is discharged; or

X The Guardian ad Litem shall continue performing further duties or obligations as follows: Investigate and prepare a report regarding the estate of Bill McKee. Monitor the financial matters until further order of the Court.

14. Notice of Right to Receive Pleadings: The following persons are described in RCW 11.88.090(5)(d), and the Guardian shall notify them of their right to file with the Court and serve upon the Guardian, or the Guardian's attorney, a request to receive copies of pleadings filed by the Guardian with respect to the Guardianship:

_____
Name

_____
Address

15. Guardian Fees:

☐ DSHS cases: The Guardian is allowed such fees and costs as permitted by the Washington Administrative Code in the amount of $_____ per month as a deduction from the incapacitated person's participation in the DSHS cost of care. Such fees are subject to court review and approval. This deduction is approved for the initial twelve month reporting period and ninety days thereafter, from the date of this order to _____. The Guardian may petition for fees in excess of the above amount only on notice to the appropriate DSHS Regional Administrator per WAC 388.71; OR

☐ Non-DSHS cases: The Guardian shall petition the Court for approval of fees. The Guardian may advance itself $_____ per month subject to Court review and approval.

16. Guardian ad Litem Fee: The fees and costs will be presented to the Court after the hearing on September 19, 2008.

☐ Fees and costs are approved as reasonable; OR

☐ The Guardian ad Litem fees and costs are approved as reasonable in the total amount of $_____. They shall be paid from ☐ the Guardianship estate assets,

609
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☐ Spokane County, OR ☐ other source(s) as follows: _____.

17. Legal Fees: The legal fees and costs of _____ are approved as reasonable in the amount of $_____, and shall be paid from the

☐ Guardianship estate assets OR

☐ other source(s) as follows: _____

18. Guardian's Report: The Guardian's report shall cover the

X 12 (twelve) month ☐ 24 (twenty-four) month or ☐ 36 (thirty-six) month period following the appointment. The Guardian's report is due within 90 days of the end of the reporting period and shall comply with the requirements of RCW 11.92.040(2).

DATED AND SIGNED IN OPEN COURT THIS 10th DAY OF SEPTEMBER, 2008

_____
Judge/~~Court Commissioner~~

Presented by: GREG SYPOLT

Signature of Petitioner/Attorney	Arthur H. Toreson, Jr. Printed Name of Petitioner/Attorney, WSBA/CPG # 5842
122 N. University Road Address	Spokane Valley, WA 99206 City, State, Zip Code
509-922-4666/509-927-6768 *Telephone/Fax Number	toresonlaw@aol.com Email Address

***Under GR 22 (b) (6), parties' personal telephone number(s) are confidential information. If you do not want your personal phone number(s) on this public form, complete form #S2-Sealed Confidential Information and file in the confidential file.**

Copy received and approved by: _____
Guardian Ad Litem

610
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Copy Received, Approved as to Form and
Content, Notice of Presentment Waived:

By: 9/4/08
John D. Munding, WSBA#21734
Attorney for Jerome McKee and Craig McKee

By:
Lloyd A. Herman, WSBA#3248
Attorney for Bill E. McKee

By:
Timothy J. Mackin, WSBA#6459
Guardian Ad Litem for Bill E. McKee

611

COPY

#54

(Copy Receipt) (Clerk's Date Stamp)

SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE

In the Guardianship of: BILL E. McKEE An Incapacitated Person	CASE NO. 08-400259-6 ORDER APPOINTING ☐ LIMITED ☐ FULL GUARDIAN OF PERSON AND/OR ☐ LIMITED ☒ FULL GUARDIAN OF ESTATE (ORAPGD) (CLERK'S ACTION REQUIRED)

CLERK'S INFORMATION SUMMARY	
Due Date for Initial Personal Care Plan and Inventory:	
Due Date for Receipt(s) of Funds in Blocked Account(s):	
Due Date for Report and Accounting:	
Due Date for Filing Fee:	
The Clerk Shall Notify the Auditor of Loss of Voting Rights Yes ☐ No ☒	
☒ Certified Professional Guardian ☐ Non Professional Guardian (training required)	

THIS MATTER came on regularly for hearing on a Petition for Appointment of Guardian or Limited Guardian of OCTOBER 3, 2008, the Alleged Incapacitated Person.

☐ The Alleged Incapacitated Person was present in Court;

☐ The hearing was conducted outside of the courtroom at the location of the Alleged Incapacitated Person;

☐ The Alleged Incapacitated Person's presence was waived for good cause shown other than mere inconvenience, as set forth in the file and reports in this matter;

The Guardian ad Litem was present. The following other persons were also present at the hearing: Arthur Toreson, Attorney for Maureen Erickson; Tim Mackin, Guardian Ad Litem; Lloyd Herman, Attorney for Bill McKee; John Munding, Attorney for Jerome and Craig McKee; and Maureen Erickson, Guardian of the person for Bill E. McKee.

The Court considered the written report of the Guardian ad Litem and the Medical/ Psychological/ARNP Report, the testimony of witnesses, remarks of counsel, and the documents filed herein. Based on the above, the Court makes the following:

I.

FINDINGS OF FACT

1. **Notices:** All notices required by law have been given and proof of service as required by statute is on file. Notice, if required, was provided to the Regional Administrator of DSHS pursuant to RCW 11.92.150, but DSHS neither appeared at this hearing nor responded to the Petition.

2. **Jurisdiction:** The jurisdictional facts set forth in the petition are true and correct, and the Court has jurisdiction over the person and/or estate of the Alleged Incapacitated Person.

3. **Guardian ad Litem:** The Guardian ad Litem appointed by the Court has filed a report with the Court. The report is complete and complies with all requirements of RCW 11.88.090.

4. **Alternative Arrangements Made By The Alleged Incapacitated Person:**

☐ The Alleged Incapacitated Person did not make alternative arrangements for assistance, such as a power of attorney, prior to becoming incapacitated.

☐ The Alleged Incapacitated Person made alternative arrangements for assistance, but such arrangements are inadequate in the following respects: _____

☐ _____ has been acting in a fiduciary capacity for the Alleged Incapacitated Person and should NOT continue to do so for the following reasons:

5. **Capacity:** The Alleged Incapacitated Person, Bill E. McKee, is

☐ incapable of managing their personal affairs

☒ incapable of managing their financial affairs

☒ the Alleged Incapacitated Person is in need of a full Guardianship over the

☐ person ☒ estate

☐ the Alleged Incapacitated Person is capable of managing some personal and/or financial affairs, but is in need of the protection and assistance of a limited Guardian of the

☐ person ☐ estate,

in the areas as follows: _____

6. **Guardian:** The proposed Guardian is qualified to act as Guardian of the Person and/or Estate of the Incapacitated Person. Proposed Guardian's address, phone numbers and email address are as follows:

Address: 223 Overlake Drive E, Medina, WA 98039

*Telephone #(s): Business 206-860-9330 Personal 206-399-8302 E-mail address: garth@arboretummortgage.com

7. **Guardian ad Litem Fees and Costs:**

☒ The Guardian ad Litem was appointed at ☒ County ☐ estate expense and shall submit a motion for payment of fees and costs pursuant to the local rules.

The Guardian ad Litem has requested a fee of $1,187.49 for services rendered and reimbursement of $_____ for costs incurred while acting as Guardian ad Litem. Fees in the amount of $1,187.49 and costs in the amount of $_____ are reasonable and should be paid as follows:

☐ $_____ by the Guardian from the guardianship estate and/or ☒ $1,187.49 by Spokane County for the following reason(s):

8. **Bond:** The assets of the Alleged Incapacitated Person:

☒ Total less than three thousand dollars ($3,000) and no bond is required.

☐ Exceed three thousand dollars ($3,000) and should be placed in a blocked account with an insured financial institution or bonded, unless the guardian is a bank or trust company.

☐ Are to be held by a nonprofit corporation authorized to act as Guardian, and the Court waives any bond requirement.

9. **Right to Vote**: The Alleged Incapacitated Person ☒ is ☐ is not capable of exercising the right to vote.

II.

CONCLUSIONS OF LAW

1. That Bill E. McKee is an Incapacitated Person within the meaning of RCW Chapter 11.88, and a

☐ Full ☐ Limited Guardian of the Person and/or

☒ Full ☐ Limited Guardian of the Estate should be appointed; and that Garth Erickson is a fit and proper person as required by RCW 11.88.020 to be appointed.

2. That the powers of the Guardian and the limitations and restrictions placed on the Incapacitated Person should be as follows:

☐ The right to vote is revoked.

☐ Other: _____

III.

ORDER

It is hereby ordered:

1. **Prior Power of Attorney:** Any Power of Attorney of any kind previously executed by the Incapacitated Person:

☒ is not canceled

☐ is canceled in its entirety

☐ is canceled in its entirety except for those provisions pertaining to health care.

2. **Appointment of Guardian**: Garth Erickson is appointed as

☐ Full ☐ Limited Guardian of the Person and/or

☒ Full ☐ Limited Guardian of the Estate of Bill E. McKee, and the powers of the Guardian and the limitation and restrictions placed on the Incapacitated Person shall be as set forth in Conclusion of Law 2.

3. **Letters of Guardianship/Limited Guardianship:** The Clerk of the Court shall issue letters of ☐ Full ☐ Limited Guardianship of the Person and/or

☒ Full ☐ Limited Guardianship of the Estate to Garth Erickson, upon the filing of an oath,

☒ Verification of Completion of Mandatory Guardian Training or an order waiving training,

☐ Guardianship bond in the amount of $_____ or ☒ bond is waived.

☐ The following account(s) shall be accessible to the Guardian and all other accounts shall be blocked and a receipt of Funds in Blocked Account (Form #37) shall be filed with the court no later than 30 days from the date of this order:

_____

If bond is waived, the Guardian is required to report to the Court if the total assets of the Incapacitated Person reaches or exceeds Three Thousand Dollars. Pursuant to RCW 11.88.100, the Guardian of the Estate shall file a yearly statement showing the monthly income of the Incapacitated Person if said monthly income, excluding moneys from state or federal benefits, is over the sum of Five Hundred Dollars per month for any three consecutive months.

4. **Report of Substantial Change in Income or Assets:** Within 30 days of any substantial change in the Estate's income or assets, the Guardian of the Estate shall report to the Court and schedule a hearing. The purpose of the hearing will be for the Court to consider changing the bond or making other provision in accordance with RCW 11.88.100.

5. **Inventory:** Within three months of appointment, the Guardian of the Estate shall file a verified Inventory of all the property of the Incapacitated Person, which shall come into the Guardian's possession or knowledge, including a statement of all encumbrances, liens and other secured charges on any item. A review hearing upon filing of the inventory

☐ is required ☒ is not required.

6. **Disbursements:** On or before the date the Inventory is due, the Guardian of the Estate shall also apply to the Court for an Order Authorizing Disbursements on behalf of the Incapacitated Person as required by RCW 11.92.040.

7. **Personal Care Plan:** The Guardian of the Person shall complete and file within three (3) months after appointment a Personal Care Plan which shall comply with the requirements of RCW 11.92.043(1).

8. Status of Incapacitated Person: Unless otherwise ordered, the Guardian of the Person shall file an annual report on the status of the Incapacitated Person that shall comply with the requirements of RCW 11.92.043(2).

9. Substantial Change in Condition or Residence: The Guardian of the Person shall report to the Court within thirty (30) days any substantial change in the Incapacitated Person's condition, or any change in residence of the Incapacitated Person.

10. Designation of Standby Guardian: The Guardian shall file a written designation of a standby Guardian that complies with the requirements of RCW 11.88.125.

11. Authority for Investment and Expenditure: The authority of the Guardian of the Estate for investment and expenditure of the ward's estate is as follows: To pay for his housing needs, medical needs, personal care and entertainment.

12. Duration of Guardianship: This Guardianship shall continue in effect:

☐ until _____ [date]; OR

☒ until terminated pursuant to RCW 11.88.140;

☐ the necessity for the Guardianship to continue shall be periodically reviewed.

13. Discharge/Retention of Guardian ad Litem:

☒ The Guardian ad Litem is discharged; or

☐ The Guardian ad Litem shall continue performing further duties or obligations as follows:

_____

14. Notice of Right to Receive Pleadings: The following persons are described in RCW 11.88.090(5)(d), and the Guardian shall notify them of their right to file with the Court and serve upon the Guardian, or the Guardian's attorney, a request to receive copies of pleadings filed by the Guardian with respect to the Guardianship:

John D. Munding, Attorney for Jerome McKee and Craig McKee
Name

The Davenport Tower, P.H. 2290, 111 S. Post Street, Spokane, WA 99201
Address

15. Guardian Fees:

☐ DSHS cases: The Guardian is allowed such fees and costs as permitted by the Washington Administrative Code in the amount of $_____ per month as a deduction from the

incapacitated person's participation in the DSHS cost of care. Such fees are subject to court review and approval. This deduction is approved for the initial twelve month reporting period and ninety days thereafter, from the date of this order to _____. The Guardian may petition for fees in excess of the above amount only on notice to the appropriate DSHS Regional Administrator per WAC 388.71; OR

☒ Non-DSHS cases: The Guardian shall petition the Court for approval of fees. The Guardian may advance itself $0.00 per month subject to Court review and approval.

16. Guardian ad Litem Fee:

☐ Fees and costs are approved as reasonable; OR

☒ The Guardian ad Litem fees and costs are approved as reasonable in the total amount of $1,187.49. They shall be paid from ☐ the Guardianship estate assets,

☒ Spokane County, OR ☐ other source(s) as follows: _____.

17. Legal Fees: The legal fees and costs of _____ are approved as reasonable in the amount of $_____, and shall be paid from the

☐ Guardianship estate assets OR

☐ other source(s) as follows: _____

18. Guardian's Report: The Guardian's report shall cover the

☒ 12 (twelve) month ☐ 24 (twenty-four) month or ☐ 36 (thirty-six) month

period following the appointment. The Guardian's report is due within 90 days of the end of the reporting period and shall comply with the requirements of RCW 11.92.040(2).

ATTACHMENTS: Court transcript from hearing on October 3, 2008.

DATED AND SIGNED IN OPEN COURT THIS 6 DAY OF Nov., 2008.

Judge/~~Court Commissioner~~ GREG SYPOLT

Presented by:

Signature of Petitioner/Attorney

Arthur H. Toreson, Jr.
Printed Name of Petitioner/Attorney,
WSBA/CPG # 5842

122 N. University Road
Address

Spokane Valley, WA 99206
City, State, Zip Code

509-922-4666/509-927-6768
*Telephone/Fax Number

toresonlaw@aol.com
Email Address

***Under GR 22 (b) (6), parties' personal telephone number(s) are confidential information. If you do not want your personal phone number(s) on this public form, complete form #S2-Sealed Confidential Information and file in the confidential file.**

Copy Received, Approved as to Form and
Content, Notice of Presentment Waived:

By:_____
John D. Munding, WSBA#21734
Attorney for Jerome McKee and Craig McKee

By:_____
Lloyd A. Herman, WSBA#3248
Attorney for Bill E. McKee

By:_____
Timothy J. Mackin, WSBA#6459
Guardian Ad Litem for Bill E. McKee

Presented by:

Signature of Petitioner/Attorney	Arthur H. Toreson, Jr. Printed Name of Petitioner/Attorney, WSBA/CPG # 5842
122 N. University Road Address	Spokane Valley, WA 99206 City, State, Zip Code
509-922-4666/509-927-6768 *Telephone/Fax Number	toresonlaw@aol.com Email Address

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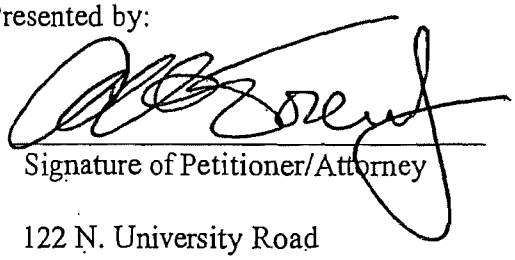
Attorney for Bill E. McKee

By:_____
Timothy J. Mackin, WSBA#6459
Guardian Ad Litem for Bill E. McKee

Presented by:



Signature of Petitioner/Attorney	Arthur H. Toreson, Jr. Printed Name of Petitioner/Attorney, WSBA/CPG # 5842
122 N. University Road	Spokane Valley, WA 99206
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Attorney for Bill E. McKee

By:_____
Timothy J. Mackin, WSBA#6459
Guardian Ad Litem for Bill E. McKee

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

In the Matter of Limited Guardianship of BILL McKEE,	))SPOKANE COUNTY
	)SUPERIOR COURT
An Alleged Incapacitated Person	)NO. 08-4-00259-6
Jerome McKee, Craig McKee, et al.,	)
Respondents.	)

MOTION TO APPOINT GUARDIAN OF THE ESTATE

The above-entitled matter was heard before the Honorable Gregory D. Sypolt, Superior Court Judge for the State of Washington, County of Spokane, on October 3, 2008.

APPEARANCES:

For the Petitioner:	Mr. Arthur H. Toreson, Jr. Attorney at Law 122 North University Road Spokane Valley, Washington 99206
For the Bill McKee:	Mr. Lloyd A. Herman Attorney at Law 213 North University Spokane Valley, Washington 99206
For the Respondents:	Mr. John D. Munding Attorney at Law The Davenport Towers 111 South Post Street, PH 2290 Spokane, Washington 99201-3913
Guardian ad Litem:	Mr. Tim J. Mackin Attorney at Law West 1015 Garland Avenue Spokane, Washington 99205-2795

Ronelle F. Corbey, #2968
Official Court Reporter Dept. 2
Spokane County Courthouse, Room 408
West 1116 Broadway Avenue
Spokane, Washington 99260-0350

GENERAL INDEX

AFTERNOON SESSION
October 3, 2008

THE COURT: Good afternoon. Thanks very much. Please be seated. Counsel, once again, this is In Re: The Guardianship of Bill McKee, 08-4-00259-6. Mr. Toreson is here. Mr. Herman's here. The guardian ad litem, Mr. Mackin, is here. And Mr. Munding is here. And, then, we have some folks in the back. So, have I indicated everybody's appearances, Counsel?

MR. MUNDING: Yes, your Honor.

MR. TORESON: Yes, your Honor.

THE COURT: So, you're here to determine, I believe, Counsel, who should be appointed guardian for Mr. McKee -- half of his guardianship, so to speak. And I have here before me, Mr. Mackin, an Amended Affidavit of Time. I had the originals from the last go around. And, so, has this changed from last time?

MR. MACKIN: Your Honor, it added a little bit of time; but it -- it probably doesn't matter because it's County paid. And it's already maxed out. And I think, maybe, the one I gave you last time didn't reflect that there's a maximum that the County pays. So --

But, if we ever get to the point where we're going present an order to the Court, I have to have Leanne sign off on that part of the order that references the County

paid. She has to do a little accounting to make sure that my math is correct --

THE COURT: Sure.

MR. MACKIN: -- and that sort of thing.

THE COURT: Okay. All right. So, Mr. Toreson, do you want to go first?

MR. TORESON: Good afternoon. If that's an invitation or a direction, I'll certainly follow it, your Honor. Thank you. You've identified the parties. I would identify my client, Maureen Erickson, is seated in the court. She's here today. Mr. McKee is not.

First of all, I want to thank -- I don't want to miss thanking Mr. Mackin for his service. He has done journeyman efforts here. And he and I was speaking. It's probably one of the longest guardianships that I've ever been involved in and I think, perhaps, for him as well. And, even though I'm working pro bono, he is here, sort of, as a captive person and will be not fully compensated for his time. So, I think he is owed the thanks of the Court as well as the parties and counsel.

Second of all, I'd thank the Court for its patience on this case and agreeing to continue the last hearing because of my personal issue. I had a funeral of a close friend that I had, obviously, not planned. And, so, I appreciate the Court's rescheduling that.

If I might, your Honor, this has come some distance from the time of the original filing; followed the appointment of a person in Idaho following a trial over there last year, a conservator, which is a little different than here. But the guardianship was denied there and a conservator was appointed. And -- and, ultimately, a guardianship was filed here because we determined that Mr. -- and the Court determined that Mr. McKee was, actually, a resident of Washington. And, so, a guardianship was deemed appropriate here.

And, ultimately, according to the current Court's recommendations and the settlement between Idaho counsel, that conservatorship over there has been terminated.

And, finally -- I won't say, "finally." That seems like we're all done, and we're not. The Court has appointed my client, Maureen Erickson, as the guardian of the person of Mr. McKee, which I would say would be appropriate and is appropriate and recognizes the reality that he has lived with her for a substantial period of time. And she's devoted, essentially, her full efforts to caring for her father to the exclusion of her being able to work because it really is a 24-7 responsibility. And she has received no compensation for that.

Since the conservatorship in Idaho is terminated and you -- I'm sure you read that in the documents that were

provided -- that I'm not speaking for Mr. Herman. We are not related on this other than our goals seem to be aligned; that his office, who is -- as he represents Mr. McKee -- has been handling the money since then and -- and had been, apparently, doing so in a -- from what I can see, a responsible fashion in taking care of all of his expenses.

So, we're here today to talk about the appointment of a guardian of the estate; that is, the person to handle the money for Mr. McKee.

As background, your Honor -- and I'm sure you're -- you've read all this and -- and are well familiar with it. But, if you don't mind, I might just take a minute to kind of bring a little recollection and for the record --

THE COURT: That's fine.

MR. TORESON: -- Mr. McKee had, at one time, owned a substantial amount of property. Some property in Canada that was sold and the money allegedly taken by one of his sons. That's the subject of litigation in Idaho.

He had some other property and some cash, which all the cash is long gone before these matters came to attention here or in Idaho. And, also, prior to all of this, the determination was made on the recommendation of Dick Sayre, who's well recognized in the Spokane Bar and Bench, as the expert on qualifications for Medicaid that the

determination was made that, to qualify Mr. McKee for Medicaid, he would have to be bereft of -- virtually, bereft of his assets.

And, so, consistent with the Will that Mr. McKee and his deceased wife made, giving all of their assets to their daughter, an arrangement was made whereby, actually, those were gifted. But, subsequently, in order to qualify for Medicaid as -- and not being a gift but being done as a result of a court action, a lawsuit was brought. And that was settled and approved by Judge Ellen Clark here in Spokane to -- to allow -- not allow, to require that those assets be distributed by -- from Mr. McKee to his daughter. And I know Mr. Herman will comment on this further, but I'm just kind of highlighting it -- to -- by Court Order rather than by gift.

So, that has done two things: It not only transfers those properties prior to any guardianship actions being convened; but, also, to qualify him for Medicaid as was determined by Mr. Sayre.

So, we stand here today that Mr. McKee is fully qualified for Medicaid as a 90-plus-year-old man in somewhat frail health. The expectation that he may have to go into skilled nursing home care in the near future or in -- sometime in the future. I won't say, "near;" but, certainly, not in the far future is very likely if he does

not die prior to that. But he seems to have enough constitution to be able to continue.

And -- and other than the ability of his daughter to care for him, which we all understand those are difficult assignments to be the full-time care for someone who is of limited physical ability, when that time comes, he is prepared for and qualified -- fully qualified for the Medicaid in a legal, appropriate fashion.

So, now we come to the question of: What are we going to do with respect to dealing, then, not with those assets because, in -- in my opinion, I would suggest to the Court that that's appropriate, that all of those issues are resolved. And, in fact, I think the Court commented briefly about that; and I think Mr. Mackin commented briefly about that in his report. But, simply, dealing with, approximately, $2,000 a month that Mr. McKee receives from retirement, Social Security, et cetera. Certainly, not a great amount of money in today's society to be able to care for a person. But, particularly, in light of the fact, as we've addressed in previous hearings, about getting his dentures, which had not occurred prior while he was in the conservatorship but now, according to his declaration in Mr. Herman's pleadings, that has begun. And, apparently, the work for it's been done. I don't think it's been paid for yet.

So, that's good news.

My client, initially, petitioned to be named the guardian of the person and the estate. And the Court has already, as I say, ordered that she be the guardian of the person; and she is serving in that role.

We're now, then, addressing here today, as far as I understand, the issue -- only the issue of guardianship of the estate.

To me, it's not a big issue because he doesn't have much -- he has, virtually, no income -- resources; and he only has a monthly income stream that is of a modest amount.

My client, given the recommendation of the guardian ad litem, has deferred, on her request, to be named as the guardian of the estate and, in fact, has endorsed that her son -- her oldest son, Garth, who is a mortgage banker here in Spokane, who is well employed, not a felon, and is willing and able to serve -- essentially, without fee because of his love for his grandfather, to serve in the role of the guardian of the estate. He is, certainly, bright enough to be able to handle that responsibility and, certainly, has the compassion and love of his grandfather to be able to do that in a loving and appropriate fashion.

So, I guess I'm a little bit concerned about why we're

even arguing about whether we should have a professional, paid guardian appointed to do this when, in fact, there really isn't the money to do that. This is amply demonstrated by the conservatorship that went on for about a year. When that was completed, there were unpaid bills that are now as documented that have resulted in lawsuits for collection -- I think it was about $8,000 -- and that the guardian -- or the conservator, Ms. Bruna, was, of course, wanting to be paid. And I don't begrudge her wanting to be paid; but we can take that issue off the table, your Honor, by simply appointing Mr. Garth Erickson as the guardian of the estate.

I have the utmost respect for Mr. Mackin, and I -- I think his quality of work -- his work on this case has been excellent. And I guess I -- I have one problem only and that is -- and, maybe, this was just because of all of the allegations that have been made -- why we need a guardian -- a professional guardian of this rather modest amount of monthly money that -- that is the -- the resource available to Mr. McKee.

I have no questions about the skills, ability, qualifications of Lin O'Dell. She's a fine lawyer, and I know that her skill -- her experience as a registered nurse before she was a lawyer and her qualification to be a guardian is -- they're unimpeachable.

I just don't think that this is a case where her skills are needed, and nor do I think it's fair to her to be able to have to not be able to fully compensate her for her services. Because, if she's fully compensated, then, I believe that something is going to interfere with the ability to pay for Mr. McKee's ongoing needs.

So, my client has withdrawn her request to be named as the guardian of the estate. She has endorsed the appointment of her oldest son, Garth, to do that. He has his own -- he has no -- doesn't owe his money any money. I mean, there's no financial tie other than just the filial love that he has. But his -- he would understand -- he does understand that his responsibility -- his first and only responsibility, if appointed, would be to his grandfather.

So, I would suggest, your Honor, that, with all due respect to Mr. Mackin's recommendation, that it's appropriate that Mr. Garth Erickson be appointed as the guardian of the estate and that this matter can be concluded.

THE COURT: All right. Thanks.

MR. TORESON: Did you have any questions, your Honor?

THE COURT: No, I don't Mr. Toreson. Mr. Herman.

MR. HERMAN: Your Honor, I -- I think that a little bit of history review here is necessary in order to have us in

an -- accurately where we're at today. There's quite a bit of history that's involved in this struggle that's been going on. And -- and I think it's important that we consider that and that background and history as part of your decision here today.

The -- my client made out Wills in '07, left his estate to his daughter. They, basically, reiterated the Wills we made out in 1994 where he agreed and his wife agreed at that time to leave all of his estate to his daughter.

After those Wills were made out and my client's wife passed away, he chose not to disclose those Wills and -- at least the mother's Will that left her half of the estate to his daughter. He chose not to disclose that. He admits that in affidavits and depositions, and he proceeded to handle the estate on his own. Property was sold in Canada, which she would have, based on her mother's Will, owned half of. Transfers were made to North Fork Coeur d'Alene property, extremely valuable property, to his son. And these were all done by 2000 -- the year 2000-2001.

The money from the Moyie Springs sale of the property has disappeared. My client has brought litigation against his son because he believes they went into his safety deposit box and took it out. That's still in litigation in Idaho.

He's asked that the lake property -- the North Coeur d'Alene property be returned. There's been negotiations over that. I've supplied you some of the letters and negotiations, letters of offers by the son to sell the property and divide the proceeds after he's reimbursed for certain things.

One of the interesting parts of that offer is that he wants charged against him the cash they got out of the sale of the timber on the property. And the history behind that is that, because Mr. McKee believed that half that property was his --

THE WITNESS: Mr. Munding, do you have --

MR. MUNDING: Yes, your Honor. I hate to interrupt counsel while he's in the middle of argument, but we're here today on who should be appointed as the guardian of the estate for Mr. Bill McKee; not to argue cases that are pending in Idaho; malign my clients; reference documents that have no foundation or bearing or relevance on this. We should focus on the task at hand. And I'd ask that the Court keep comments within that realm. Thank you.

THE COURT: Well, I'm pretty familiar with the history and the background, Mr. Herman. And Mr. Toreson gave us a good outline a moment ago. And I've read --

MR. HERMAN: Well, I think, your Honor, what I want to do is get -- there's ascertains made by Munding against

the chosen guardian of the person (sic), Garth Erickson. He's insinuating there's -- there's skullduggery going on. And I want to get the Court to the point so that you know the history behind it and what has really happened.

And the skullduggery he's alleging is going on that somehow Garth Erickson has a conflict and shouldn't be appointed, I think, that should be accurately -- accurate history should put him in a place that he's in. And he's in that place because of what happened, and he stepped up to prevent the loss of the property. And that's where I'm going, your Honor. I think that's critical for the Court to hear.

THE COURT: Sure. I recall from the Idaho papers that Judge McFadden seemed to take the view that Garth should not be in a -- and I don't mean any disrespect by not using the last names -- but that it was not appropriate. I'm not quite sure why he reached that conclusion. So, if you want to get into that and explain that to me as you understand it, that would be helpful.

MR. HERMAN: Well, your Honor, I think that whatever Judge McFadden had to say is gone over the wayside. That guardianship has been dismissed. It never should have been brought in the first place because my client wasn't even a resident of Idaho when it was brought.

In any case, he said he was too closely related to his

mother; and he felt that that would be a conflict. But --

THE COURT: So, that was -- that was it in a nutshell, then.

MR. HERMAN: That was it in a nutshell. And the Court has already gone against McFadden's finding that Maureen shouldn't be guardian of the person. You've already appointed her.

So, I think what the judge was doing in Idaho is not really important to the Court here. What I think is important is that the judge understand that Garth Erickson is in the position he's in now because of trying to save property for the -- in the estate rather than being somehow in collusion with his mother to take property from his father (sic), which is what Mr. Munding is making accusations of. And I think the Court should know that there's -- there is litigation going on here between my client and his sons over substantial interest in cash or property, and there's bad feelings all around. And people are going to say bad things about people who are in -- each other in litigation.

I think that's important for the Court, on balance, to know that this is -- this isn't -- since they're so anxious to bad mouth my client, his decisions with his daughter, the Court should know that there's litigation going on brought on by themselves, their own actions, and

-- and -- in order for you to have a balanced decision here as to what the facts are.

What I'm working up towards is -- is that once my client decided to deed his property to his daughter, pursuant to his Will, which he did in '07, wham, a guardianship was started in Idaho.

Now, during that guardianship, injunctions were -- were -- and lis pendens were filed on the property in Osborn. That property was marketable. There was a sale in place. All that got thrown out. The sale was for $180, $190,000, which would have brought excess cash to my client. He did -- he put it in his daughter's name. She put it on the market. The sale was in place. And, once the guardianship -- the conservatorship was granted, the conservator brought litigation to stop that sale.

And -- and the result of that is, is that the property, which had been saved by Ms. Erickson by getting a temporary loan because it was way in default, the -- that sale was prevented.

So, what happened is that the new loan that was got on -- gotten on the property to save it from foreclosure was due. And the only means in which Ms. Erickson had to prevent it from being forfeited again is she transferred title to her son, and he was able to get a loan up to a certain amount, which paid off the old mortgage. And

that's why he's in the position he's in today. She turned to him for help. There's no collusion going on. It's still an effort to try to save that property, which never would have been put in that position if the conservator hadn't slapped a lis pendens on that property and blown off the sale that occurred back in 2007. And that's why he's in that position today.

What's really important, I think, is that, when the Wills were made out in 2007, my client appointed his daughter as guardian of his person and the durable power of attorney and his grandson as guardian of his estate, gave him power of attorney. That's a well-recognized procedure. It was done under advice of counsel. It was done in '07 as part of an estate plan that he did. And testimony was heard from the lawyer who did that at that time in the hearing. I provided it to the Court. She felt --

THE COURT: That was Ms. St. Lewis (phonetic), right?

MR. HERMAN: Right. And she felt that he wasn't under any undue influence when he made those selections.

THE COURT: And the statute expresses preference for that person to remain in that role as durable power of attorney to remain as --

MR. HERMAN: Right. And I think that what's happened is this Court has honored that appointment in appointing

Ms. Erickson as his -- as his guardian of the person. And I -- and what we're -- what my client is asking is that you fulfill his request in his -- in his durable power of attorney to appoint Garth Erickson as his -- to be power of attorney over his estate.

I've gone to the trouble to recite the statute, the reasons for it that support that. And I think we -- the Court needs to take into consideration my client's consistent desires of how he wants his estate handled, despite whatever litigation went on, whatever decisions were made by other courts or whatever, which are, basically, not in existence at this point because those things have been dismissed. And I think that the Court has an obligation to look at that appointment.

Mr. Erickson lives in Seattle. Mr. Toreson said, "Spokane;" but he meant to say, "Seattle." He's a mortgage broker over there. He's got an extremely close relationship with his grandfather. There's an affidavit by Garth Erickson as to his relationships and things that his grandfather did for him, how he is more than willing to do this at this time. There's an affidavit from my client, the close relationship he's always had with his grandson, the fact that he helps him out, he visits him, he sees him, he spends time with him, and he's willing to serve without a fee, as does the power of attorney --

durable power of attorney provides and to look after his grandfather's property needs.

We've got such a limited estate here I just think it's appropriate to leave things the way they were set up in 2007 by my client. And he's made it clear that's his -- what his desires are.

And Garth Erickson is well qualified, wants to do it for his grandfather, and I think should be appointed by this Court. The statutes provide for that appointment to stay if place, unless there's some reason to disqualify him -- substantial reason to disqualify him.

We have such a small amount of money to deal with, by the time the payments are made on the house, the lights, the phone, the insurance, the association payments, there's just hardly any money left. And, so, there isn't any need to have some professional look over those things. Most of that $2,200 is used up by just maintaining the home in which he leaves. And I think that it's -- it's just really out of the realm of necessity to have somebody else appointed.

Why the brothers, the sons, want to have it some other way? I don't know. But they were very successful in getting the last conservator to start all kinds of litigation, which, in effect, resulted in using up his income for things other than his needs. Half of that --

most of that litigation is now res judicata or been collaterally estopped from any further action. There's good reasons for why things were done. And -- and, so, I -- it doesn't even make sense why they would want their father to have to spend money on a professional guardian over $2,200, unless they're going to try another end gain here and try to get the new appointee to start the same litigation that they got the other appointee to do.

So, I think it's just -- just really unnecessary; and it's just a waste of.

Thank you, your Honor.

THE COURT: Thank you, Mr. Herman. Mr. Munding.

MR. MUNDING: Thank you, your Honor. John Munding, law firm of Crumb and Munding, on behalf of Bill McKee -- or on behalf of Craig McKee and Jerome McKee, the adult children of Bill McKee.

The Court has been advised why we are here today, although it has heard an extensive history through argument, not fact. Disagree with the argument of Mr. Herman, especially, his attacks and commentary on events, including circumstances surrounding my clients' actions and outcome in the Idaho court. I'm not going to spend a lot of time rebutting that because, again, it is simply argument of counsel and there's not much factual basis to it. I don't think it's appropriate to bring it

up here.

But what is important are the interests of Bill McKee. That is all my clients have ever wanted. I think we've addressed that in our paper as to why we believe that Mr. Mackin's recommendations to this Court of an independent guardian -- somebody who is trained, has experience. Lin O'Dell is a nurse. She's been around the community. She's well respected. She doesn't appear to be somebody driven by money. I've known her myself. She looks out for the interests of her ward, and that is what we're here about today is Bill McKee.

And notably absent from this courtroom -- it's easy to submit an affidavit, but where is Bill?

Second, where is Garth? I don't want to attack Garth. I don't know him. He has submitted a very short affidavit. It's obvious he played sports in his youth. That should be admired. He, apparently, is employed. But he's not here to be cross examined or to be questioned by the Court as to his qualifications. Yet, we do have findings from a prior Court that are binding. They were made by a judge in Idaho that there was a conflict, and it was not appropriate for him to be conservator.

THE COURT: I tried to examine that record, as I discussed earlier with, I think, Mr. Herman. And, apart from the family relationship, he -- Garth being the son of

Ms. Maureen Erickson -- what was the basis for the conflict as far as the Court was concerned vis-a-vis Garth?

MR. MUNDING: I believe it was -- and, again, I'm going hindsight and was not a part of that proceeding; but I have reviewed the record and the Findings of Fact so I must make an assumption. But there were negative findings towards Ms. Erickson about her influence upon Bill. And that's in the record. It's not an assertion of John Munding, as Mr. Herman stated. It's an assertion by an Idaho Court.

THE COURT: I recall that, but how does that --

MR. MUNDING: Well --

THE COURT: How does that --

MR. MUNDING: It -- it creates a conflict, and that brings us up to today: Serving two masters. You have your mother on one point, who has asked this Court from 5 to $7,000 a month for the care of Bill. Yet, on the other hand, you have a son who's obligation to both his mother and his grandfather and would be torn in the middle.

And I believe that that is where the Court in Idaho, as well as we'd request this Court, to step in and say, "You know, this cries out for an independent." It doesn't mean it has to be forever. But, at least, right now that makes the most sense because the independent guardian would only

be serving one master; and that would be the guardian looking out for the interests of the ward. Nobody else would have influence on that.

THE COURT: How are we going to pay Ms. O'Dell?

MR. MUNDING: She would be paid -- I'm glad that the Court asked that question because this is something that really hasn't been addressed. We do have a situation here where the only income is $2,200 a month. Yet Mr. Toreson referenced Mr. Sayre's advice in prior planning.

That's why I took this (indicating) dollar out. Apparently, three or four years ago, Bill McKee had a lot of assets. Assets, when liquidated, turned into dollars. These dollars had to go somewhere. They're gone. So, we have a man now who doesn't even have dentures yet he had a lot of these (indicating) early on.

And they did it for Medicare qualification. Medicare or Medicaid, whatever it may be, is funded by the federal government or the state government off of taxes, which comes from you and I. And yet these dollars (indicating) -- they're gone. Where did they go? We don't know. But that's history.

But the problem with that planning -- there's a lot of problems with it. But, again, that's not why we're here today. But the end result is that money's gone. So, the taxpayers are burdened with this. Poor Mr. Mackin has to

reduce his rates, not because he had an insolvent person from the beginning. No, that person was made insolvent to qualify for medical treatment. And that's -- that's fine. Everybody needs medical treatment. But there was money to pay for it prior and now it's just gone.

So, what do we do about Ms. O'Dell? She's simply managing $2,200 and making sure that the expenditures are used for Bill's care and not for other people's litigation, not for other people's living expenses, but Bill's.

We heard about association dues. That must mean that the house where Bill is residing is in some type of neighborhood that has association maintenance dues and fees. Well, why would Bill be saddled with those? He could have simply stayed in Idaho at a full care facility that would have been fully funded. But, no, Ms. Erickson chose to have him here; and that's fine. Reside at his house, that's fine. But Bill shouldn't be saddled with association dues. That's not an appropriate expense.

We pointed out a Starbucks charge. Again, we need some adult supervision to manage this money. It's not that sophisticated. Her fees, I would imagine, would be very minimal. And she would take them out of there. But the savings in supervision will reduce expense and put an end to this because we will have an independent guardian. She

doesn't work for my clients. She won't work for Ms. Erickson. She will look out for the interests of Bill McKee.

And, if she determines at some point that she is no longer necessary or it can be a direct deposit or something, that's her decision. But, again, we have some controls in place. We have responsibility. We have answers to the Court. And, most importantly, it's going to put an end to all this litigation. And it's time. Thank you.

THE COURT: Thanks, Mr. Munding. Mr. Mackin, can I hear from you? And I've read your report. Thanks so much for that thorough report.

MR. MACKIN: All right. Thank you. If the Court -- I don't really have anything to add unless the Court wants me to expound on some issue.

THE COURT: Well, one question I would have is in reference to this statute that was cited by Mr. Lloyd Herman; and he's reprinted part of it, I -- I think, in his memo. And it says, "The Court shall make an appointment in accordance with the principal's most recent nomination in a durable power of attorney, except for good cause and disqualification," and that most recent appointment is -- appears to be the one from 1997 where Garth Erickson was appointed.

MR. MACKIN: Well, let me just --

THE COURT: So, what's your take on that?

MR. MACKIN: A couple things. The statute, under 11.88, also directs the Court that the Court should try to find the least restrictive alternative that is available. And, so, that dovetails with what you're talking about.

But I guess, in looking at that 2007 appointment, what bothers me about that appointment is it took place right in the middle of a pending conservatorship -- guardianship proceeding in Idaho. Mr. McKee was taken to a lawyer when he had a guardian -- or I guess it's not a guardian ad litem but --

THE COURT: Conservator?

MR. MACKIN: Well, he hadn't had the conservator appointed yet. The -- the guardianship was started in about February or March of 2007. The -- and there was, I think, a visitor -- I think they call them a "visitor" rather than a "guardian ad litem" -- was appointed by the Idaho Court. And, in about June, I think, the power of attorney was created in Washington. And, in about September, the conservatorship was established in Idaho.

So, you wouldn't, typically, find that happening in Washington if there was a guardianship pending. The Court, probably, wouldn't give weight to that --

THE COURT: Because of the timing.

MR. MACKIN: Yeah, because of the timing because, ultimately, the Court determined that this gentleman was incapacitated from the standpoint of being able to manage his own affairs.

But I think you can maybe set that aside and -- and look at the issue of -- just under 11.88 of: Is there a less restrictive alternative that's available that would be -- better serve the needs of the incapacitated person?

THE COURT: "Less restrictive" meaning the neutrality of the nominee to be the guardian? Is that what you mean?

MR. MACKIN: No. What I meant was, when you impose this guardianship of the estate, you're taking away someone's civil rights. So, the statute says, "Look, is there something less than taking away their civil rights you can do?" And, if there's an existing power of attorney, then, you may be able to -- to utilize that, if that works for this person.

And, when I made my recommendation, I made my -- the only name on the table at that point was Maureen Erickson. But -- and I don't know Garth Erickson. And I -- so, I don't -- I don't have anything positive or negative to say about him.

But, I guess, what bothers me about this whole thing from the very beginning is that I -- I think, looking back over not just the last couple years but a long period of

time, there was a gradual increase in Mr. McKee providing for his daughter.

And it troubles me that we have a gentleman that had a house in Osborn, Idaho. He had a leasehold -- a valuable leasehold on Lake Pend Oreille. And Dick Sayre says, "If there is a legitimate way to transfer that property by way of a judgment," well, I don't understand how anything more than the mother's one-half share of the Osborn house and the Lake Pend Oreille property ever got transferred to Ms. Erickson in this -- this judgment because it doesn't make sense given what the allegation was that he had the -- Bill McKee had denied his daughter her mother and his wife's share of the estate when she died in the early '90s.

I think what developed over time was a dependence by Maureen Erickson on her father. And it -- it further bothers me that there's this valuable asset that still exists, being a leasehold in -- on Lake Pend Oreille that really could -- could fund this -- this gentleman's existence for as long as he had left to live.

And, so, I -- again, when I wrote my report, I didn't have the issue of Garth Erickson as the guardian before me. But I -- I share the same concerns that Mr. Munding has. I think that there -- there is a conflict there. I think Garth Erickson is the heir of his mother's estate.

Garth Erickson bought the Osborn property. And, in looking at the numbers, there seems to be -- aside from the current economic state of affairs but, at the time he bought it, there seemed to be equity so that he could sell it and turn around and make a little bit of money. Again --

THE COURT: It was listed for about 180, and I think he bought it for 128? Does that -- does that sound right?

MR. MACKIN: I think so. But, again, why -- you know, I -- I think in the rush of Maureen Erickson to preserve the estate for herself, the whole issue of "What about Mr. McKee" -- and I can remember the second time that I met with him I asked him "What property do you own?" Keep in mind this is in the spring of 2008. And he said, "You know, I'm really not sure what I own."

So, it's a real tough situation because, on the one hand, Maureen Erickson has really devoted herself to her father. Her father is very devoted to her. But I can't help but think, you know, if the issue is: What's in his best interest, why did we get to where we are today? It doesn't seem like it would have been necessary to have him lose all of his property. I don't know.

So -- and I don't have an answer for how do we pay Lin O'Dell when there's only $2,200 a month. I think --

THE COURT: Well, what would you expect her charges

would be?

MR. MACKIN: Well -- and this is just a guess. And I asked her to be here, but she couldn't. I -- I would think they're going to be 150 to 250 a month, something like that.

But, you know, on the other hand, if there's a bunch of phone calls or there's a -- you know, it could be more than that. It shouldn't be.

But -- but nothing has been simple about this matter from the very beginning. And, so, I -- I think any decision the Court's going to make is going to be imperfect. But that's, in a way, the nature of guardianship anyway. You're never going to have a perfect situation. So --

THE COURT: Do you think it would be helpful at all for you to have any additional time to meet and/or talk and get further information about Mr. Garth Erickson?

MR. MACKIN: No. I'm assuming -- I'm assuming that he's a capable person and would get the bills paid. I don't think that's really going to add anything.

THE COURT: What about a bond requirement for him? Have you thought about that?

MR. MACKIN: Well, I think -- I think, on the bonding issue, I don't know that I -- there's -- there's so little money involved that doesn't even -- I don't think I -- I

don't think I would bond him. I guess it would be --

THE COURT: Well, we still have these assets out here that have not been resolved.

MR. MACKIN: Well, you don't have those assets because those assets are in the name of Maureen Erickson now.

THE COURT: Well, I thought I heard there was still ongoing litigation.

MR. MACKIN: Yeah, I guess there is a potential asset in the lawsuit against the sons. But I -- I -- if that -- you know, if that ever came to fruition, I guess, a bond could be set for those aspects. But the other -- you know, the house is gone and the -- the lease is now in Maureen Erickson's name. So, I wish I had some simple answer. But it's a tough situation, your Honor.

THE COURT: All right. Thanks very much, Mr. Mackin. Well, Counsel, we hadn't had any testimony from Ms. O'Dell, which I assume she would say the same things, in general, that have been said here by others.

We haven't had testimony from Mr. Garth Erickson. And anybody could have called him, I think, to amplify on his -- his stance on this matter. The evidence that does exist is in the form of his declaration of September 22nd. And, indeed, it's correct that the assets are few right now, substantially reduced from what they were and through this convoluted train of events that has happened. And

that's the situation that presents itself as we speak today.

And I see the point of the perception of conflict of interest on Mr. Erickson's part -- Garth Erickson -- as outlined by Mr. Munding and Mr. Mackin because of the family relation and, perhaps, being torn between one's mom and one's granddad. And Mr. Erickson does outline some of the history that he's had with his granddad.

He has indicated that he's done a lot of things gratis for his grandfather through the years. And I'm reminded of the fact that, in terms of the current status quo where Mr. McKee is residing -- Mr. Bill McKee -- that he is, certainly, elderly, as said. That's quite evident here stating the obvious. He is happy where is he. I don't think there's any question about that. He's got his dog there. Given his nature and variety of medical problems, he does need full-time care. Yes, he could get that in a -- in a care facility; but he wouldn't have his dog there. And it's unknown how much time Mr. -- Mr. Bill McKee has remaining.

I'm trying to balance all of these factors, Counsel; and I would believe that the interests of the brothers are sincere in looking out for their dad's welfare, as Jerry and Craig McKee. And I would believe they'll continue to want to keep some close contact, as best they can, on the

situation.

So, in that sense, it puts Garth Erickson in a difficult spot, to be sure.

There's no doubt but that Ms. Lin O'Dell could do a super job as a guardian. And she's most definitely independent here, has excellent qualifications, not the least of which is her medical background.

We have little funds available. The Court, in considering all these matters, does see that the funds are extremely limited.

So, Counsel, I am appointing Garth Erickson as the guardian.

MR. TORESON: Thank you.

MR. MACKIN: Your Honor, one thing -- I think Mr. Erickson, in order to comply with the local rules, is going to need to take the guardianship training program. Ordinarily, he would have -- he would have done that prior to this time. So, he's probably going to -- in order to not get this bounced back by the Monitoring Program, he's going to need to complete that training program.

MR. TORESON: Not a problem, your Honor.

THE COURT: Right. So, that should happen right away, Counsel. And the Court signing a new order would, obviously, be conditioned on that obligation.

MR. TORESON: Thank you, your Honor.

THE COURT: Is there anything else right now?

MR. TORESON: I've got another hearing.

THE COURT: You bet. So do I.

MR. HERMAN: Thank you, your Honor.

THE COURT: Have a good weekend.

(COURT RECESSED)

(END OF REQUESTED PROCEEDINGS)

C E R T I F I C A T E

I, RONELLE F. CORBEY, do hereby certify:

That I am an Official Court Reporter for the Spokane County Superior Court, Department No. 2, at Spokane, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the cover page hereto;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 8th day of October, 2008.

Ronelle F. Corbey

RONELLE F. CORBEY
Official Court Reporter
Spokane County, Washington

#55

STATE OF IDAHO
COUNTY OF SHOSHONE/SS
FILED

2009 SEP 17 PM 4:29

PEGGY WHITE
CLERK DIST. COURT
/s/ MARLA ANSON
DEPUTY

RECEIVED
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE	)	Case No. CV06-40
ESTATE OF	)	
NATALIE PARKS MCKEE:	)	DECISION AND ORDER ON AMENDED
_____	)	MOTION FOR RECONSIDERATION

Hearing on the Personal Representative's Amended Motion for Reconsideration took place on August 18, 2009. Mr. Lloyd A. Herman, attorney, appeared on behalf of Maureen Erickson, Personal Representative of the Estate of Natalie Parks McKee. Charles R. Dean, Jr., attorney, appeared on behalf of Jerome McKee. The matter was taken under advisement so that briefing, affidavits, and submitted cases could be fully reviewed.

The Amended Motion for Reconsideration relates to a ruling on a Motion for Partial Distribution file stamped on April 19, 2007. In Findings of Fact, Conclusions of Law and Order, the Court denied partial distribution of the subject property for the reasons announced by the Court and set forth in the Order. On April 30, 2007, Michael F. Peacock, attorney, filed a Motion for Reconsideration on behalf of the estate. Mr. Peacock did not notice the motion for hearing, nor did the motion contain any request for hearing. The original Motion for Reconsideration was served by facsimile to Mr. Branstetter, but copies were not provided to the Court as required by Idaho Rule of Civil Procedure 7(b)(3)(F). The Amended Motion for Reconsideration was not filed until July 29, 2009, some 27 months after the Court denied the Motion for Partial Distribution.

Most of the affidavits and briefing submitted in support of the Amended Motion for Reconsideration assert facts that the community property agreement between Bill McKee and Natalie Parks McKee was revoked by mutual holographic wills. There has never been produced any writing (including any purported holographic will) signed by Bill McKee. Petitioner, Maureen Erickson, had plenty of time and opportunity to present these matters to the Court during the evidentiary hearing which took place on March 16, 2007 and she failed to do so. The property the subject of the original Motion for Partial Distribution is not as a matter of law part of the estate of Natalie Parks McKee. Insufficient showing has been made to grant the Amended Motion for Reconsideration and the motion is denied.

The Court also denies the Amended Motion for Reconsideration on grounds that it was not timely. The original Motion for Reconsideration was filed within the time limits set forth in Idaho Rule of Civil Procedure 11(a)(2)(B), but that motion was not properly noticed for hearing by the Petitioner. Bringing the amended motion 27 months after the Court ruled and after the original Motion for Reconsideration was filed is unfairly prejudicial to Jerome McKee.

DATED this 16th day of September, 2009.

Patrick R. McFadden

PATRICK R. MCFADDEN – 367
DISTRICT COURT MAGISTRATE

Certificate of Mailing

I hereby certify that copies of the foregoing were mailed first class, postage pre-paid or hand delivered to the following parties on this 17 day of September, 2009.

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STATE OF IDAHO
COUNTY OF SHOSHONE / SS
FILED

2007 AUG 27 AM 11 15

PEGGY WHITE
CLERK DIST. COURT
BY s/Marla Anson
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

- - - - -

BILL E. McKEE, Plaintiff, vs. JEROME McKEE and MINA McKEE, husband and wife, Defendant.	]]]]]]]]]	No. CV 2007- 469 FEE CATEGORY A. 1. FEE $88.00 COMPLAINT AND DEMAND FOR JURY TRIAL

- - - - -

Plaintiff alleges:

1. That at all times material hereto the plaintiff was a resident of Osburn, Shoshone County, Idaho.

2. That at all time material hereto the defendants were residents of Bonners County, Idaho and Louisiana.

3. The Court has jurisdiction of this matter because the acts complained of began in Shoshone County, Idaho.

ASSIGNED TO JUDGE GIBLER

4. On August 30, 2005, the plaintiff was a lessee of safety deposit box number 106, at Bank of America, Osburn, Idaho. The plaintiff had $150,000.00 in United States currency stored in said safety deposit box and other valuable documents.

5. On August 30, 2005, the defendants entered into the plaintiff's safety deposit box # 106 and took possession of $150,000 United States Currency and other valuable documents belonging to the plaintiff, without authority of the plaintiff, and without instituting legal proceedings.

6. On August 30, 2005, the defendants removed the plaintiff from his home in Osburn, Idaho against his will, and removed the plaintiff to Bonner County, Idaho.

7. On approximately August 31, 2005, the defendants continued to hold the plaintiff against his will. As a result thereof, the plaintiff sickened from the mental distress caused by the defendant's conduct and required hospitalization. The plaintiff's sickening continued and subsequent hospitalization was required.

8. From approximately August 31, 2005 through September 3, 2005, the defendants held the plaintiff against his will in Bonners County, Idaho, at the defendants Idaho place of residence.

9. On approximately September 3, 2005, the defendant, Mina McKee, removed the plaintiff to Spokane, Washington and Salt Lake City, Utah. Mina McKee was aided and abetted by the defendant, Jerome McKee, and acted as an agent of Jerome McKee. The removal of the

plaintiff was against the plaintiffs will.

FIRST CAUSE OF ACTION - CONVERSION

10. The plaintiff re-alleges paragraphs 1 through 9.

11. The defendants tortiously converted the plaintiff's $150,000.00 and valuable documents from his safety deposit box.

12. The plaintiff has suffered damage in the amount of $150,000.00 United States currency together with the value of such other personal property as may be shown at trial.

SECOND CAUSE OF ACTION - FALSE IMPRISONMENT

13. The plaintiff re-alleges paragraphs 1 through 9.

14. The defendants unlawfully and maliciously imprisoned and restrained and deprived the plaintiff of his liberty, against the plaintiff's will, and without any legal authority to do so by taking advantage of the plaintiff's old age, holding the plaintiff against his will, incommunicado, and forcible removing the plaintiff from the State of Idaho.

15. As a direct and proximate result of the false imprisonment by the defendants of the plaintiff, plaintiff has suffered bodily harm, general damages, and special damages in an amount in excess of $10,000.00 to be proven at trial.

THIRD CAUSE OF ACTION - INTENTIONAL INFLICTION OF MENTAL DISTRESS

16. The plaintiff re-alleges paragraphs 1 through 9.

17. The defendants' conduct of removing the plaintiff from his home, holding the plaintiff against his will, and removal of the

plaintiff from Idaho was extreme and outrageous conduct and caused the plaintiff to sicken and suffer severe emotional distress. As a direct and proximate result of said conduct the plaintiff suffered general and special damage in a amount to be proven at trial.

Wherefore the plaintiff prays for judgment against the defendants as follows:

1. Judgment in the amount of $150,000.00 together with such further amounts as shown at trial for conversion of the plaintiffs personal property.

2. Judgment against the defendants for false imprisonment of the plaintiff.

3. Judgment against the defendants for intentional infliction of emotional distress.

4. For such further relief as the Court or Jury deems just and equitable.

DEMAND FOR JURY TRIAL

The plaintiff requests a trial by jury consisting of twelve persons.

DATED this 27 day of August 2007.

JOHN J. ROSE, JR.

#57

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DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF SHOSHONE

BILL E. McKEE, Plaintiff, vs. JEROME McKEE and NINA McKEE, husband and wife, Defendants	Case No.: CV 07-469 DEFENDANT'S ANSWERS PLAINTIFF'S FIRST SET OF INTERROGATORIES PROPOUNDED TO DEFENDANT JEROME MCKEE

Defendant Jerome McKee responds to Plaintiff's First Set of Interrogatories Propounded to Defendant Jerome McKee as follows:

INTERROGATORIES

INTERROGATORY NO. 1: Identify each person who assisted in the preparation of your responses to these interrogatories other than in a purely clerical role.

ANSWER: Responding defendant, his wife and counsel.

INTERROGATORY NO. 2: Please state if you were present at a meeting at your parents home in Osburn, Idaho in 1994, and if so, please state:

a. Who all was present at the meeting;

b. The purpose of the meeting; and

ANSWER: Responding defendant accompanied Bill McKee on three occasions when he entered his box.

INTERROGATORY NO. 13: If the preceding interrogatory is in the affirmative, please state:

a. each date you entered the safety deposit box located at Bank of America in Osburn, Idaho;

b. all persons who entered the safety deposit box at Bank of America in Osburn, Idaho with you;

c. whether you entered the safety deposit box at Bank of America in Osburn, Idaho without Bill McKee being present; and whether you remained in the safety deposit box at Bank of America in Osburn, Idaho by yourself or with another person without Bill McKee being present in the safety deposit box.

ANSWER: It is physically impossible for anyone to be in the safety deposit box, alone or with someone else. To respond to what Maureen's counsel appears to be asking, however, responding defendant accompanied Bill McKee and his wife to the safety deposit box on the three occasions in 2004 and 2005 referenced on the signature cards plaintiff produced. Bill was present each time and orchestrated the opening and inspection of the box. Responding defendant was never present, nor could he be under bank policy, without Bill.

INTERROGATORY NO. 14: Describe in detail each and every item witnessed by you to be contained in the safety deposit box belonging to Bill McKee.

ANSWER: The first time responding defendant recalls seeing what he assumed to be the original of what Maureen had reported to be Natalie's holographic will, Craig's birth certificate and Jerry's baptismal certificate. There were other papers in the box that responding defendant

cannot recall. On the second occasion, the original holographic will was missing and had been replaced with a copy. Most, if not all, of the other documents noted on the first visit were also present. On the third occasion, the only thing in the box was an unsealed envelope containing silver certificates with face values of $25-$30.00.

INTERROGATORY NO. 15: State whether you removed any items from Bill McKee's safety deposit box located at Bank of America in Osburn, Idaho with or without Bill McKee's knowledge.

ANSWER: Responding defendant removed nothing from the box.

INTERROGATORY NO. 16: Describe in detail each and every item you removed from Bill McKee's safety deposit box located at Bank of America in Osburn, Idaho.

ANSWER: Not applicable.

INTERROGATORY NO. 17: State whether you removed items belonging to Bill McKee from his residence in Osburn, Idaho with or without his permission.

ANSWER: Responding defendant removed nothing from the home.

INTERROGATORY NO. 18: Describe in detail each and every item you removed from Bill McKee's residence in Osburn, Idaho and where the item(s) were removed from, i.e., safes, storage areas, bedrooms, etc., and where each item is currently located.

ANSWER: Not applicable.

INTERROGATORY NO. 19: Did you or anyone acting on your behalf have a new will prepared for Bill McKee in 1999? If so, please identify each and every person you contacted, and the substance of the new will you wanted prepared.

ANSWER: No.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE: Deceased.	Case No.: CV 06-40 JEROME McKEE'S BRIEF ON APPEAL

JEROME McKEE'S BRIEF ON APPEAL

Appeal from the Magistrate Court of the First Judicial District
of the State of Idaho in and for the County of Shoshone

Honorable Fred M. Gibler, presiding

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TABLE OF CONTENTS

STATE CASES

COURT RULES

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DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE: Deceased.	Case No.: CV 06-40 JEROME McKEE'S BRIEF ON APPEAL

INTRODUCTION

Apparently believing that filling pages of paper with numerous, completely baseless accusations that find no support in the record on appeal will fool this Court into losing focus or prejudice its thinking, appellant Maureen Erickson ("Maureen") violates the most basic rules of appellate procedure in her brief and ignores the true basis for Judge McFadden's decisions. Respondent, Jerome McKee ("Jerry") will not address every one of the falsehoods contained in Maureen's brief. Instead, he will note only those falsehoods that bear on the decisions made by Judge McFadden and her procedural failures in this appeal.

OBJECTION AND MOTION TO STRIKE

An appeal from the magistrate's division to the district court is governed by the same standards and is to be decided in the same manner as if the appeal were to an appellate court (IRCP 83(u)(1)). Except as otherwise provided in any of the subsections of IRCP 83, the appellate rules of the Supreme Court also apply (*Id.*).

Two standards/rules that hallmark appellate procedure in Idaho and undoubtedly every other state in the Union appertain to this matter. First, an appellate court cannot consider matters outside the record on appeal (*Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 40 (1999); *State v. Congdon*, 96 Idaho 377 (1974); *Bergh v. Pennington*, 33 Idaho 726, 727 (1921)). In an appeal from the magistrate's division, the clerk's record on appeal is the court's file in the proceeding from which the appeal is taken (IRCP 83(n)).

Maureen's brief asks presents this Court with numerous exhibits that are outside the record. The Court will note from the actual clerk's record that Maureen's "Amended Motion for Reconsideration" appended 25 exhibits (Exhibits A through Y). Her brief on appeal attaches 57 purported exhibits. The first 25 are the same as in her motion to Judge McFadden, except that more pages are added to Exhibit 14 than were in its corresponding Exhibit N in the proceedings below. Of the 32 additional exhibits, only 5 (Exhibits 32, 33, 39, 47 and 55) can be found in the clerk's transcript on this appeal. The other 27 new exhibits are outside the record and cannot be considered by this Court under the authority cited above.[1]

Jerry accordingly moves to strike Exhibits 26-31, 34-38, 40-46, 48-54, 56 and 57. Throughout her brief, Maureen references and premises argument on those exhibits. Any factual claim or argument based thereon, especially the thoroughly argumentative and completely misleading "Significant Factual Chronology", should either be stricken or totally disregarded by this Court.[2]

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[1] Jerry further objects to those exhibits on the grounds that none of them are properly authenticated. Mr. Herman simply attaches them to his affidavit saying that they are true and correct copies. No foundation exists for him to make such representations or to establish the authenticity thereof.

[2] For example, if the Court looks at the entry for 2/28/07 it will note the absurd claim a guardianship proceeding was initiated to keep Bill McKee from testifying (at what is unclear). That proceeding was initiated because Maureen was stealing her father blind to the point that he was virtually a pauper, a fact that Judge McFadden so found in that proceeding. However, getting into what the truth is in that case reflects the rationale for restricting the scope of what can be considered on appeal (i.e. the record in the proceedings below).

Second, and in the same vein, an appellate court cannot consider arguments raised for the first time on appeal (*Johannsen v. Utterback*, 146 Idaho 423, 429 (2008); Dominquez *ex rel Hamp v. Evergreen Resources, Inc.*, 142 Idaho 7, 14 (2005); *Bouten v. H.F. Magnuson Co.*, 133 Idaho 756 (1999)). Including exhibits not presented to Judge McFadden, Maureen necessarily raises arguments not presented at the trial court level. Maureen brief is replete with arguments not presented to Judge McFadden (see e.g. pages 23 and 24 of her brief) and thus should not be considered in this appeal.

STATEMENT OF THE CASE

A. Procedural Matters. While the probate proceeding will be discussed in more detail below, it is important to keep in mind what truly happened in that proceeding and what was actually before Judge McFadden to decide.

1. *Motion For Partial Distribution.* On January 24, 2006, almost 12 years after her mother's death, Maureen secretly initiated this proceeding. Maureen's clear objective was to secure an order from the court awarding her an interest in a 37-acre parcel of land on the North Fork of the Coeur d'Alene River her parents had previously owed jointly with Jerry and his wife before Jerry could discover what she was doing.[3] No other reason existed to file the petition probating her mother's estate. Doing so was otherwise a wasted effort, since Maureen had by then exhausted virtually every other asset her parents owned.

Jerry fortunately discovered Maureen's scheme and appeared in this proceeding. He was thus entitled to notice when Maureen filed her motion for partial distribution one year later on January 7, 2007. Jerry opposed the motion by filing a motion to dismiss the proceeding

[3] In March of 2000, almost 6 years after his wife's death, Bill quitclaimed his half interest in that property to Jerry and his wife, Mina. Doing so was consistent with the provisions of a will he executed in 1999 that was drafted at Bill's request by attorney Nancy McGee.

based on the statute of limitations for probating a will (3 years from the date of death) and by raising in direct opposition the fact that Natalie McKee's purported holographic will was trumped by a Community Property Agreement recorded years earlier (Maureen's Exhibit 7).

In response to the motion to dismiss, Maureen concocted a claim that her father had defrauded her by keeping the will's existence from her until she discovered it in August of 2004.[4] Judge McFadden accordingly ruled that he did not have to decide the statute of limitations issue to deny Maureen's motion for partial distribution based on the existence of the Community Property Agreement and the fact that the North Fork Property was not part of Natalie's estate since Bill McKee had deeded it to Jerry *and his wife* in March of 2000. *Both Jerry's motion to dismiss and Maureen's motion for partial distribution were therefore denied.*

Important to keep in mind in that procedural background is the following:

a. The motion for partial distribution was Maureen's. She chose that that procedure. For some reason, Maureen did not file an action as the personal representative of her mother's estate to declare the Community Property Agreement null and void or to set aside the deed from Bill to Jerry and his wife.

b. The motion was not a substitute for an action to set aside the 2000 deed from Bill to Jerry and his wife since (a) that relief was not requested in the motion and (b) all necessary parties were not before the court (i.e. Jerry's wife). Judge McFadden's ruling that the real property at issue was not part of the estate and thus not something he could order distributed is accurate not only as a matter of law, but as a matter of fact.

c. The proceeding Maureen initiated was also not an action for fraud or any other action in which damages could be awarded.

[4] The Court will note from Jerry's affidavit in opposition to the motion for reconsideration that it was Maureen who disclosed its existence to him in 2002. She had had the will from the outset and probably scripted it for her mother.

d. Judge McFadden's ruling that the Community Property Agreement prevailed over the purported will in the absence of a writing signed by both Bill and Natalie McKee rescinding that agreement is absolutely correct as a matter of law based on the evidence presented in 2007 (See IC § 6-503).

e. The motion was not one to be decided on a summary judgment standard even if there had been conflicting evidence presented on the determinative issue. Instead, Maureen's motion had to be denied if she could not convince Judge McFadden that it was more probable than not that the property was still part of the estate and available for distribution.

2. *Motion For Reconsideration.* Also important to keep in focus is the grounds upon which Judge McFadden denied Maureen's motion for reconsideration. Aside from the timing issue (with which this Court has already disagreed) and the obvious prejudice to Jerry in responding to a motion to reconsider 27 months after the fact, Judge McFadden denied the motion on two other, unassailable grounds:

a. Maureen did not make a sufficient showing based on admissible evidence that the Community Property Agreement had been mutually rescinded. Either Judge McFadden correctly found that most of what Maureen presented was inadmissible or, for very good reason, was not credible (see *infra*).

b. Maureen had presented nothing in her motion to establish that the real property subject to the motion for partial distribution was part of the estate of Natalie McKee.

STATEMENT OF FACTS

Natalie Parks McKee died in 1994. She was survived by her husband Bill McKee, sons, Jerry and Craig McKee, and daughter, Maureen.

After having exhausted virtually all of her father's estate on herself and her family in the 10 years following Natalie's death, Maureen turned her attention to Jerry as her next source of funding (see Affidavit of Jerry filed in opposition to motion to reconsider). In 2005, she hired attorney Michael Peacock to threaten Jerry with litigation if he did not voluntarily return the half interest in the acreage on the North Fork of the Coeur d'Alene River that Bill McKee had deeded to Jerry and his wife in 2000, 5 years earlier and almost 6 years after the death of his wife.

In January of 2006, while negotiating with Jerry and Mr. Branstetter, and obviously thinking that they could sneak something past Jerry and his attorney, Maureen verified as true an Application for Informal Probate that Mr. Peacock prepared that affirmatively averred that ***Natalie had no heirs or children other than herself and her father***. No notice of the Application was accordingly sent to Jerry, his brother or Mr. Branstetter. Maureen and her counsel thus hid from the Court when seeking her appointment that she, in fact, had two brothers, brothers she did not want to know about this proceeding.

Maureen waited a year to file her motion for partial distribution. When Jerry responded with a motion to dismiss the probate based on the statute of limitations, Maureen knew she had a problem. She was attempting to probate a will 9 years after the statute had expired. Based on her experience as literally a professional litigant, Maureen knew she would have to come up with a claim of fraud in order to argue tolling. Since she controlled her father both mentally and physically, he would sign anything put in front of him. He therefore supported her in her claim that he had kept the existence of his wife's will from her until she discovered it in his safety

deposit box in 2004. While Judge McFadden felt he could not resolve the statute of limitations issue without a full evidentiary hearing in light of those claims, he correctly held that Maureen had presented no evidence to show that the Community Property Agreement had been rescinded by mutual agreement of Bill and his wife or that the North Fork property was an asset of Natalie's estate.

After mulling over Judge's McFadden's ruling for several years, Maureen concocted a new fairytale. She knew that she would have to present a writing signed by Bill before Natalie's death from which she could argue mutual rescission. What better than a holographic will signed by her father? Maureen knew, however, that she could not make that claim because she had already executed a number of affidavits detailing how she found her mother's will in her father's safety deposit box that made no mention of one signed by her father. Claiming she saw a will signed by her father in 2004 when she found supposedly found her mother's will would not only be inconsistent with those affidavits, but would not support a claim for "newly-discovered" evidence. The solution – have her son Dirk who was not constrained by earlier affidavits testify by affidavit that he was with his mother, that while his mother was off copying her mother's will he saw one signed by his grandfather and that he did not mention his finding to her until recently.[5] That solution, however, did not avoid the fact that Maureen could not produce a copy of that will, a problem she sought to avoid by making the preposterous and wholly unsupported claim that Jerry must have found and destroyed it. For very good reasons (detailed below), Judge McFadden unquestionably found Maureen newly concocted claim not credible when he ruled that Maureen had not made a sufficient showing to grant her motion for reconsideration.

[5] Dirk's affidavit (Exhibit 15) was the cornerstone of Maureen's motion for reconsideration.

ISSUES ON APPEAL

1. May this Court consider matters outside of the record on appeal or arguments not presented to the magistrate's court?

2. Is a motion for partial distribution presented to a magistrate's court sitting in probate the proper procedure for setting aside a Community Property Agreement or a deed?

3. May a magistrate's court sitting in probate order the distribution of an asset that is not an asset of the decedent's estate?

4. May a court on motion set aside an agreement or deed when all indispensable parties are not before it?

5. May a court consider "evidence" that is not admissible when evaluating a motion for reconsideration?

6. Is a court required to grant a motion for reconsideration premised on "evidence" it does not believe is credible?

7. Can a court infer prejudice under the circumstances of this case?

8. Notwithstanding the foregoing, are Maureen's claims nevertheless barred by the statute of limitations?

ARGUMENT

A. Maureen's "Summary Judgment Standard" Argument Is Wholly Misplaced.

Maureen wastes pages of her brief (18-20 and the last paragraph of 24) arguing about Judge McFadden's supposed failure to apply the standards applicable to summary judgment motions when ruling on the motion to dismiss. In support, she cites case law imposing the same rules applicable to summary judgment motions when the trial court is ruling on a motion to dismiss where factual issues are involved. *Maureen, however, has the record dead wrong.*

Maureen is either completely confused or is attempting to misdirect this Court. Judge McFadden did, in fact, apply a summary judgment standard of review when ruling on *Jerry's* motion to dismiss. He denied that motion because he perceived that there was a factual issue as to whether or not Natalie's will had been concealed from her based on her perjured affidavit. Maureen thus prevailed on that motion since judge McFadden refused to dismiss the probate because of her claim the statute of limitations had been tolled as a result of the fraud claim she manufactured.

What is at issue in this appeal is not the motion to dismiss, but *Maureen's* motion for partial distribution. Judge McFadden also denied that motion because, as a matter of law, the provisions of Natalie's purported will did not supersede the Community Property Agreement and the property at issue was not an asset of Natalie's estate at the time the motion was filed. Absolutely no authority exists to suggest that such a motion is governed by summary judgment standards. Based on what was presented in both the original motion and in support of Maureen's motion for reconsideration, Judge McFadden simply ruled that insufficient evidence was before him to grant her motion.

Maureen's entire argument concerning the burden of proof and the standard by which Judge McFadden's decision on *her* motions are to be gauged are thus completely inapplicable and meaningless.

B. Maureen Ignores The Fact The Property Is Not An Asset Of The Estate. As a matter of public record, any interest Natalie McKee may have had in the North Fork property passed to her husband, Bill, upon her death either pursuant to the Community Property Agreement. Bill deeded the half interest he and Natalie had owned to Jerry and his wife Mina in

March of 2000. From March of 2000 through today's date, record title to the property is stands in the join names of Jerry and Mina McKee.

Maureen filed a motion for partial distribution (presumably under IC 15-3-505 even though the probate was not supervised). For some reason, even though she had received letters appointing her as the personal representative of her mother's estate, Maureen apparently chose not to file an action to set aside the deed or to seek a declaration that the Community Property Agreement was null and void. She could have done so at any time within the applicable statute of limitations (now long past), naming both Jerry and his wife. Judge McFadden correctly recognized both in ruling on the original motion and on Maureen's motion for reconsideration that the property Maureen wanted him to order distributed was not an asset of the estate *as a matter of law*. He was accordingly powerless to grant a motion to distribute an asset the estate did not own.

Maureen completely ignores in this appeal the fact that she failed to take timely action to bring the property into the estate, that a motion for partial distribution is not the vehicle for doing so (especially when not all interested parties are before the court (IRCP 19(a)(1)), and that Judge McFadden could not grant a motion to distribute an asset the estate did not own. Accordingly, even if Judge McFadden had concluded sufficient evidence existed to question the validity of the Community Property Agreement, he could not legally have granted Maureen's motion. Nothing Maureen raises in her appeal changes that fact or questions the validity of Judge McFadden's ruling on both motions.

C. Judge McFadden Correctly Found Maureen's Purported Evidenced Insufficient.

In addition to *again* finding that "[t]he property the subject of the original Motion for Partial Distribution is not as a matter of law part of the estate of Natalie Parks McKee", Judge

McFadden also found that an "insufficient showing" had been made to warrant granting of the motion for reconsideration.

When considering a motion for reconsideration based on a claim of newly discovered evidence, a court is required to limit its consideration only to evidence that admissible (*Shelton v. Shelton*, 2008-ID-1001-100)). In light of the language of his ruling, Judge McFadden clearly considered what Maureen presented in her motion for reconsideration and found the same either inadmissible or not worthy of belief. A simple review of the exhibits before him explains why[6]:

1. Exhibit 1: This letter purportedly from Bill to Maureen's lawyer (notably dated more than a year before her motion for partial distribution) is clearly inadmissible and not probative. It is not properly authenticated (Mr. Herman is incompetent to do so), is hearsay not subject to any exception and is not testimony presented under oath.

2. Exhibit 2: This letter purportedly from Bill to Jerry is clearly inadmissible. It is not properly authenticated (Mr. Herman is incompetent to do so), is hearsay not subject to any exception and is not testimony presented under oath.

3. Exhibit 15. The affidavit testimony of Dirk Erickson, Maureen's son, about the contents of a will he claims to have seen in 2004 (while not credible, see *infra*) is inadmissible hearsay and violates the best evidence rule.

The only even remotely admissible testimony that Maureen presented was the deposition testimony of her father in May of 2007, less than a month after Judge McFadden's formal order denying her motion for partial distribution (26 months before Maureen's motion for reconsideration). That testimony from a confused, 91 year old man does state that both he and his wife signed wills at the same time. Again, while not worthy of belief (see *infra*), that testimony if

[6] Jerry will address only those exhibits, which Maureen claims are or present evidence of a contemporaneous holographic will by her father, not the myriad of others that contain mind-boggling inadmissible hearsay like the affidavits Jack Rose, Maureen and her sons.

read closely does not support Maureen's claims on her motion for reconsideration. Bill McKee was asked about the contents of his wife's will, not his ("What did *she* say in your will, as best you can remember", Maureen Exhibit 11, pg 24). Nowhere does Bill recite what was supposed to be in the one he signed. The answer he gives to that question clearly reflects his confusion since it was clearly inaccurate as to even the contents of his wife's will.

Thus, the only admissible evidence before Judge McFadden on Maureen's motion for reconsideration is the confused, equivocal testimony of Bill McKee. That evidence was far from sufficient to overcome the recorded Community Property Agreement even if doing so would return the property to Natalie's estate.

Moreover, Judge McFadden had very good reason to question the accuracy of Bill's deposition testimony and the veracity of the belated assertions made by Dirk Erickson. As to Bill, Judge McFadden undoubtedly noted that the testimony his attorney led him to give in a rehearsed deposition (noticed by Mr. Rose) was:

1. Belied by the two affidavits he executed in this action in 2006 and earlier in 2007 (Maureen Exhibits 4 and 6). In both affidavits, Bill mentions his wife's will, but never states that he also signed one. The second affidavit given in opposition to the motion to dismiss goes into far greater detail, describing a supposed meeting among family members while his wife was dying in 1994 (one that never actually occurred) and his supposed intent to revoke the Community Property Agreement. If Bill had actually signed a holographic will himself, that fact would have been presented front and center.

2. Inconsistent with the fact that Bill did, in fact, execute a will that gave virtually his entire estate to Maureen, but one that did not cut out Jerry or his brother Craig. Judge McFadden had before him a will (Exhibit 5 to Jerry's affidavit) that was prepared without

input from, or even the knowledge of, any of his children. All on his own, Bill consulted attorney Nancy McKee in 1999 and executed a will she drafted that left everything except the North Fork Property and $5,000 to Maureen. That will bequeathed the real property to Jerry and the money to Craig (see affidavit of Nancy McGee). Judge McFadden clearly recognized that either that was the will Bill was thinking of or that he had been induced to say something in his deposition that was untrue.

As to Dirk Erickson, Judge McFadden obviously recognized that both he and his brother had lied to him before on behalf of their mother as to other matters. Aside from the "you-have-got-to-be-kidding-me" nature of Dirk's assertion he found a will in his grandfather's safety deposit box when his mother was out of the room in 2004 and did not tell her about it for years, Judge McFadden knew:

1. The affidavit testimony by both Dirk and his brother Garth that they had participated in a family meeting in 1994 at which the family agreed after discussion that the parents' estate would be left to Maureen since she was most in need is obviously perjured. Aside from the fact that Jerry denies any such meeting ever took place, the testimony of Garth and Dirk is inherently unbelievable. As Jerry reveals, Garth and Dirk were only 13 and 10 years of age at the time. Children of those ages would not be included in such a meeting, much less remember what transpired more than a decade later.

2. Judge McFadden also had before him incontrovertible proof that both had lied to parrot their mother about a meeting that occurred at Bill's Osburn home in August of 2004. In lockstep with their mother, both signed affidavits saying that Jerry had hired a lawyer to do a new will for Bill and that they came from their home in Spokane to rescue Bill before Jerry could force him to do so. Judge McFadden had before him the truth – an affidavit from

Nancy McGee in which re makes clear that it was *Maureen*, not Jerry who had asked her to do a new will, that Jerry was clearly embarrassed by Maureen's behavior and that she refused to assist Bill in drafting a new will at that time because it was clear that Maureen was pushing her father to do something he did not want and was clearly attempting to exert undue influence on him. Of equal note, she testified in her affidavit that Garth and Dirk were not even in the room when these discussions were taking place.

Faced with the foregoing, Judge McFadden had no reason to believe Dirk about what he claimed to have seen in 2004 even if his testimony as to the contents of a document no one else has seen were admissible. Dirk lied about the 1994 meeting, Dirk lied about the 2004 meeting and no possible reason existed why Judge McFadden would believe his completely implausible claims in 2009.

Without any admissible or believable evidence, Judge McFadden had good reason to exercise his discretion to deny the motion for reconsideration even if the North Fork property had not already been deeded to Jerry and his wife.

D. Prejudice May Be Inferred Or Presumed. Though not critical to his decision, Judge McFadden also found that the multi-year delay in bringing the motion for reconsideration on for hearing was prejudicial to Jerry. In 2009, Judge McFadden clearly knew that Bill McKee was at least 93 years of age and in poor health. Maureen presented nothing in her motion that even suggested Bill was mentally capable of verifying the claims she now makes or of resolving his apparent confusion between the 1999 will drafted by Nancy McKee and the supposed will no one but Dirk has seen. Judge McFadden at the very least was entitled to consider the fact that Maureen presented nothing current from Bill to establish that he is even alive, much less able to

cogently explain why he failed to mention his supposed 1994 will in all of his prior affidavits. Obviously, if he is not able to present himself to resolve those issues, Jerry has been prejudiced.

E. Maureen's Claim is, In Any Event, Barred by the Statute of Limitations. The issues Maureen purports to address on this appeal are mooted by the applicable statute of limitations, a defense that the Affidavit filed by Maureen in support of her motion for reconsideration puts to rest.

Maureen asks this Court to treat her motion for partial distribution as an action to set aside the deed given by her father to Jerry and his wife in March of 2000. While Jerry disputes that a motion for partial distribution of an asset from an estate constitutes such an action even if all necessary parties were before the court, Maureen is, in any event, time barred.

In her affidavit,[7] Maureen unequivocally asserts that she first learned of the fraud that supposedly deprived her of the interest in the Property she should have inherited under her mother's will in August of 2004 (See Affidavit ¶ 12). The motion for partial distribution was not filed until January of 2007, some 29 months after she supposedly discovered the fraud. However, Idaho Code § 15-1-106 provides that any action by a person injured by any fraud used to avoid or circumvent the provisions of the probate code must be filed ***within 2 years of the date of discovery of the fraud***. Accordingly, even if her motion for the distribution of an asset that had not been in her mother's estate for almost 7 years qualified as an action to redress the fraud she alleges, Maureen was 5 months to late in her filing her action.

Setting aside Judge McFadden's orders on either or both motions challenged in this appeal would thus be a wasted effort since the claims Maureen wishes to pursue are time barred as an absolute matter of law. Well recognized in Idaho jurisprudence is the ability of an appellate court to affirm a trial court's decision on alternate grounds even if those upon which

[7] Maureen's Exhibit 8.

the decision is based are faulty (*Martel v. Bulotti*, 138 Idaho 451, 454 (2003); *Andre v. Morrow*, 106 Idaho 455 (1984)). Thus, even if this Court believes that Judge McFadden somehow erred his decision should be upheld.

CONCLUSION

This is not an appeal from a motion to dismiss, but a challenge to the denial of Maureen's motion for partial distribution of an asset that is not legally a part of Natalie Parks McKee's estate. For reasons unknown, Maureen failed to timely pursue an action to set aside the Community Property Agreement or the quitclaim to Jerry and Mina McKee. Instead, she elected to employ a simple motion procedure that did not bring all necessary parties before the court. The trial court was powerless to grant her motion in the first instance and nothing she presented by way of her motion for reconsideration, aside from being incompetent and unbelievable, changed that fact. Judge McFadden's decision should accordingly be affirmed.

Dated: 2/11/10

Dean & Kolts

By _____
Charles R. Dean, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of February 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Lloyd A. Herman
Lloyd A. Herman & Associates, P.S.
213 N. University
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☒ U.S. MAIL
☐ FEDEX GROUND
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ FACSIMILE

Charles R. Dean, Jr.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE;	)	Case No. CV 06-40
	)	
	)	APPELLANT'S REPLY
Deceased.	)	BRIEF
	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from the Magistrate Court of the First Judicial District
of the State of Idaho in and for the County of Shoshone

Honorable Fred M. Gibler, presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Rules

Evidence Rules

Secondary Authority

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IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTYOF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE Deceased.	CASE NO. CV 2006-40 APPELLANT'S REPLY BRIEF

I. FACTUAL BACKGROUND

The facts in this case have been laid out previously but are reiterated here to bring forth the key issues before this Court.

FACT #1. The Motion to Dismiss was decided on facts outside the official record in this matter, and not the record established by the UNCONTRADICTED affidavits submitted. The affidavits and other information in the file establish that there are material questions of fact.

FACT #2. The trial court decided a question not before it on motion; there was a motion to dismiss the estate and a motion for partial distribution before the trial court. There was no motion for summary judgment before the court. The trial court's decision resulted in a summary judgment.

FACT #3. In a summary judgment motion the moving party has the burden of showing the absence of any genuine issue as to all the material facts.

FACT #4. To satisfy his burden the moving party must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine material facts.

FACT #5. A motion for summary judgment all doubts are to be resolved against the moving party.

II. ARGUMENT

A. RESPONSE TO OBJECTION TO AND MOTION TO STRIKE EXHIBITS

The Respondent claims that some of the exhibits attached to the Affidavit of Lloyd A. Herman and related portions of the Appellant's brief are "outside the record" and constitute new material introduced for the first time on appeal. Thus, he is objecting to and moving to strike Exhibits 26-31, 34-38, 40-46, 48-54, 56, and 57 attached to the Herman Affidavit. Yet, the Respondent is mistaken if they believe these exhibits and related arguments are new to the whole dispute between the parties. The litigation before the Court represents just one of several cases in both Idaho and Washington having to do with the property of Bill and Natalie Parks McKee and the related matter of Bill McKee's guardianship. They all involve the same nexus of parties, issues, and evidence. As such, the exhibits and arguments are properly before the Court according to the rule of judicial notice.

Judicial notice is governed by ER 201, which states in section (g) that it may be taken by the court at any stage of the proceedings. In the exercise of their discretion, at least where such records are properly, or in some appropriate manner, called to their attention, the courts may take judicial notice of their records, files, or proceedings in other cases, particularly where such other cases were between or involved the same, or some of the same, parties. 31A C.J.S. Evidence § 103. As a general rule, a court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, unless the prior proceedings are

introduced into evidence. *Lowe v. McDonald*, 221 F.2d 228, 230 (9th Cir. 1955). The rule is not, however, a hard and fast one since the extent to which it will be applied depends in large measure upon considerations of expediency and justice in the circumstances of the particular case. *Id.* Among the recognized exceptions are instances in which the prior case is brought into the pleadings in the case on trial or where the two cases represent related litigation. *Id.* at 230-231. Generally, a trial court may take judicial notice of its own records. *Lewiston Pistol Club, Inc. v. Board of County Commissioners of New Perce County*, 96 Idaho 137, 140, 525 P.2d 332 (1974). Also, the record on a prior appeal in the same case in the same court is judicially noticed by the latter. *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P.2d 734, 736 (1932). An appellate court can take judicial notice of other judgments made by a trial court if that other judgment is so closely related to the case before it as to be crucial to the record. *See England v. Phillips*, 96 Idaho 830, 831-832, 537 P.2d 1019 (1975).

The following exhibit numbers are all pleadings, foreign state judgments, and discovery-related material filed in the other closely related cases that the Respondent is moving to strike.

Exhibit "26": Timeline prepared by Jerome McKee and submitted to the Department of Social Services in Idaho, which is a business record that was provided for the purpose of admissions by Jerome that Maureen did not obtain Natalie's will until August 2004, and that there were negotiation starting in 2002 through 2003 for Jerome to purchase the "River" property from Maureen regarding the return of the "River" property indicating ownership by Maureen during that period, which is confirmed by her affidavit and exhibits already as part of the record in the Amended Motion for Reconsideration. (Exhibits 8 – Affidavit of Maureen Erickson; Exhibit 16 – Affidavit of Van Smith; and Exhibit 17 – Affidavit of Rhonda Fay.)

Exhibit "27": July 6, 2005 letter from Michael Peacock to Jerome McKee requesting the return of the "River" property.

Exhibit "28": September 9, 2005 letter from Michael Peacock to Michael Branstetter negotiating the return of the "River" property.

Exhibit "29": **July 13, 2006 letter from Michael Peacock which was already Exhibit 5 in the Amended Motion for Reconsideration.**

Exhibit "30": **Lis Pendens filed 1/26/06 on "River" property referred to in Michael Peacock's Memorandum in Opposition to Motion to Dismiss, and Exhibit 5 in the Amended Motion for Reconsideration.**

Exhibit "31": **Letter from Maureen Erickson to Jerome McKee offering to sell the "River" property to him, which confirms her belief that she owned the property, and that it had been transferred back to her as pointed out by Exhibits 8, 16 and 17 in the Amended Motion for Reconsideration, and confirmed by Exhibit 26 (timeline) which include admissions by Jerome that he made offers to purchase the "River" property in 2002 and 2003.**

Exhibit "34": Petition for Preservation Deposition prior to filing cause of action – CV 2007-016.

Exhibit "35": Notice of Service of Preservation Deposition – Craig McKee - 2/26/07.

Exhibit "36": Notice of Non-service of Preservation Deposition – Jerome McKee - 2/26/07.

Exhibit "37": **Affidavit of Michael Peacock dated January 14, 2010 authenticating Exhibits 1 and 2 of the Amended Motion for Reconsideration, where Jerome and Michael Peacock are informed of Bill's mutual holographic will done at the same time as Natalie's.**

Exhibit "38": 2/26/07 Notice of Taking of Preservation Deposition of Bill McKee in Probate matter.

Exhibit "40": Motion for Cognitive Assessment of Bill McKee in Guardianship matter - 4/13/07.

Exhibit "41": Notice of Taking of Preservation Deposition of Bill McKee in Probate matter - 4/27/07.

Exhibit "42": Notice of Taking of Deposition of Jerome McKee in Probate matter - 4/27/07.

Exhibit "43": Denial of Motion for Cognitive Assessment.

Exhibit "44"; Motion for Second Opinion and Postponement of Surgery - 6/8/07.

Exhibit "45": Order Shortening Time of Petitioner's Motion for Second Opinion and Postponement of Surgery - 6/14/07.

Exhibit "46": Order Denying Postponement of Surgery - 6/18/07.

Exhibit "48": Restraining Order / Washington Guardianship Action filed on 2/28/07.

Exhibit "49": Affidavit of Dr. Fuhs – 3/4/08.

Exhibit "50": **Letter of negotiation between Peacock and Branstetter filed in Charles Dean's Opposition to Amended Motion for Reconsideration and already an exhibit.**

Exhibit "51": Court testimony of Lyn St. Louis in the guardianship proceeding on 7/12/07

Exhibit "52": Order terminating Idaho Conservatorship – 6/20/08.

Exhibit "53": Order appointing Maureen Erickson as guardian of the person in Washington.

Exhibit "54": Order appointing Garth Erickson as guardian of the estate in Washington.

Exhibit "56": CV 07-469, McKee v McKee.

Exhibit "57": Jerome McKee's Answers to Interrogatories in CV 07-469.

Each of these documentary exhibits is crucial to the record. Moreover, given the complicated nature of this case and fact pattern, they are absolutely essential if the Court is to have any understanding of the controversy before it.

Under the heading of Objection and Motion to Strike, after moving to strike several exhibits, Respondent claims that Appellant is making arguments for the first time on appeal and not presented to the trial court. Respondent specifically cites Plaintiff's Brief is replete with arguments not presented to Judge McFadden (pgs. 23 and 24 of her Brief), and should not be

considered on appeal. This part of the Brief is under section B: Why the Decision Should be Overruled on Appeal as a Matter of Fact. This section of the Brief points out that the court upholds its original ruling on the grounds that Appellant has never produced Mr. McKee's mutual holographic will. The Brief cites the testimony presented in the Amended Motion for Reconsideration, which includes the Affidavit of Dirk Erickson who saw the mutual will in the safety deposit box; and the additional fact that Bill McKee testified in his deposition that he did a mutual will with his wife, which is also part of the record in the Amended Motion for Reconsideration. That section of the Brief also points out that when the court originally ruled on the Motion to Dismiss, there were no opposing affidavits that supported Respondents contentions in this matter. Page 23 points out the significance that no affidavit has been submitted denying the existence of Bill McKee's holographic will that he testified he entered into at the same time as Natalie McKee's will, and evidenced by Exhibits 1 and 2 of the Amended Motion for Reconsideration. Page 23 of the Brief on Appeal points out that the Respondent Jerome McKee had entered Bill McKee's safety deposit box on three occasions, and after that time Bill and Natalie's holographic wills had disappeared from the safety deposit box. The Brief goes on to cite Jerome McKee's answers to interrogatories citing the same. The Amended Motion for Reconsideration submits as one of its exhibits (exhibit 14), the safety deposit box sign in sheet, and argues on page 6 that said the safety deposit box sign in sheet Jerome McKee and his wife entered the safety deposit box on August 13, 2004, and on two other occasions after Maureen Erickson has discovered his mother's holographic will providing plenty of opportunity for Respondent Jerome McKee to clean out the safety deposit box, causing the loss of the mutual holographic wills. Also made part of the Amended Motion for Reconsideration was Bill McKee's videotaped deposition in its entirety (Exhibit 11), parts of which were referred to on

page 24 of the Brief on Appeal in support of Maureen Erickson's contention that Respondent had plenty of opportunity to clean out the safety deposit box, especially since her father testified in his deposition that he saw several of his documents from his safety deposit box in Jerome's home in Sandpoint, Idaho after Jerome had entered the safety deposit box. Furthermore, the court itself in its decision admits "most of the affidavits and briefing submitted in the Amended Motion for Reconsideration asserts facts that the community property agreement between Bill and Natalie Parks McKee was revoked by mutual holographic wills." Obviously the courts decision cites the very heart of Appellant's contention that there were mutual wills, that this was not a new argument on appeal. The Brief on Appeal on page 24 further points out that all the evidence submitted to the court on the Motion for Reconsideration and Amended Motion for Consideration was uncontradicted by Jerome McKee.

B. RESPONSE TO CLAIM THAT APPELLANT'S SUMMARY JUDGMENT STANDARD ARGUMENT IS MISPLACED, AND A MOTION FOR DISTRIBUTION IN THE PROBATE WAS NOT THE PROPER PROCEDURE FOR SETTING ASIDE A COMMUNITY PROPERTY AGREEMENT AND/OR DEED, AND WHETHER A PROBATE COURT CAN ORDER THE DISTRIBUTION OF AN ASSET.

The Respondent cites no legal authority in support of his argument. A similar factual circumstance arose in *Woodward v. Utter,* 29 Idaho 310, 158 P. 495 (1916). A petition was filed to reopen the probate questioning the validity of a deed in a probate, challenging the deed on the grounds that it was executed by a person who was incapacitated and under duress and undue influence. Supporting affidavits were submitted by the petitioners that alleged the author of the deed was incapacitated and under undue influence. The court, in upholding the petition to

reopen the probate and set aside the deed, pointed out that "no counter affidavits were filed, a certain degree of verity must be imputed to these objections... as well as to the affidavits... in support of their motion."

The court endorsed the procedure when it said, "So far as the probate court is concerned, it must permit the stream of succession to flow in its usual course and must distribute the property in question to the heir, leaving the grantee under the disputed deed to try out the issue of his title in district court." The court went on to cite valid reasons such as pressing necessities that induce heirs to part with their inheritance to designing persons for inadequate considerations as was done here by Jerome McKee. The court said, "This may be deemed a controlling reason for requiring those who obtained conveyances from heirs before settlement of the estate to establish their rights in a court of equity if the conveyance is questioned in the probate court."

The procedure is the same whether the probate has been brought and closed or whether the probate had not been instituted prior to the transfer. Once the will is discovered and a valid probate is begun, the court has the power to make determinations in regard to any of the property devised by the will. *Douglas v Douglas*, 22 Idaho 336, 125 P. 799 (1912), specifically states, "A probate court, however, does not have jurisdiction to determine adverse claims or an adverse title to real estate, **except in so far as such questions arise between the heirs or devisees of an estate and are necessary to be determined in the administration of the estate.**"

In the Statement of Facts, counsel for Jerome McKee criticizes Appellant's attorney Michael Peacock for choosing this procedure when he filed the will for probate while Jerome admits negotiations for return of the "River" property were ongoing. Idaho Probate Code Section 3-108 allows an heir to file a probate after the three year statute if it's filed within two years of discovery of the will. Idaho Probate Code, IC 5-1-101 et seq, is extended for an

additional two years from the date the fraud was discovered. IC 15-1-106 states, "if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud." The fraud in this case was admitted by Bill McKee in an affidavit filed with the Petition for Informal Probate. Counsel for Jerome McKee alleges that it was a secretly initiated proceeding to acquire the "River" property without notice. The real objective was to prevent Jerome McKee from transferring the property pending the negotiations, because the filing was accompanied by a Lis Pendens. Idaho Probate Code Section 15-3-303A clearly requires notice only if "no letters are issued to a personal representative." The process of notice is explained in *Cahoon v Seaton,* 102 Idaho 542, 633 P.2d 608 (1981), wherein it states that, "The process thus initiated under I.C. s 15-3-301 application is ex parte, in that no notice of the application is generally required." The court goes on to say, " Informal proceedings are characterized by the use of "applications," not requiring notice, followed by issuance of informal orders by the registrar." In the case holding the court says, "However, under the language of this section (I.C. s 15-3-303A), the requirement of notice to the heirs and devisees is not applicable here since in both estates letters were issued to personal representatives." If any activity in the probate whereby title to property would be affected was initiated, notice is then required. No further action was taken pending negotiations pending the return of the "River" property. When Jerome discovered the probate filing he asked that he be provided notice as allowed under I.C. s 15-3-204. When the negotiations failed, a Motion to Dismiss the Probate was filed by Jerome McKee on January 5, 2007. A Motion for Partial Distribution was then filed by Maureen Erickson on January 16, 2007, and notice duly sent. Counsel for Jerome McKee filed an Objection to Partial Distribution on January 23, 2007 requesting the court to hear the Motion to Dismiss before hearing the Motion for Partial

Distribution and alleging no distribution should be made until the "validity of the purported will, undue influence and overreaching of Erickson," among other things were determined, and whether the newly discovered community property agreement filed in 1988 had caused by operation of law the property to pass to Bill McKee on the death of Natalie Parks McKee on December 19, 1994. Counsel for Jerome McKee attempts to persuade the court in their statement of the case that the probate was secretly initiated to somehow divest property, when he knows very well that any transfers of property would require notice. Counsel for Jerome McKee also contends that Maureen Erickson concocted a claim for fraud after the community property agreement was discovered. However, it should be pointed out that fraud of concealment was admitted to at the time of filing of the probate in Bill McKee's affidavit dated January 20, 2006. Counsel even accuses Maureen Erickson of scripting the will for her mother knowing all along that Jerome McKee in his deposition (Exhibit 13 in the Amended Motion for Reconsideration) admitted under oath when shown the will at page 70, lines 13-18, that it was his mother's handwriting, that he recognized the signature, and that he saw the will for the first time in 2002.

Counsel for Jerome McKee argues under procedural matters that the motion heard by Judge McFadden was not a summary judgment hearing. I.R.C.P. 12(b)(6) provides if motions to dismiss are brought before the court and matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in I.R.C.P. 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by I.R.C.P. 56. Judge McFadden in his Findings of Fact and Conclusions of Law specifically states, "The court considered all pleadings filed herein, including the affidavits, memorandums and records." In his Decision and Order on Amended Motion for Reconsideration, the court states that "the matter was taken under advisement so that

briefing, affidavits, and submitted cases could be fully reviewed." He further states that, "Most of the affidavits and briefing submitted in support of the Amended Motion for Reconsideration assert facts that the community property agreement between Bill McKee and Natalie Parks McKee was revoked by mutual holographic wills." The court makes it clear that he considered matters outside the pleadings, and all parties were given reasonable opportunity to present all materials made pertinent to a motion by I.R.C.P. 56.

Counsel for Jerome McKee attempts to say that Maureen Erickson should have filed an action to attempt to declare the community property agreement null and void. The cases are clear that the proper place to determine properties between heirs is in the probate proceeding and not in an independent action in equity. Third parties who are not heirs have the burden to bring such independent equitable actions. The probate was the proper venue. The court has jurisdiction under the probate code to hear property disputes involving heirs in a probate. That dispute was brought forward by means of Motion for Partial Distribution. It was not necessary for a fraud action to be brought and for damages to be awarded as contended by Jerome McKee. The rulings by the court are only significant in that there were substantial issues of fact as to whether the community property agreement had been rescinded by mutual holographic wills. The court chose to ignore Maureen Erickson's overwhelming evidence that was uncontroverted.

C. RESPONSE TO THE QUESTION AS TO WHETHER THE COURT ON MOTION CAN SET ASIDE AN AGREEMENT OR DEED WHEN ALL INDISPENSABLE PARTIES ARE NOT BEFORE IT

In *Woodward v Utter*, the probate court was asked to set aside a deed to a non-heir by heirs objecting to the deed after the estate was closed. The court, on appeal, upheld the probate courts right to allow the heirs to challenge the deed to a non-heir and set aside the deed for fraud

and undue influence, because the maker of the deed was incapacitated. No independent lawsuit was brought either by the recipient of the deeded property nor were they named in the process. The court upheld the probate courts right to deal with all parties including a non-heir, and provided that, "The right to cancel the deed obtained from an ancestor by fraud, duress or undue influence passes to the heirs, provided the ancestor had not committed acts amounting to ratification before his death." In this case, the rightful heir to part of the property under Natalie Parks McKee's will sought to open a probate to determine her rights to ownership on discovery of the will. The father deeded property to his son, half of which had been given under the will to the daughter prior to the discovery of the will and while it was being concealed by the father and the son who was the recipient of the deed. The father has never committed any acts of ratification, in fact is still alive and supporting the petition in probate to set aside the deed because of his fraudulent behavior. *Woodward v Utter* clearly puts the burden on any non-heirs that are on the deed to pursue their rights in the probate or a third party claim.

D. RESPONSE TO CLAIMS THAT THE EVIDENCE IS NOT ADMISSIBLE AND IS NOT CREDIBLE

Counsel for Jerome McKee makes the mistaken misplaced argument that summary judgment was not the proper form to decide the issues before the court on the Motion to Dismiss and Motion for Partial Distribution. Having made that incorrect assessment, the argument is then put forth that Maureen Erickson has the burden of submitting evidence to the judge, which allows the judge to consider it under the same rules as if a trial or full-blown hearing had taken place. In a summary judgment motion, the judge doesn't get to determine whether the evidence that would come in at some later time at a hearing is inadmissible or not worthy of belief. Complaints of not properly authenticating documents or that affidavits are based on hearsay do

not apply. Arguments that deposition testimony is somehow tainted or confused and therefore not worthy of belief are not the standard by which the judge gets to determine the evidence submitted by affidavit and deposition. All those arguments are reserved for a hearing after the court has determined if there is any genuine issue of fact. In determining if there is a genuine issue of fact, the party making the motion has the burden of showing the absence of any genuine issues as to all the material facts, and in order to satisfy that burden the moving party must make a showing that is quite clear what the truth is and excludes any real doubt as to any existence of any genuine material fact. These burdens are the moving party's duty and the court is required to resolve all doubts against the moving party. Clearly the affidavit and documentary evidence submitted to the court at the original hearing and at the Amended Motion for Reconsideration hearing were done in such a way as to establish there was a genuine issue of fact as to whether the community property agreement had been rescinded by the parties to the agreement.

E. RESPONSE TO CLAIM OF LACHES CREATING PREJUDICE

In a pleading to a preceding pleading, "a party shall set forth affirmatively ... laches... and any other matter constituting an avoidance or affirmative defense." I.R.C.P. 8(c). The purpose of this rule is to alert the parties concerning the issues of fact to be tried and to afford them an opportunity to present evidence to meet those defenses. *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976). The affirmative defense of laches creating prejudice is a question of fact that must be pleaded and proved by the asserting party.[1] *Thomas v Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241 (2002). Because the doctrine of laches is founded in equity in determining whether the doctrine applies, consideration must be given to all surrounding

[1] The necessary elements of laches are (1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred. *Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6 (1996).

circumstances and acts of the parties. The lapse of the time alone is not controlling on whether laches applies. *Id.* The failure to raise the question of laches ordinarily results in a waiver of the defense. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (1984). Finally and most importantly, the affirmative defense of laches creating prejudice must be raised by the asserting party at the trial court level and cannot be considered for the first time on appeal. *See Herrmann v. Woodell*, 107 Idaho 916, 921-922, 693 P.2d 1118 (1985).

In this case, the whole question of laches creating prejudice was never brought up by the Respondent at the trial court level. Their briefing and arguments responding to the Motion for Reconsideration and the Amended Motion for Reconsideration contain no mention of this affirmative defense. There has been no pleading or proof submitted asserting and proving the existence of a detrimental change of position by the Respondent. The whole matter of laches creating prejudice would have been completely ignored were it not for Judge McFadden's arbitrary and unprompted presumption that the 27-month delay in bringing the motion was supposedly prejudicial to Jerome McKee. Now, the Respondent Jerome McKee is trying to raise this issue at the appellate court level. However, since this is a question of fact that is being pleaded for the first time, it cannot and must not be considered by the Court.

F. RESPONSE TO CLAIM APPELLANT'S MOTION WAS BARRED BY THE STATUTE OF LIMITATIONS

Regarding the contention that the Appellant's claim was barred by the statute of limitations set forth in Idaho Code § 15-1-106, the Respondent argues that the relevant statute of limitations began running on August 17, 2004 when Natalie McKee's will was discovered by the Appellant Maureen Erickson and that the filing of the Motion for Partial Distribution came on January 16, 2007 came more than two years later. However, the key date for statute of limitation

purposes was actually January 23, 2006 – when Natalie McKee's will was filed for probate. This was within two years of the discovery set forth in the statute, Idaho Code § 15-1-106. To add further clarification, Comment to the Official Text of Idaho Code § 15-1-106 states in part:

> This is an overriding provision that provides an exception to the procedures and limitations provided in the Code. The remedy of the party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be a forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under the section. Or if the will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period (section 3-108) has elapsed, there still may be an action under this section.

Comment to Official Text of Idaho Code 15-1-106 (emphasis added.)

III. CONCLUSION

In conclusion, it is clear that the judge handled the Motion to Dismiss and the Motion for Partial Distribution as a summary judgment, and as a result all the conditions under I.R.C.P. 56 apply. The case law in the probate and the Idaho Rules governing probate make it very clear that the way to deal with disputes over property between heirs is in the probate court either by starting a probate or by requesting the reopening of a probate. An heir to an estate is not required to bring an independent action in equity and can seek regress under the probate code. As a result, the original motions brought and joined in argument require that the judge make a finding as to whether there was a genuine issue of fact, or that there being none he could decide the case as a matter of law. In this form the judge does not make a determination as to the weight of the testimony of the witnesses, their veracity, their character, and certainly not on a standard on what is more-probable-than-not. That standard is basis on which the judge makes his decision after a full hearing on all the issues after it has been established that there has been a genuine issue of material fact and resolving all doubts against the moving party. There was, at the original

hearing and the Motion for Reconsideration, substantial evidence that the parties revoked their 1988 community property agreement. That being said, the admitted to fraud on the part of Bill McKee and the concealment of Natalie's will, and the transferring of properties governed by the will prior to the wills existence being known to Maureen Erickson, the sole beneficiary under the will, was fraud. In that event, Maureen Erickson had two years from the date of the discovery of the will to file the probate. Once the will was filed for probate, all statute of limitations were tolled until a trial on the issues resulted. *Woodward v Utter* states, "The regular line of succession to real property, both under the common law and under the statute law, is from ancestor to heir or devisee, and the machinery of the probate court is designated to effect such devolution of property as expeditiously as possible."

Dated this 3rd day of March 2010

LLOYD A. HERMAN
Attorney for Appellant Maureen Erickson
Personal Representative,
Estate of Natalie Parks McKee

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IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTYOF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE	CASE NO. CV 2006-40
Deceased.	CERTIFICATE OF SERVICE

COMES NOW, Maureen Erickson , by and through her attorney of record, Lloyd A. Herman, and pursuant to the Idaho Rules of Civil Procedure, hereby certifies that on the 4th Day of March, 2010, APPELLANT'S REPLY BRIEF was hand delivered by Maureen Erickson to:

Honorable Fred Gibler
Shoshone County Courthouse
First Judical Distric Court
700 Bank Street, Suite 120
Wallace, ID 83837

Charle R. Dean
Dean & Kolts
1110 W. Park Place, Suite 212
Coeur d'Alene, ID 83814

DATED this 4th day of March, 2010.

Lloyd A. Herman, PS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following this 4th day of March, 2010.

_____U.S. MAIL

__X__HAND DELIVERED

_____OVERNIGHT MAIL

_____FACSIMILE

Maureen Erickson, Personal Representative

Lloyd A. Herman & Associates
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Charles R. Dean, Jr, ISB # 5763
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(208) 664-7794/(208) 664-9844 FAX

Attorney for Respondent, Jerome McKee

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE:	Case No.: CV 06-40
Deceased.	DECISION ON APPEAL

The appeal by petitioner, Maureen Erickson, of the Order of April 19, 2007 denying her Motion for Partial Distribution and the Order of September 16, 2009 denying her Motion for Reconsideration thereof came on regularly for oral argument on May 17, 2010, the Honorable Fred M. Gibler, District Court Judge, presiding. Lloyd A. Herman appeared on behalf of Maureen Erickson; Charles R. Dean, Jr. appeared on behalf of respondent, Jerry McKee.

The Court having considered the record on appeal, the briefing of the parties and the argument of counsel announced its findings and conclusions on the record. For the reasons so announced, the Court finds that good cause appears, now therefore,

IT IS HEREBY ORDERED AND DECREED that the Orders challenged on appeal be and hereby are affirmed.

Dated: May 18, 2010

Fred M. Gibler
Fred M. Gibler, District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of May 2010 I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Charles R. Dean, Jr.
Dean & Kolts
1110 West Park Place, Suite 212
Coeur d'Alene, Idaho 83814
Facsimile: (208) 664-9844

Lloyd A. Herman
Lloyd A. Herman & Associates, P.S.
213 N. University
Spokane, WA 99206
Facsimile: (509) 922-4720

- ☐ U.S. MAIL
- ☐ HAND DELIVERED
- ☐ OVERNIGHT MAIL
- ☒ FACSIMILE

Bonnie Johnsen, Deputy Clerk
Clerk of the First Judicial District
State of Idaho, County of Shoshone

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IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE, Deceased.	CASE NO. CV 2006-40 MOTION FOR RECONSIDERATION

Comes Now Maureen Erickson ("Erickson"), Personal Representative of the Estate of Natalie Parks McKee, pursuant to IRCP 11(a)(2)(b), moves the Court for a Motion for Reconsideration. This motion is made as a result of the Decision on Appeal from the Magistrate Court to the District Court on May 18, 2010 that affirmed the Magistrate Court's Findings of Fact and Conclusions of Law and Order signed on April 16, 2009 and dated April 19, 2007 that denied Erickson's Motion for Partial Distribution and the Order in Magistrate Court that denied her earlier Motion for Reconsideration dated September 16, 2009.

This Motion for Reconsideration is based upon the following facts and circumstances:

1. The Decision on Appeal to the District Court was decided on an error of law in that there was not a final judgment at the Magistrate Court level in which an appeal could be taken.

2. The Decision on Appeal to the District Court was decided on an error of law in that the District Court affirmed the Magistrate Court's decision that the recording of the

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community property agreement vested on her death all of Natalie Parks McKee's property in Bill E. McKee and was therefore not part of the estate ignoring the undisputed issues of fact raised by appellate Erickson that there had been a mutual revocation of the community property agreement.

3. The Decision on Appeal to the District Court was decided on an error of law in that the District Court reaffirmed a Motion to Reconsider before the Magistrate Court and stated that the property in question was, by law, not part of the Estate of Natalie Parks McKee ignoring the uncontested issues of fact raised that Bill E. McKee and Natalie Parks McKee mutually revoked the community agreement either by mutual wills or by agreement.

4. The Decision on Appeal to the District Court was decided on an error of law because court held the proper parties were not before the court thereby ignoring that the filing of the probate and the appearance in the probate by the heirs under the will (including the heir who received the property by deed) does give the probate court the right to decide issues of fact raised as to whether the surviving spouse has title to the property deeded to the son because the surviving spouse and the decedent had entered into a mutual rescission of the community property agreement either by mutual wills or by contract.

5. The Decision on Appeal to the District Court was decided on an error of law in that the court found that when there is a dispute over property in an estate between heirs, the proper procedure was to bring an independent action against the heir instead of filing to probate the will.

6. The Decision on Appeal to the District Court was decided on an error of law in that the court maintained that the surviving grantor of the deed (or its representative) should bring an action to set aside the property he deeded to the heir when the issue is whether the

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survivor had the right to deed the property when the mutual wills had rescinded the community property agreement and the will of the decedent had left it to the rightful heir, the appellant Erickson.

7. The Decision on Appeal to the District Court was decided on an error of law in that the court stated the statute of limitations contained in I.C. Sec. 15-3-108 controlled and that the estate was not filed within three years of the decedent's death instead of applying I.C. Sec. 15-1-106 which allows heirs who have been defrauded by parties seeking to avoid or circumvent provisions or purposes of the probate code to seek appropriate relief by commencing a proceeding within two years after the discovery of the fraud.

8. The Decision on Appeal to the District Court was decided on an error of law in that the probate was opened on January 23, 2006, the motion to dismiss the probate was filed on January 5, 2007, and the motion to dismiss the probate denied on April 19, 2007 with no appeal ever taken thereby leaving the Estate of Natalie Parks McKee still open for probate and, therefore, res judicata.

These matters need to be fully addressed by the court in a hearing on this motion. The appellate Erickson requests oral argument and will file a brief within 14 days of the filing of this Motion for Reconsideration.

DATED in Spokane Valley, Washington, this 28th day of May 2010.

LLOYD A. HERMAN & ASSOCIATES

By: _____

Lloyd A. Herman
ISB No. 6884
Attorney for Maureen Erickson
Personal Representative
Estate of Natalie Parks McKee

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IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE, Deceased.	CASE NO. CV 2006-40 MEMORANDUM SUPPORTING MOTION FOR RECONSIDERATION

Comes now, Maureen Erickson ("Erickson"), Personal Representative of the Estate of Natalie Parks McKee, submits the following memorandum supporting her Motion for Reconsideration.

1. The Decision on Appeal to the District Court was decided on an error of law in that there was not a final judgment at the Magistrate Court level in which an appeal could be taken.

Although Judge Gibler felt that there might not be a final judgment on which an appeal could be taken, appellant is cognitive of his reasoning and assigns error in order to discuss that issue on reconsideration.

A "final judgment" is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. *Spokane Structures, Inc. v. Equitable Investment, LLC*, 148 Idaho 616, 226 P.3d 1263, 1267 (2010). It must

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be a separate document that does not contain the trial court's reasoning or analysis (i.e., not the jury verdict or court's decision) and, on its face, states the relief granted or denied. *Id.* Whether an instrument is an appealable order or judgment must be determined by its content and substance and not by its title. *Id.* Merely typing "It is so ordered" at the end of a memorandum decision does not constitute a final judgment that can be appealed. *Id.*

An appeal as a matter of right can only be taken from a final judgment. I.A.R. 11(a)(1); *Spokane Structures, Inc.*, 226 P.3d at 1265. Any notice of appeal taken from a memorandum decision is premature and is thus ineffective to vest jurisdiction. *Spokane Structures*, 226 P.3d at 1268.

In this case, the Appeal was taken from the Magistrate Court's Findings of Fact and Conclusions of Law and Order signed on April 16, 2009 and dated April 19, 2009 denying the Motion for Distribution, and denying the Motion to Dismiss the Probate of the Estate of Natalie Parks McKee. This was a separate document for the memorandum decision, and although it did not contain the word "judgment", it was captioned as an order of the court. In *Spokane Structures*, 226 P.3d at 1267, the court said the title is not determinative. "Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title. For example, a document entitled "Order" that stated, "It is hereby ordered that the complaint is dismissed" would constitute a judgment. It would set forth the relief to which the party was entitled." The Amended Motion for Reconsideration was denied and an appeal was taken of both orders.

2. The Decision on Appeal to the District Court was decided on an error of law in that the District Court affirmed the Magistrate Court's decision that the recording of the community property agreement vested on her death all of Natalie Parks McKee's property in

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Bill E. McKee and was therefore not part of the estate ignoring the undisputed issues of fact raised by appellant Erickson that there had been a mutual revocation of the community property agreement.

Appellant has provided more than sufficient evidence that raises the question as to whether there was a mutual agreement to rescind the community property agreement. The intention of the parties to terminate the community property agreement were provided in the form of evidence of a will of the decedent passing title of her share of the estate to Maureen Erickson. The surviving spouse has said repeatedly through affidavits, testimony under oath, and letters to his attorney and to his son that he entered into a mutual will with his spouse leaving all their property to Maureen Erickson. The grandson has testified under oath that he saw the grandfather's will and read it, and testified to the contents of the will, to wit leaving all his share of the estate to Maureen Erickson. All of the above factors create an ambiguity that must be resolved by testimony because an issue of fact has been raised and cannot be resolved by a motion to dismiss, which was treated as a summary judgment.

In *Herrera v Estay*, 146 Idaho 674; 201 P.3d 647 (2009), the court reiterated the rules on summary judgment, to wit "When reviewing a ruling on a summary judgment motion, the Supreme Court of Idaho, employs the same standard used by the district court. Summary judgment is appropriate if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The Supreme Court of Idaho liberally construes all disputed facts in favor of the non-moving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion." Neither the magistrate court of the appellate court can weigh the facts to determine the issues. However, in most summary judgments there are

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at least contradictory affidavits supporting the moving party's view of the facts. As pointed out in prior briefs, none exist in this case, and to this point no one has denied that the decedent and Bill McKee entered into mutual wills rescinding the community property agreement.

3. The Decision on Appeal to the District Court was decided on an error of law in that the District Court reaffirmed a Motion to Reconsider before the Magistrate Court and stated that the property in question was, by law, not part of the Estate of Natalie Parks McKee ignoring the uncontested issues of fact raised that Bill E. McKee and Natalie Parks McKee mutually revoked the community agreement either by mutual wills or by agreement.

As pointed out above, there has been plenty of evidence demonstrating a mutual intent to give all of the decedent and survivors estate to Maureen Erickson. That evidence has only been contradicted by a pre-existing 1988 community property agreement, which the statute in Idaho has not provided any direction on how to rescind such an agreement. Drake, *Devolution Agreements: Non-Probate Disposition of Community Property in Idaho and Washington*, 34 IDAHO L. REV. 591, 608-609 (1997-98).

In *Miller v Prater*, 141 Idaho 208, 108 P.3d 355 (2005), the court held under "the law of either Washington or Idaho, the question of whether the later contract rescinded the earlier contract was a factual issue properly submitted to the jury. The courts of both states apply general rules of contract interpretation in determining the intent of contradicting parties where a later agreement made by them appears to be in conflict with an earlier one." The *Miller v Prater* court cited Washington authority in *Higgins v. Stafford*, 123 Wash. 2d 160, 866 P.2d 31 (1994) for the interpretation of the effect of subsequently executed mutual wills on an earlier community property agreement. The court contended that there must be mutual intent in order for the later instrument to rescind the earlier one. *Miller v Prater* court quoted favorably the language in *Higgins v*

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Stafford (*Id.*) and went on to say "General rules of contract interpretation are applied. If there is no ambiguity on the issue, it may be decided as a matter of law. However, if an inconsistency between the instruments creates an ambiguity, a factual inquiry is required to determine the intent of the parties. The *Miller v Prater* court stated "the analysis under Idaho is similar..... That either the earlier and later instruments must be read and construed as one in order to determine the intent of the parties, utilizing rules of construction applying to the interpretation of a single contract." The intent of the decedent and the survivor to pass all of their estate to Maureen Erickson is clearly manifested in the decedent's will, and the survivors testimony disclosing his wish to do so, and his entering into a mutual will with his decedent spouse.

4. The Decision on Appeal to the District Court was decided on an error of law because court held the proper parties were not before the court thereby ignoring that the filing of the probate and the appearance in the probate by the heirs under the will (including the heir who received the property by deed) does give the probate court the right to decide issues of fact raised as to whether the surviving spouse has title to the property deeded to the son because the surviving spouse and the decedent had entered into a mutual rescission of the community property agreement either by mutual wills or by contract.

The Uniform Probate Code in Idaho, IC15-1-102(a) states that, " this code shall be liberally construed and applied to promote its underlying purposes and policies. (b) The underlying purposes and policies of this code are: (2) to discover and make effective the intent of the decedent in distribution of his property." IC 15-3-1001. Formal proceedings terminating administration – Testator intestate – Order of general protection – The court provides the petition and requests the court to consider final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. Under

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Judicial Decisions the court points out under the heading of Jurisdiction of Probate, *Lundy v Lundy*, 79 Idaho 185, 312 P.2d 1028 (1957), which holds that "the probate court had in its jurisdiction to settle title to realty where question involved was whether property was community between decedent and administratrix or separate and to determine to whom it should descend, no strangers being involved in such matter but only rival claimants to heirship."

Lundy specifically says, "As to jurisdiction, it is appellants' contention that title to real property was put in issue, and that the probate court lacked jurisdiction to try such issue. It is the general rule that where title to real property is in issue between an estate and its heirs and a third person, such issue must be tried in an independent action brought for that purpose in a competent tribunal and cannot be tried by the probate court. .... However, this is not such a case. Here the issue is between the administratrix claiming as sole heir and appellants claiming they are the sole heirs. In probate proceedings the probate court is a court of record and has 'original jurisdiction in all matters of probate, settlement of estates of deceased person, and appointment of guardians'. ...We have held that this probate jurisdiction bestowed on the probate court by the constitution is exclusive. ...'The foregoing authorities clearly and fully establish the proposition that the probate courts have exclusive original jurisdiction in the settlement of estates of deceased persons; and it is within the jurisdiction of those courts to determine who are the heirs of a deceased person, and who is entitled to succeed to the estate and their respective shares and interests therein. The decrees of probate courts are conclusive in such matters. A probate court, however, does not have jurisdiction to determine adverse claims or an adverse title to real estate, except in so far as such questions arise between the heirs or devisees of an estate, and are necessary to be determined in the administration of the estate. No such jurisdiction, however, exists in the probate court to determine and adjudicate adverse and conflicting claims to title to real estate as between the estate or heir thereof and third

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parties; and such issues can only be tried in a court of competent jurisdiction, where the issue was to title and interest is directly and squarely made and presented to the court. ...To enable the probate court to perform its function of determining heirship, it must be recognized as having jurisdiction to determine specific issues involved in that process, and arising between parties to the estate proceedings. Here no stranger or third party is involved. The issue is drawn between rival claimants to heirship. As between such parties the probate court has jurisdiction to settle all issues essentially involved in a determination of who are the heirs, and the distributive share or shares of each."

In this case, the question is whether a community property agreement has been mutually rescinded resulting in the revocation of a deed to one heir instead of passing through the probate process to the heir intended in the will of the decedent. It is clear the probate court has jurisdiction in determining heirship between rival claimants to heirship. There is no stranger or third party involved, and therefore no independent action has to be brought either by the intended heir, Maureen Erickson, against the recipient heir, Jerome McKee, or by Bill McKee against Jerome McKee for the return of the property.

5. The Decision on Appeal to the District Court was decided on an error of law in that the court found that when there is a dispute over property in an estate between heirs, the proper procedure was to bring an independent action against the heir instead of filing to probate the will.

See argument and discussion in No. 4 above.

6. The Decision on Appeal to the District Court was decided on an error of law in that the court maintained that the surviving grantor of the deed (or its representative) should bring an action to set aside the property he deeded to the heir when the issue is whether the

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survivor had the right to deed the property when the mutual wills had rescinded the community property agreement and the will of the decedent had left it to the rightful heir, the appellant Erickson.

See argument and discussion in No. 4 above.

7. The Decision on Appeal to the District Court was decided on an error of law in that the court stated the statute of limitations contained in I.C. Sec. 15-3-108 controlled and that the estate was not filed within three years of the decedent's death instead of applying I.C. Sec. 15-1-106 which allows heirs who have been defrauded by parties seeking to avoid or circumvent provisions or purposes of the probate code to seek appropriate relief by commencing a proceeding within two years after the discovery of the fraud.

The undisputed facts demonstrate that Maureen Erickson did not even discover her mother's will until more than 3 years after her death. The facts demonstrate that Jerome McKee knew the existence of the will in 2002. The undisputed facts are that her father, Bill McKee, had admittedly withheld the will from her so that he could control the entire estate. Bill McKee has admitted to committing fraud and disposing of real property he said he knew belonged to Maureen Erickson, and has had a consent judgment entered against him in Shoshone County for said actions. Said action was brought at the suggestion of Judge McFadden when he rendered his decision on April 11, 2007. The action on the part of Bill McKee, and the participation in it by Jerome McKee in transferring property that the parties knew by the declared intentions of the decedent was to belong to Maureen Erickson, is covered specifically by the Uniform Probate Code, Title 15-1-106, wherein it provides that if fraud is used to circumvent the provisions of this code, any person injured may obtain appropriate relief by commencing within two years after the discovery any proceeding. This statute is especially significant since it is part of the probate code and would

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necessarily lend one to believe probate is the property place to adjust such wrongdoings when there is a dispute between the heirs as to title. In *The Matter of the Estate of Cahoon v Seaton*, 102 Idaho 542, 633 P. 2d 607, held that this statute applied where the final accounting and distribution of an estate occurred in November 1975, an action in the probate was commenced in May 1976 which alleged fraud by the personal representative was timely filed, even though actual prosecution of the action did not take place until 1978, since the commencement of the action in 1976 was within the two year limitation period contained in this section.

In this case, the will was not discovered by Maureen Erickson until August 17, 2004, and was filed for probate on January 23, 2006, which was within two years of discovery and fraud.

8. The Decision on Appeal to the District Court was decided on an error of law in that the probate was opened on January 23, 2006, the motion to dismiss the probate was filed on January 5, 2007, and the motion to dismiss the probate denied on April 19, 2007 with no appeal ever taken thereby leaving the Estate of Natalie Parks McKee still open for probate and, therefore, res judicata as to the issue as to whether there is an estate or not with no appeal ever taken, thereby leaving the estate open.

See No. 7 above.

DATED in Spokane Valley, Washington, this 8th day of June 2010.

LLOYD A. HERMAN & ASSOCIATES

By: _____
Lloyd A. Herman
ISB No. 6884
Attorney for Maureen Erickson
Personal Representative
Estate of Natalie Parks McKee

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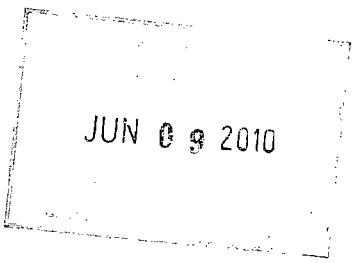
June 8, 2010



Judge McFadden
Shoshone County District Court
700 Bank Street, Suite 120
Wallace, ID 83873

Re: In the Matter of the Estate of Natalie Parks McKee
CV 2006-40

Dear Judge McFadden:

Enclosed please find a final Judgment in the above captioned case. This Judgment is being provided as a result of Judge Gibler's cautioning that *T.J.T., INC v Ulysses Mori* (which does not have a citation at this time) may apply in this case. Enclosed is a copy of the decision for your convenience.

It is not clear from the case whether your Findings of Facts and Conclusion of Law and Order signed on April 16, 2007 and filed on April 17, 2007, after your opinion entered on April 11, 2007, is a final judgment that is required to be entered in a separate document before an appeal can be taken.

The only order entered as a result of the Motion for Reconsideration was your Decision and Order on Amended Motion for Reconsideration signed on September 16, 2009, and filed on September 17, 2009. It is not clear from the decision in *T.J.T., INC v Ulysses Mori* whether this is a final judgment representing a final determination of the rights of the parties giving the District Court the jurisdiction to hear an appeal.

I am also enclosing for your convenience your Findings of Facts and Conclusions of Law and Order, and your Decision and Order on Amended Motion for Reconsideration. A copy of this letter and all documents are also being sent to Mr. Dean.

I would appreciate it if you could sign the Judgment provided so that any question as to whether a final judgment was entered in this case can be clarified. Once signed, it would appreciate if you could deliver it to the Shoshone County Clerk's office for filing.

Thank you for your assistance.

Very truly yours,

LLOYD A. HERMAN

Encl.
p.c. Charles Dean

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE	)	Case No. CV06-40
ESTATE OF	)	
NATALIE PARKS MCKEE:	)	DECISION AND ORDER ON AMENDED
_____	)	MOTION FOR RECONSIDERATION

Hearing on the Personal Representative's Amended Motion for Reconsideration took place on August 18, 2009. Mr. Lloyd A. Herman, attorney, appeared on behalf of Maureen Erickson, Personal Representative of the Estate of Natalie Parks McKee. Charles R. Dean, Jr., attorney, appeared on behalf of Jerome McKee. The matter was taken under advisement so that briefing, affidavits, and submitted cases could be fully reviewed.

The Amended Motion for Reconsideration relates to a ruling on a Motion for Partial Distribution file stamped on April 19, 2007. In Findings of Fact, Conclusions of Law and Order, the Court denied partial distribution of the subject property for the reasons announced by the Court and set forth in the Order. On April 30, 2007, Michael F. Peacock, attorney, filed a Motion for Reconsideration on behalf of the estate. Mr. Peacock did not notice the motion for hearing, nor did the motion contain any request for hearing. The original Motion for Reconsideration was served by facsimile to Mr. Branstetter, but copies were not provided to the Court as required by Idaho Rule of Civil Procedure 7(b)(3)(F). The Amended Motion for Reconsideration was not filed until July 29, 2009, some 27 months after the Court denied the Motion for Partial Distribution.

Most of the affidavits and briefing submitted in support of the Amended Motion for Reconsideration assert facts that the community property agreement between Bill McKee and Natalie Parks McKee was revoked by mutual holographic wills. There has never been produced any writing (including any purported holographic will) signed by Bill McKee. Petitioner, Maureen Erickson, had plenty of time and opportunity to present these matters to the Court during the evidentiary hearing which took place on March 16, 2007 and she failed to do so. The property the subject of the original Motion for Partial Distribution is not as a matter of law part of the estate of Natalie Parks McKee. Insufficient showing has been made to grant the Amended Motion for Reconsideration and the motion is denied.

The Court also denies the Amended Motion for Reconsideration on grounds that it was not timely. The original Motion for Reconsideration was filed within the time limits set forth in Idaho Rule of Civil Procedure 11(a)(2)(B), but that motion was not properly noticed for hearing by the Petitioner. Bringing the amended motion 27 months after the Court ruled and after the original Motion for Reconsideration was filed is unfairly prejudicial to Jerome McKee.

DATED this 16th day of September, 2009.

Patrick R. McFadden

PATRICK R. MCFADDEN – 367
DISTRICT COURT MAGISTRATE

Certificate of Mailing

I hereby certify that copies of the foregoing were mailed first class, postage pre-paid or hand delivered to the following parties on this 17 day of September, 2009.

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Marla Anson

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ISB #2454

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

In the Matter of the Estate	)	Case No. CV-06- 40
	)	
	)	FINDINGS OF FACT,
of	)	CONCLUSIONS OF LAW AND
	)	ORDER
	)	
NATALIE PARKS McKEE,	)	
	)	
Deceased.	)	

Pursuant to instructions from the Court, Michael K. Branstetter of Hull & Branstetter Chartered, attorneys for Jerome S. McKee and Michael F. Peacock, attorney for Maureen Erickson, Personal Representative of the Estate, appeared in Court on April 11, 2007; Maureen Erickson was also present in Court. The Court announced that it was prepared to enter its Findings of Fact, Conclusions of Law and Order in this matter and do so orally upon the record; Said ruling is made as a

result of a hearing held on March 16, 2007 at which time the parties presented oral arguments on their pending motions.

The matters pending for the Court to consider, as argued on March 16, 2007, consist of (1) the Personal Representative's Motion For Partial Distribution of the Property know as an undivided one-fourth interest in and to Government Lot 2, Section 17, Township 49 North, Range 2 EBM, Shoshone County, State of Idaho and commonly referred to as the River property. Jerome S. McKee objected to said Motion For Partial Distribution and filed an OBJECTION; (2) Jerome S. McKee also filed a Motion to Dismiss the Probate, and (3) Motion to Strike the Affidavit of Bill E. McKee dated January 26, 2007.

The Court has considered all the pleadings filed herein, including the affidavits, memorandums and records. The Court's oral pronouncements in open Court shall constitute the Findings of Fact, Conclusions of Law in this matter and said oral pronouncements are incorporated herein. Based thereon and good cause appearing IT IS HEREBY ORDERED AS FOLLOWS:

1. Maureen Erickson's Motion for Partial Distributions is hereby denied, the property known as the River property and described as an undivided one-fourth interest in and to Government Lot 2, Section 17, Township 49 North, Range 2 EBM, Shoshone County, State of Idaho, is not part of the assets of the Estate of Natalie Parks McKee. Said property passed to Bill E. McKee

pursuant to a valid Community Property Agreement, and thereafter by deed from Bill E. McKee to Jerome McKee and Mina McKee; therefore, said property is not an asset of the Estate of Natalie Parks McKee.

2. Jerome S. McKee's Motion to Dismiss the Probate of Estate of Natalie Parks McKee is hereby denied at this time provided, however, the Court has found the Community Property Agreement is valid as to the River property and title to the River property is not affected by the continued probate of the Estate of Natalie Parks McKee. There may be other issues and matters to consider in the probate and the Court is not prepared to dismiss the probate at this time.

3. The Court finds it unnecessary to rule upon Jerome S. McKee's Motion to Strike the Affidavit of Bill E. McKee for the reason that, even if considered in full, said Affidavit does not affect the foregoing Findings of Fact, Conclusions of Law and Order duly entered herein for the reasons state in open Court.

4. Jerome S. McKee and Maureen Erickson, Personal Representative of the Estate of Natalie Parks McKee, shall each bear their own attorney fees and costs.

DATED this 16th day of April, 2007.

Patrick R. McFadden, Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served by the method indicated below and addressed to the following this 19 day of April, 2007:

Michael K. Branstetter
Hull & Branstetter Chartered
P.O. Box 709
Wallace, ID 83873

X U.S. Mail
____ Hand Delivered
____ Overnight Mail
____ Facsimile

Michael F. Peacock
Attorney at Law
123 McKinley Avenue
Kellogg, ID 83873

X U.S. Mail
____ Hand Delivered
____ Overnight Mail
____ Facsimile

CLERK OF THE DISTRICT COURT

By: Gail Elliott
Deputy Clerk

STATE OF IDAHO,)
) ss
COUNTY OF SHOSHONE,)

I do hereby certify that the foregoing is a true and correct copy of the original _____

Findings of Fact, Conclusions of Law and Order filed April 19, 2007 (4 pages) on file in my office.

DATED at Wallace, Idaho, this 2 day of April, 2008.

PEGGY WHITE CLERK DISTRICT COURT
First Judicial District Court
Shoshone County, Idaho

By Heidi Elliott

--- P.3d ----, 2010 WL 1491424 (Idaho)

Briefs and Other Related Documents
Judges and Attorneys
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Idaho,
Boise, January 2010 Term.
T.J.T., INC., a Washington corporation, Plaintiff-Appellant,
v.
Ulysses MORI, an individual, Defendant-Respondent.

No. 35079.
April 15, 2010.

Background: Employer brought action against former employee for breach of non-compete agreement. The Fourth Judicial District Court, Ada County, Ronald J. Wilper, J., entered summary judgment in employee's favor, and then entered subsequent order awarding employee costs and attorney fees. Employer appealed.

Holding: The Supreme Court, Burdick, J., held that it lacked jurisdiction in absence of final judgment.

Appeal dismissed.

West Headnotes

[1] KeyCite Citing References for this Headnote

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k37 Waiver of Objections
106k37(2) k. Time of Making Objection. Most Cited Cases

106 Courts KeyCite Citing References for this Headnote
106I Nature, Extent, and Exercise of Jurisdiction in General
106k39 k. Determination of Questions of Jurisdiction in General. Most Cited Cases

The question of subject matter jurisdiction may be raised by the court at any time sua sponte.

[2] KeyCite Citing References for this Headnote

30 Appeal and Error
30VII Transfer of Cause
30VII(D) Writ of Error, Citation, or Notice
30k428 Filing Notice and Proof of Service
30k428(2) k. Time for Filing. Most Cited Cases

The timely filing of a notice of appeal is jurisdictional.

731

[3] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases

Jurisdictional issues are questions of law over which the appellate court exercises free review.

[4] KeyCite Citing References for this Headnote

228 Judgment
228V On Motion or Summary Proceeding
228k187 k. Form and Requisites of Judgment. Most Cited Cases

Granting motion for summary judgment is simply a procedural step towards granting relief, and, thus, merely typing "It is so ordered" at the end of a memorandum decision does not constitute a judgment. Rules Civ.Proc., Rules 56(c), 58(a).

[5] KeyCite Citing References for this Headnote

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k215 k. Mode of Rendition. Most Cited Cases

228 Judgment KeyCite Citing References for this Headnote
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k219 k. Contents in General. Most Cited Cases

Judgment must be a separate document that does not contain the trial court's legal reasoning or analysis. Rules Civ.Proc., Rule 58(a).

[6] KeyCite Citing References for this Headnote

30 Appeal and Error
30III Decisions Reviewable
30III(F) Mode of Rendition, Form, and Entry of Judgment or Order
30k123 k. Necessity of Formal Judgment or Order. Most Cited Cases

Supreme Court had no jurisdiction to hear appeal from summary judgment in favor of former employee on ground that non-compete agreement was void and from award of attorney fees and costs in absence of final judgment on separate document stating relief granted or denied and representing final determination of rights of the parties, even though summary judgment stated "IT IS SO ORDERED." Rules Civ.Proc., Rules 56(c), 58(a).

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County, Hon. Ronald J. Wilper, District Judge.
District court order granting summary judgment, dismissed.
Moffett, Thomas, Barrett, Rock & Fields, Chtd., Boise, for appellant. Tyler James Anderson argued.

732

Hawley, Troxell, Ennis & Hawley, LLP, Boise, for respondent. D. John Ashby argued.

SUBSTITUTE OPINION.
THE COURT'S PRIOR OPINION

DATED MARCH 26, 2010, IS HEREBY WITHDRAWN.

BURDICK, Justice.

*1 Appellant T.J.T., Inc. (TJT) appeals from the district court's grant of summary judgment to Respondent Ulysses Mori (Mori) in connection with a non-compete agreement entered into between the parties. TJT argues that the district court erred in finding that the Non-Competition Agreement was void and therefore unenforceable under California law. TJT also appeals from the district court's award of attorney fees and costs to Mori in the amount of $107,236.85, and the court's denial of TJT's Motion for Reconsideration. Because we do not have jurisdiction to hear this case, we dismiss the appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

TJT filed its Complaint on June 1, 2007, seeking injunctive relief and imposition of a constructive trust, and raising claims including breach of fiduciary duty, breach of contract on three separate grounds, breach of the implied covenant of good faith and fair dealing, and tortious interference on two separate grounds. Following a hearing on October 22, 2007, the district court issued an order denying TJT's motion for a preliminary injunction. On January 31, 2008, the district court denied TJT's request for partial summary judgment and granted Mori's motion for summary judgment in its entirety, holding that the Non-Competition Agreement was void as a matter of California law. The Order concluded: "The Court hereby GRANTS Mori's motion for summary judgment and DENIES TJT's motion for partial summary judgment. IT IS SO ORDERED."

TJT appealed to this Court from that Decision and Order on March 13, 2008. On June 2, 2008, the court entered its Order and Judgment, awarding Mori his requested attorney fees and costs in the amount of $107,236.85. The Judgment referred to the January 31, 2008, order granting summary judgment and stated that Mori was the prevailing party. TJT filed an amended notice of appeal with this Court on June 23, 2008. Prior to that date, on June 16, 2008, TJT filed a Motion for Reconsideration, which was denied by the district court on November 21, 2008. TJT then filed its Second Amended Notice of Appeal with this Court on December 31, 2008.

II. ANALYSIS

A. Standard of Review

[1] [2] [3] "The question of subject matter jurisdiction may be raised by the Court at any time *sua sponte*." *In re Quesnell Dairy*, 143 Idaho 691, 693, 152 P.3d 562, 564 (2007). "The timely filing of a notice of appeal is jurisdictional." *In re Universe Life Ins. Co.*, 144 Idaho 751, 755, 171 P.3d 242, 246 (2007). Jurisdictional issues are questions of law over which this Court exercises free review. *Christian v. Mason*, 148 Idaho 149, ----, 219 P.3d 473, 475 (2009).

B. Jurisdiction

In *Camp v. East Fork Ditch Co.*, this Court defined a final judgment as "an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document that on its face states the relief granted or denied." 137 Idaho 850, 867, 55 P.3d 304, 321 (2002) (internal citations omitted). We further stated in *In re Universe Life Insurance Co.*, that "[a]n order granting summary judgment does not constitute a judgment." 144 Idaho at 756, 171 P.3d at 247. In addition, Idaho Rule of Civil Procedure 58(a) requires: "Every judgment shall be set forth on a separate document."

*2 [4] [5] Idaho Rule of Civil Procedure 56(c) provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In other words, "[t]he judgment sought is a final determination of

a claim or claims for relief in the lawsuit." *Spokane Structures, Inc. v. Equitable Inv., LLC*, No. 35349-2008, 2010 WL 309004, at *3 (Idaho Jan. 28, 2010). In *Spokane Structures*, this Court explained:

> The relief to which a party is entitled is not the granting of a motion for summary judgment. The Rule refers to the relief to which the party is ultimately entitled in the lawsuit, or with respect to a claim in the lawsuit. The granting of a motion for summary judgment is simply a procedural step towards the party obtaining that relief.

Id. Because the granting of a motion for summary judgment is simply a procedural step, "merely typing 'It is so ordered' at the end of a memorandum decision does not constitute a judgment." *Id.* at *4. Instead, "[t]he judgment must be a separate document that does not contain the trial court's legal reasoning or analysis." *Id.*

[6] In this case the district court signed an order granting summary judgment and then entered a judgment awarding costs and attorney fees, but no final judgment was entered that stated the relief granted or denied and represented a final determination of the rights of the parties. Therefore, we have no jurisdiction to hear the appeal.

III. CONCLUSION

We find that this Court does not have jurisdiction to hear the appeal as no final and appealable judgment was entered below; therefore, the appeal is dismissed.

Chief Justice EISMANN and Justices J. JONES, W. JONES and HORTON concur.

Idaho,2010.
T.J.T., Inc. v. Mori
--- P.3d ----, 2010 WL 1491424 (Idaho)

Briefs and Other Related Documents (Back to top)

- 2009 WL 1603873 (Appellate Brief) Appellant's Reply Brief (May 27, 2009) Original Image of this Document (PDF)
- 2009 WL 1162140 (Appellate Brief) Respondent's Supplemental Excerpts of Record (Apr. 15, 2009) Original Image of this Document with Appendix (PDF)
- 2009 WL 1162141 (Appellate Brief) Respondent's Brief (Apr. 15, 2009) Original Image of this Document with Appendix (PDF)
- 2009 WL 691727 (Appellate Brief) Appellant's Opening Brief (Feb. 26, 2009) Original Image of this Document (PDF)

Judges and Attorneys (Back to top)

Judges | Attorneys

Judges

- **Burdick, Hon. Roger S.**

Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Eismann, Hon. Daniel T.**

Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Horton, Hon. Joel D.**
State of Idaho Supreme Court
Idaho
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Jones, Hon. Warren E.**
State of Idaho Supreme Court
Idaho
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Wilper, Hon. Ronald J.**
State of Idaho District Court, 4th Judicial District
Idaho
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

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Attorneys

Attorneys for Appellant

- **Anderson, Tyler J.**
Boise, Idaho
Litigation History Report | Profiler

END OF DOCUMENT

- Judge declined to sign Order

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Attorney for Bill E. McKee

IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTYOF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE,	CASE NO. CV 2006-40
Deceased.	JUDGMENT

The Court, having heard the arguments of counsel on the original Motion by Personal Represenative Maureen Erickson for Partial Distribution and the original Motion by Jerome McKee for Dismissal of the Probate on April 11, 2007, and having entered Findings of Fact and Conclusions of Law on April 16, 2007, and having heard the Amended Motion for Reconsideration on the above-described matters on August 18, 2009, and viewed the evidence presented, NOW, THEREFORE, makes the following:

ORDER

1. THAT the Motion by Maureen Erickson, Personal Representative of the Estate of Natalie Parks McKee, for Partial Distribution of Property is hereby **DENIED;**

2. THAT the Motion by Jerome McKee, an heir in the Estate of Natalie Parks McKee, to dismiss the Probate of the Estate of Natalie Parks McKee is hereby **DENIED.**

3. THAT the Amended Motion for Reconsideration is hereby **DENIED.**

DONE IN OPEN COURT this _____day of _____20____.

6/10/10

(736)
MAGISTRATE PATRICK MCFADDEN

Court declines to sign this document since matters still pending in district court. Would also require a "No objection" from opposing counsel. Patrick McFadden 367

cc. Mr. Herman and Mr. Dean

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of June, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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✓ U.S. MAIL
___ HAND DELIVERED
___ OVERNIGHT MAIL
___ FACSIMILE

PEGGY WHITE, CLERK DISTRICT COURT

Clerk of the First Judicial District
State of Idaho, County of Shoshone

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Attorney for Respondent, Jerry McKee

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE: Deceased.	Case No.: CV 06-40 MEMORANDUM IN OPPOSITION OF MOTION FOR RECONSIDERATION OF DECISION ON APPEAL

INTRODUCTION

Maureen's motion for reconsideration of this Court's decision on appeal is flawed with the same legal errors she and her counsel continue to repeat in almost every losing argument they have presented for the past four years of this case. Since most issues have been already briefed *ad nauseam,* Jerry McKee will address only those dispositive of this motion without possible reply (or, rather, legitimate reply).

ARGUMENT

A. Orders Denying Motions For Partial Distribution Are Appealable. Maureen latches on to this Court's pondering at the hearing on appeal as to whether it had jurisdiction to hear the arguments Maureen was presenting since no formal judgment had been entered below. Maureen, however, need not have wasted several pages of her brief on that issue, since she and her counsel already know from prior briefing in this matter that Idaho Code § 17-201(7)

specifically permits appeals to be taken from orders granting or denying motions for partial distribution.

B. Summary Judgment Standards Are Not Applicable. Maureen continues to harp on summary judgments and motions to dismiss. For at least the 10th time, neither is in issue in this case. Jerry McKee's motion to dismiss was not granted, meaning that Judge McFadden did precisely what Maureen argues he should have done – denied the motion because there were factual issues as to whether Maureen was the victim of fraud by her father. Though Judge McFadden was incorrect in his ruling (see *infra*), he applied summary judgment standards to deny the motion.

Contrary to what Maureen keeps presenting in her briefings, the pleading at issue is instead her motion for partial distribution as to which no case law imposes a summary judgment standard. Even the law did, however, Judge McFadden again ruled properly since it was Maureen's burden on that motion, not Jerry McKee's. Since her entitlement to any interest in the real estate subject to that motion was disputed with the existence of the community property agreement, Judge McFadden was obligated by the law Maureen now argues applies to deny her motion. Again, she has nothing to complain about.[1]

C. The Real Property Was Bill McKee's To Convey As A Matter of Law. Judge McFadden and this Court correctly ruled that the real property that was the subject of Maureen's motion for partial distribution was not a part of the estate as a matter of law. As detailed below, the statute of limitations for probating a will found in Idaho Code § 15-3-108 is absolute (subject to exceptions not applicable in this case). Once the statute lapses, a will can no longer be probated and the estate passes by intestacy. Whether or not the Community Property Agreement was rescinded (clearly a recent fabrication by Maureen), Natalie McKee's purported will could

[1] Maureen's brief is replete with claims that her newly concocted claims about a mutual rescission of the Community Property Agreement are not in dispute is so patently false she may as well be advocating for the

not be probated after the third anniversary of her death (i.e. 1997). Under the laws of intestacy, her interest in that property thus passed to her husband pursuant to Idaho Code § 15-2-102(b). While he may have been subject to an action for fraud (if anything Maureen claims is remotely true (see, *infra*)), the property was still his and not part of his wife's estate either at the time of her original petition for informal probate or her motion for partial distribution.

D. Maureen Falsely Claims Only Heirs Are Involved In This Dispute. Maureen correctly recites that a probate court has jurisdiction in Idaho to determine disputes among heirs when no strangers are involved. She correctly reports that a probate court has no authority to resolve such disputes when non-heirs re involved. However, she then falsely reports that "Here no stranger of third party is involved" (See Maureen's Brief, pg. 7).

Maureen and her counsel know full well that the rights of a stranger, a non-heir are involved. Nina McKee, Jerry McKee's wife, owns half of the real property at issue. Her interest is not just a community interest; her name is on the deed from Bill McKee Maureen challenges.

Nina McKee is not an heir as defined in Idaho Code S 15-1-201(21). The probate court thus did not have jurisdiction to adjudicate her interest.

E. Maureen's Claim Is Barred By The Statute of Limitations. Maureen again misses the point as to the Statute of Limitations. Idaho Code § 15-3-108 imposes an absolute 3-year time limit on probating a will (subject to a few specifically listed exceptions, none of which are applicable to this case). Idaho Code § 15-1-106 does not extend the time to probate a will as Maureen asserts. Instead, by its precise terms, § 15- 1-106 gives a party damaged by fraud the right to initiate action to "obtain appropriate relief against the perpetrator of the fraud or restitution from any person ... benefiting from the fraud" within 2 years of the date the fraud is discovered.

---

existence of the Easter Bunny. A simple review of all Jerry McKee's opposition to Maureen's various motions reveals her fairytales are highly contested.

Seeking an informal appointment as the personal representative of an estate (especially after the time to do so has expired to do so) is clearly not an action by the "person injured" nor an action seeking relief based on the fraud.[2] If she was injured by her father's purported fraud, Maureen should have filed an action against him or sought restitution from Jerry McKee and his wife by August of 2006 (2 years after her admitted discovery). Maureen did not do so. She waited until April of 2007 to file a motion for partial distribution of an asset that was no longer part of the estate in a probate that was time-barred and which involved claims by strangers to the estate. Even if that action could, in the abstract,. be considered an action for "appropriate relief" it was itself time-barred under § 15-1-106 and brought in a probate proceeding that should have been dismissed under § 15-3-108 and presented to a court that did not have jurisdiction to resolve conflicting claims by non-heirs.

Dated: June 21, 2010

Dean & Kolts

By _____
Charles R. Dean, Jr.

[2] *In The Matter of the Estate of Cahoon v. Seaton*, 102 Idaho 542 (1981) has no application to the facts of this case. In *Cahoon*, the persons "injured" by the personal representative's fraud filed a motion to set aside orders they contended were secured by fraud. They filed their motion within 2 years of the date of discovery of the fraud and against the person responsible. The Supreme Court held that setting such a motion was both timely and the proper procedure to obtain "appropriate relief". Unlike Maureen's motion, the probate in *Cahoon* was timely, the motion was timely and the court had jurisdiction to grant the relief requested.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of June 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTYOF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE Deceased.	CASE NO. CV 2006-40 REPLY TO MEMORANDUM IN OPPOSITION OF MOTION FOR RECONSIDERATION OF DECISION ON APPEAL

I. INTRODUCTION

Comes Now Maureen Erickson, Personal Representative of the Estate of Natalie Parks McKee pursuant to IRCP 11(a)(2)(b), and responds to Jerome McKee's Memorandum in Opposition to the Motion for Reconsideration of Decision on Appeal..

II. ARGUMENT

A. Orders Denying Motions For Partial Distribution Are Appealable.

Appellant Maureen Erickson agrees that Idaho Code §17-201(7) permits appeals from judgments or orders that either allow or refuses to allow the distribution of an estate or any part thereof. The appellant was concerned that the courts discussion of T.J.T., Inc. v Ulysses Mori, concerned the form of the order, not whether an order had been granted. Appellant attempted to clarify the intent of the order and make it clear that it was a final order by proposing a separate document entitled "Judgment" that clearly met the requirements of the form of the order set out in T.J.T., Inc. v. Ulysses Mori. Magistrate court declined to sign this document since matters are still pending in district court, and

also required that opposing counsel have no objection. (See Exhibit 1.) Appellant still believes that the Findings of Facts and Conclusions of Law and Order signed on April 16, 2009 and dated April 19, 2009 denying the Motion for Distribution, and denying the Motion to Dismiss the Probate of Natalie Parks McKee meet the requirements of T.J.T. Inc. v Ulysses Mori. The document was a separate document from the memorandum decision, and although it did not contain the word "judgment", it was captioned as an order of the court. Spokane Structures, 226 P.3d at 1267, states that the title is not determinative and that an order that states the motion or complaint was dismissed would constitute judgment, and therefore set forth the relief to which the party was entitled. Appellant believes that since the will is still admitted for probate, the magistrate court still has jurisdiction to enter final orders that would comply with T.J.T., Inc. v Ulysses Mori, but the magistrate court has declined.

B. Summary Judgment Standards Are Not Applicable. Jerry McKee continues to argue that the magistrate court was not bound by Rule 56 when he made his decision. Jerry McKee admits that the judge applied summary judgment standards to deny the motion. The argument of appellant Maureen Erickson is that if he applied summary judgment standards, which he should have and did, he had to decide the motion based upon the requirements of Rule 56. The court was bound to follow the requirements that "When reviewing a ruling on summary judgment motion, the Supreme Court of Idaho, employs the same standard used by the district court. Summary judgment is appropriate if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As a result the court liberally construes all disputed facts in favor of the non-moving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. Appellants point of contention is that there was more than enough evidence submitted by form of affidavit that raised an issue of fact, which the court ignored in finding as a matter of law the community property agreement ruled.

Contrary to counsel for Jerry McKee's argument, it was not the burden of the non-moving party; it was the burden of the moving party to establish by its motion that

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there were no issues of fact. The record is replete with facts that demonstrated a mutual intent to rescind the community property agreement, and therefore a motion to dismiss could not be granted as a matter of law. Nor could the community property agreement be found as a matter of law to be enforceable.

C. The Real Property Was Bill McKee's To Convey As A Matter of Law. His right to convey is subject to acquiring the property without fraud. Bill McKee has admitted to this court and courts in Washington that he concealed not only his wife's will from the personal representative, but also his own will. In addition, Bill McKee has admitted that there existed an agreement between himself and the descendent, his wife, to leave all of their property to Maureen Erickson. An action alleging fraud for disposing of property that belonged to Maureen Erickson was brought in the state of Washington, and was settled and a judgment entered based upon that admitted fraud. That judgment has been recorded in Shoshone County. Part of the property that was involved in the fraudulent concealment was transferred to Jerry McKee and resulted in a fraudulent conveyance.

I.C. § 15-3-1006 - **Limitations on actions and proceedings against distributes** specifically states that, "This section does not bar an action to recover property or value received as the result of fraud." It is clear that the probate code has no statute of limitations in attempts to recover property that is received as a result of fraud. This section would be even broader than probate code 15-1-106, which extended the time for commencing actions to recover property where fraud is used to avoid or circumvent the probate code to two years after the discovery of the fraud. Thus, the limitation in I.C. § 15-3-108 is not absolute when it comes to fraud and is even extended beyond I.C. § 15-3-108 by I.C. § 15-3-1006 to be unlimited when fraud is involved. The whole point of the Uniform Probate Code in the fraud area, and adopted by Idaho, is to allow a procedure by which personal representatives can seek property that has been fraudulently transferred before an estate is probated, left out of the estate, or not probated as part of the estate. It also allows heirs the same right. The code emphasis eliminating statute of limitations when fraud is involved is given further endorsement in I.C. § 15-3-1005, wherein it states, "The rights thus barred do not include rights to recover from a personal

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representative for fraud, misrepresentation, or inadequate disclosure relating to the settlement of the descendents estate." Previously appellant has cited for authority for its position Cahoon v. Seaton, which is extremely informative when it comes to fraud in application of the Uniform Probate Code. In Cahoon, suit was brought by means of not an independent civil action, but by means of petitioning the magistrate court to reopen an estate based upon fraud of the personal representative. The court dealt with the application of I.C. § 15-1-106, where fraud had been committed and specifically authorized proceedings in probate to reverse the fraud committed by filing an action in the probate, not an independent civil action. In Cahoon the fact that there was a delay to prosecute the probate action by two years after filing the reopening of the probate, the court allowed the action to proceed relating back to the date of the reopening of the probate, not when the heirs proceeded to renew their active concern two years later. The court concluded that the action for relief from the alleged fraud was commenced when the respondents petitioned the magistrate court. The court went on to say that the commencement of the action in probate thus comes within the period established by I.C. § 15-1-106.

I.C. § 55-909 – **Title of purchaser not impaired** also deals with the question of fraud in passing of title. That statute says that a purchaser who pays valuable consideration for property, which is not the case in this transfer because there was no consideration paid, the grantee's title is impaired if fraud was involved rendering void the title of the grantor.

D. Maureen Falsely Claims Only Heirs Are Involved In This Dispute.

Counsel for Jerry McKee maintains that since Jerry McKee's wife is a stranger and is on the title to the property, that appellant Maureen Erickson is required to file an independent action outside the probate to determine her rights to the property in question. Appellant Maureen Erickson contends that she is the rightful heir to the property that was fraudulently transferred by the descendent spouse knowing the existence of his own and the decedents will which mutually rescinded the community property agreement. Filing the will for probate and requesting a partial distribution places the question of that fraudulent transfer before the probate court. If the probate court would have ruled that

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the community property agreement is not, as a matter of law, controlling and held a hearing to determine whether the community property agreement was mutually rescinded, and ultimately decided that the community property agreement was rescinded, then the transfers would be set aside by the magistrate court and the property in question becomes an asset of the estate. At that point Jerry McKee's wife is required by I.C. § 15-3-404 to file a written objection to the probate, and was required by statute to file an objection when notice that the will had been filed for probate and a motion for partial distribution was made. Black's Law Dictionary defines "stranger" as "one who is not party to a given transaction or someone other than the party or party's employee, agent, tenant or immediate family member." Black's Law Dictionary further described immediate family as "a person's immediate family including spouses of children and siblings."

Furthermore, I.C. § 15-3-106 provides, "The court may herein determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party. Persons notified are bound though less than all interested persons may have been given notice." The comment on the code provides that "The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property, alleged to belong to the estate...." This is the very position that Jerry McKee's counsel took when he argued on page 20 of the transcript of Oral Arguments on Appeal, ..."Idaho adopted the Uniform Probate Code in 1971. And it goes on to say that the Uniform Probate Code gave the probate court wide range in powers to determine contested matters, such as those involved in the case. And he went on to say that the upshot is that both district judges and magistrate judges have jurisdiction to entertain actions of the type that was involved in that which was between third parties which would have resolved title to some issue." (See Exhibit 2.)

III. CONCLUSION

The appellant respectfully requests the court reconsider its decision finding that the community property agreement, as a matter of law, controls, and allow the hearing on

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the issue of mutual recision of the community property agreement that was raised by all the unconverted facts provided by affidavit in the hearing.

Dated this 9th day of July 2010.

LLOYD A. HERMAN
Attorney for Maureen Erickson
Personal Representative,
Estate of Natalie Parks McKee

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Exhibit 1

STATE OF IDAHO
COUNTY OF SHOSHONE/SS
FILED

2010 JUN 10 PM 1:48

PEGGY WHITE
DISTRICT COURT
BY /s/ Gail Elliott
DEPUTY

- Judge declined to sign Order

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IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTYOF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE,	CASE NO. CV 2006-40
Deceased.	JUDGMENT

RECEIVED
JUN 11 2010
BY: LLOYD A. HERMAN

The Court, having heard the arguments of counsel on the original Motion by Personal Represenative Maureen Erickson for Partial Distribution and the original Motion by Jerome McKee for Dismissal of the Probate on April 11, 2007, and having entered Findings of Fact and Conclusions of Law on April 16, 2007, and having heard the Amended Motion for Reconsideration on the above-described matters on August 18, 2009, and viewed the evidence presented, NOW, THEREFORE, makes the following:

ORDER

1. THAT the Motion by Maureen Erickson, Personal Representative of the Estate of Natalie Parks McKee, for Partial Distribution of Property is hereby **DENIED;**

2. THAT the Motion by Jerome McKee, an heir in the Estate of Natalie Parks McKee, to dismiss the Probate of the Estate of Natalie Parks McKee is hereby **DENIED.**

3. THAT the Amended Motion for Reconsideration is hereby **DENIED.**

DONE IN OPEN COURT this _____ day of _____ 20____.

6/10/10

MAGISTRATE PATRICK MCFADDEN

Court declines to sign this document since matters still pending in district court. Would also require a "No objection" from opposing counsel. Patrick McFadden

cc Mr. Herman and Mr. Dean

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of June, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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PEGGY WHITE, CLERK DISTRICT COURT
Deputy Clerk
Clerk of the First Judicial District
State of Idaho, County of Shoshone

19

my brief, in you-have-got-to-be-kidding-me categories to listen to her son say he saw it and read it and do it. But in any event, it -- none of that changes the fact that if Judge McFadden had before him contested issues, he did what he was supposed to do, and that is deny a motion for partial distribution. And nothing in the motion for reconsideration changes that fact.

One other thing I wanted to point out is throughout several places during the reply brief and, I think, partially in their opening brief, Maureen argues about the case of Woodward (phonetic) versus Utter (phonetic). It is a 1916 case that predates by 55 years the Uniform Probate Code. And in that case, which is distinguishable on its facts because the probate court there had an asset that they admitted was an asset of the estate when the probate was filed. It was a ranch, the beneficiary of -- the sole beneficiary, his elderly mother deeded that property to a third party and then died before the order of distribution occurred. And some of her other children contested that deed claiming she was incompetent. The probate court affirmed the validity of the deed and said if you want to fight about it, go do it in district court. The probate court says you do not have jurisdiction to resolve title issue. But that was what the law was in 1916.

20

What is overlooked is the case that Mr. Herman just cited, and that is the Estate of Miller versus Prater -- excuse me, Miller vs. Prater. And in that case the supreme court makes clear that Woodward versus Utter is obviously no longer good law. They were dealing with -- this was a case in district court. But one of the parties was arguing that the district court didn't have jurisdiction to resolve an issue with respect to the probate -- excuse me, a contract to -- a contract to make a will, and the other party was arguing that the probate court did not have jurisdiction. And the supreme court in response to the one who said that the probate court does not have jurisdiction said Miller -- and that's who the party was. What Miller overlooks is that Idaho adopted the Uniform Probate Code in 1971. And it goes on to say that the Uniform Probate Code gave the probate court wide range in powers to determine contested matters, such as those involved in the case. And went on to say that the upshot is that both district judges and magistrate judges have jurisdiction to entertain actions of the type that was involved in that which was between third parties which would have resolved title to some issue.

So the case law that they are relying upon to say that Judge McFadden should have just, even though the property hadn't been part of the estate for decades, more

21

than a decade, should have distributed a quarter interest in the River Property to Maureen and let the parties fight it out in district court, that's not what the Uniform Probate Code says, and the case law that they are relying on is outdated and inconsistent with the Uniform Probate Code.

The thrust of it, although, is to get back, no matter -- I mean, what we are looking at is the procedure that Maureen employed to try to get something from her brother is barred by the statute of limitations. It is not the appropriate way to do it, because it wasn't an adversarial proceeding. And it is not something that, because of the procedural aspect of it, Judge McFadden was in any way wrong in deciding that you haven't met your burden so, therefore, I am not going to grant the motion. Thank you, your Honor.

THE COURT: Thank you. Mr. Herman.

MR. HERMAN: Your Honor, I would like to point out that this motion with lack of -- statute of limitation was argued once before by Mr. Dean in his motion to dismiss this appeal, and you ruled against him on that motion.

MR. DEAN: I'll object to that, your Honor. That is a misstatement. You said you don't have to reach it.

THE COURT: I don't recall making that decision.

22

I think I said I'd make a procedural decision to not bar you from making the arguments you presented with respect to the original petition, request for partial distribution.

MR. HERMAN: Well, your Honor, the statute clearly gives a party a right to bring an action within two years to resolve the issue of fraud and if fraud has occurred in the handling of the estate or fraud has occurred preventing the estate to be being brought. And it is clearly the intent here when the estate was filed, it was filed during negotiations over trying to get the property returned. That went on for months or years. It was filed to protect the statute from running. Then a later motion for distribution was brought when an agreement couldn't be made.

So, the filing of the probate was filed within two years of discovery of the will. The probate is the proper place to bring the issue to the court and for decision. And if you look at in Calhoun's Estate 102 Washington 542, we cited it in our prior brief when we had this same argument over what was the right place to bring the motion, the Idaho Supreme Court found that violations and fraud in the case was sufficient to justify opening the probate. And the probate it was the opening the estate. And that's the proper form for deciding those

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE, Deceased.	CASE NO. CV-06-40 ORDER DENYING MOTION FOR RECONSIDERATION

Maureen Erickson has moved for reconsideration of the court's decision on appeal, affirming the decision of the magistrate court. Procedurally, there is no rule allowing a "motion for reconsideration" of a decision of a district court sitting in an appellate capacity. Rule 83(x) of the Idaho Rules of Civil Procedure provides that "[a]ny appellate procedure not specified or covered by these rules shall be in accordance with the appropriate rule of the I.R.C.P. or the I.A.R. to the extent the same is not contrary to this Rule 83."

IAR 42 allows for filing a petition for rehearing, and pursuant to the court's directive in *Ustick v. Ustick,* 104 Idaho 215, 657 P.2d 1083 (Ct.App.1983) Erickson's motion will be treated as one for reconsideration.

The court has reviewed the arguments submitted in support of the motion for reconsideration, and hereby denies the motion for reconsideration.

The case is remanded to magistrate division.

DATED this 5th day of August, 2010.

Fred M Gibler
FRED M. GIBLER, District Judge

I hereby certify a true and correct copy of the foregoing was mailed, postage prepaid, this 5th day of August, 2010, to the following:

Lloyd A. Herman,
Lloyd Herman & Associates, P.S.
213 N. University Rd.
Spokane Valley, WA 99206

Charles Dean
Dean & Kolts
1110 W. Park Place, Ste. 212
Coeur d'Alene, ID 83814

PEGGY WHITE, Clerk of Court

By: Bonnie Johnsen
Deputy Clerk

STATE OF IDAHO
COUNTY OF SHOSHONE/SS
FILED

2010 AUG 26 PM 4:15

PEGGY WHITE
CLERK DIST. COURT
BY Bonnie Johnsen
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE, Deceased.	)	CASE NO. CV-06-40
	)	CLERK'S REMITTITUR
	)	(Idaho Appellate Rule 38)

TO: The Honorable Patrick McFadden, Judge of the Magistrate Division:

Notice is hereby given, pursuant to Idaho Appellate Rule 38, that the opinion deciding the appeal in the above-entitled matter has become final.

Notice is further given that you shall forthwith comply with the directive of the opinion.

Dated this 26 day of August, 2010.

Peggy White
Clerk of the District Court

I hereby certify that a true and correct copy of the foregoing was sent this 26th day of August, 2010, as follows:

LLOYD A. HERMAN
ATTORNEY AT LAW
213 N UNIVERSITY ROAD
SPOKANE WA 99206

CHARLES DEAN
ATTORNEY AT LAW
1110 WEST PARK PLACE STE 212
COEUR D ALENE ID 83814

Honorable Patrick McFadden, Magistrate Judge
Fax: 208-245-3046

By: Bonnie Johnsen, Deputy Clerk

LLOYD A. HERMAN
LLOYD HERMAN & ASSOCIATES, P.S.
213 N. University Road
Spokane Valley, WA 99206
(509) 922-6600 * fax (509) 922-4720
lloydherm@aol.com
ISB No. 6884
Attorney for Appellant

IN THE DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS McKEE Deceased.	CASE NO. CV 2006-40 NOTICE OF APPEAL

TO: RESPONDENT, JEROME S. MCKEE, AND THE PARTY'S ATTORNEY, CHARLES DEAN, 1110 WEST PARK PLACE, SUITE 212, COUER D'ALANE, IDAHO, AND THE CLERK OF THE ABOVE ENTITLED COURT, SHOSHONE COUNTY COURTHOUSE, WALLACE, IDAHO.

NOTICE IS HEREBY GIVEN THAT:

1. The personal repesentative of above-named Estate of Natalie Parks McKee, Maureen Erickson, appeals against the above-named respondent, Jerome S. McKee, to the Idaho Supreme Court from the Decision on Appeal entered in the above entitled action on May 18, 2010, and the Order Denying Motion for Reconsideration entered in the above entitled action on August 5, 2010, by Judge Fred M. Gibler in the First Judicial District of the State of Idaho, in and for the County of Shoshone.

2. That the party has the right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 are appealable orders under and pursuant to Rule 11(a)(1) and (2) and Rule 11(b) I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in appeal; provided, any such list of issues on appeal shall not prevent the appellant other issues on appeal.

The District Court erred in upholding the Magistrate Court's decision as follows:

(1) Did the Magistrate Court's err and abuse its discretion when it made its decision during the March 16, 2007 hearing for partial distribution of the property in question, the motion to dismiss the probate, and the motion to strike the Affidavit of Bill McKee (surviving spouse) when the Magistrate Court, prior to ruling on all the motions—including the motion to strike—failed to determine the threshold question of admissibility of the evidence in the form of Affidavit of Bill McKee which demonstrated the mutual intent of the parties to revoke the community property agreement and furthermore, when entering the Findings of Fact and Conclusions of Law, found that it was unnecessary to rule upon Jerome S. McKee's Motion to Strike the Affidavit of Bill E. McKee.

(2) Did the Magistrate Court err and abuse its discretion when, on September 16, 2009, it rendered its decision on the Amended Motion for Reconsideration by either not taking or taking into account the Affidavit of Bill McKee without ruling on its admissibility during the hearing on the Motion to Dismiss.

(3) Did the Magistrate Court err when it contradicted itself in its decision on the Amended Motion for Reconsideration when the court described the original March 16, 2007 hearing as an evidentiary hearing when in fact the judge signed Findings of Court and Conclusions of Law reciting that it was unnecessary to rule upon the Motion to Strike the Affidavit of Bill McKee.

(4) Did the Magistrate Court err and abuse its discretion when it stated that there has never been produced any writing by Bill McKee that he drafted a mutual holographic will.

(5) Did the Magistrate Court err when it weighed the evidence before it during the Motion for Reconsideration of the Motion to Dismiss (the Motion to Dismiss being the equivalent of a Motion for Summary Judgment).

(6) Did the Magistrate Court err when it found there were no writings submitted signed by Bill McKee that proved the intent to mutually revoke the community property agreement.

(7) Did the Magistrate Court err when it found as a matter of law that the community property agreement was controlling despite there being substantial issues of fact raised by affidavits and testimony as to the mutual intent of the parties to revoke the community property agreement by the subsequent execution of mutual wills.

(8) Did the Magistrate Court err when it failed to recognize the issue of fact of the inconsistency between the community property agreement and the subsequent will of the decedent along with failing to consider the Affidavit of Bill McKee asserting the mutual intent of the parties to revoke their community property agreement.

(9) Did the Magistrate Court err in upholding the validity of the community property agreement between Bill McKee and Natalie Parks McKee that entered into on July 11, 1988, and basing that holding on the following facts: finding that the holographic will executed by Natalie Parks McKee was insufficient to revoke the community property agreement and any action of Bill McKee to assent or agree to the rescission of the community property agreement was insufficient as a matter of law.

(10) Did the Magistrate Court error in its finding that the community property agreement between Bill McKee and Natalie Parks McKee was not revoked by mutual holographic wills of the above named parties on the grounds that the will of Bill McKee was never produced even though Bill McKee testified under oath that he and his wife signed mutual holographic wills of like intent.

(11) Did the Magistrate Court commit further error by placing the burden on Maureen Erickson of having to produce Bill McKee's holographic will at the March 16, 2007 hearing, when the sworn testimony at the Motion for Reconsideration indicated she nor her lawyer were aware of the existence of the will at the time the original Motion for Partial Distribution was heard, and it was new evidence brought to the Court at the time of the hearing on the Amended Motion for Reconsideration.

(12) Did the Magistrate Court error when it ignored the new evidence sworn testimony of the existence of the will by Dirk Erickson, 1stLt, USMC, who saw the will in his grandfather's safety deposit box on August 17, 2004.

(13) Did the Magistrate Court further error when the Court ignored the testimony of Bill McKee that he had done a mutual holographic will as so indicated in his sworn testimony before the same Court in a prior hearing, and as indicated in letters to Michael Peacock, attorney for the estate, and in letters to Jerome McKee who was the last known person, along with Bill McKee, to have access to the safety deposit box where the mutual holographic will of Bill McKee was stored.

(14) Did the Magistrate Court error in failing to require a full hearing involving testimony of all parties to this will contest, which would have allowed the proponents of the mutual holographic wills to prove as a matter of law the intent of Bill McKee and Natalie Parks McKee to make mutual wills rescinding their community property agreement.

(15) Did the Magistrate Court error in failing to require a full hearing because the existence of Natalie Parks McKee's will and the testimony of Bill McKee agreeing to the revocation of the community property agreement raised an ambiguity or an issue of fact as to the mutual intent of Bill McKee and Natalie Parks McKee. At such a hearing the opposing parties would have had the burden of establishing lack of testamentary intent to cancel the community property agreement.

(16) Did the Magistrate Court error in ruling the Motion for Reconsideration was not set for hearing timely by moving party, and therefore to bring that motion on 27 months later was unfairly prejudicial to Jerome McKee when no prejudice has occurred, no evidence of prejudice was offered, and no claim of prejudice was made, especially in light of Rule 7(d)(3)(D) which allows the Court to deny such motion when it's been filed without a brief.

(17) Did the Magistrate Court error in failing to consider the newly discovered evidence and judgments of fraud against Bill McKee for hiding, with Jerome McKee's help, the will of Natalie Parks McKee from appellant resulting in preventing the appellant from inheriting from her mother in accordance with the will.

4. No order has been entered sealing all or any portion of the record.

5. (a) Is a reporter's transcript requested? Yes

(b) The appellant requests the preparation of the standard transcript according to Rule 25(c)(5) and (6) I.A.R.

6. The Appellant requests the following documents be included in the clerk's papers in addition to those automatically incuded under Rule 28 I.A.R: Motion for Partial Distribution, Motion to Dismiss, and Motion to Strike Testimony; all briefs by all the parties submitted in support of or opposing the Motion for Partial Distribution, the Motion to Dismiss, and the Motion to Strike Testimony; all affidavits submit in support of or opposing the Motion for Partial Distribution, the Motion to Dismiss, and the Motion to Strike Testimony; all briefs and affidavits submitted in support of or opposing the Motion for Reconsideration before the Magistrate Court, Judge McFadden; all memoranda and opinions of Judge McFadden; all findings of fact and conclusions of law of Judge McFadden; all briefs and affidavits on appeal from Magistrate Court to District Court; all motions to dismiss the appeal and responses thereto including affidavits and briefs; all memoranda and opinions on the motion to dismiss the appeal; all memoranda and opinions of the District Court rendered on appeal from the Magistrate Court; all briefs and affidavits in support of and opposing the Motion for Reconsideration filed in District Court; all memoranda and opinions rendered by the District Court on the Motion for Reconsideration; all transcripts of the hearings and decisions before Judge McFadden on March 16, 2007 and August 18, 2009; and all transcripts of the hearings and decisions before Judge Gibler on December 14, 2009 and May 17, 2010.

7. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: Beryl Cinnamon (Hearing of March 16, 2007 on Motion for Partial Distribution), P.O. Box 2821, Hayden, ID 83835;

Name and address: Joann Schaller (Hearing of May 17, 2010 on Motion to Appeal), P.O. Box 9000, Coeur d' Alene, ID 83816-9000.

(b)(1) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.

(c)(1) That the estimated fee for preparation of the clerk's record has been paid.

(d)(1) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 14th day of September 2010.

LLOYD A. HERMAN
Attorney for Maureen Erickson
Personal Representative,
Estate of Natalie Parks McKee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served by the method indicated below, and addressed to the following this 14th day of September 2010.

District Court Judge Fred M . Gibler Shoshone County Courthouse P.O. Box 527 Wallace, ID 83873-0527	X U.S. Mail X Hand Delivered _____ Overnight Mail _____ Facsimile_____
Charles R. Dean, Jr. Dean & Kolts 1110 West Park Place, Suite 212 Coeur d'Alene, ID 83814	X U.S. Mail _____ Hand Delivered _____ Overnight Mail _____ Facsimile_____
Shoshone County District Court Clerk First Judicial District Court 700 Bank Street, Suite 120 Wallace, ID 83873	_____ U.S. Mail X Hand Delivered _____ Overnight Mail _____ Facsimile_____
Byrl Cinnamon, CRS Official Court Reporter P.O. Box 2821 Hayden, ID 83835 P.O. Box 527 Wallace, ID 83873-0527	X U.S. Mail _____ Hand Delivered _____ Overnight Mail _____ Facsimile_____
Joann Schaller P.O. Box 9000 Coeur d. Alene, ID 83816 701 W. College Ave. St. Maries, ID 83861 700 Bank Street, Suite 120 Wallace, ID 83873	X U.S. Mail _____ Hand Delivered _____ Overnight Mail _____ Facsimile_____

Lynn Worthington
Print Name:

JoAnn Schaller
Official Court Reporter, ID CSR No. 160
324 West Garden Avenue • P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000
Phone: (208) 446-1136

STATE OF IDAHO
COUNTY OF SHOSHONE ss
FILED
2010 OCT 18 PM 4:47
PEGGY WHITE
CLERK DIST. COURT
BY Marla Hanson
DEPUTY

TO: Clerk of the Courts
Idaho Supreme Court Building
P.O. Box 83720
Boise, Idaho 83720-0101

DOCKET NO. 38130
(Shoshone No. CV-06-40)

(IN THE MATTER OF THE ESTATE OF
(NATALIE PARKS MC KEE,
(
(Deceased.

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on October 15, 2010, I lodged, through the U.S. Post Office, all assigned appellate transcript(s) requested of me in the above-referenced appeal, entitled Transcript on Appeal, totalling 35 pages, an original and three copies, with the District Court Clerk of the County of Shoshone in the First Judicial District. An electronic PDF file is attached to e-mail and sent to sctfilings@idcourts.net. A copy of this notice with the Table of Contents of the appeal transcript attached is faxed to the Idaho Supreme Court at 208 334-2616.

JoAnn Schaller
October 15, 2010
(Date)

NOTICE OF LODGING ORIGINAL TRANSCRIPT

Post-it® Fax Note 7671	Date 10/15/10	# of pages ▶ 2
To Supreme Court	From JoAnn Schaller	
Co./Dept. Clerk	Co. District Court	
Phone #	Phone # 208 446-1136	
Fax # 208 334-2616	Fax # " " 1138	

STATE OF IDAHO
COUNTY OF SHOSHONE/SS
FILED

2010 OCT 19 AM 9:07

PEGGY WHITE
CLERK DIST. COURT
BY Maila Anson
DEPUTY

TO: Clerk of the Court
Idaho Supreme Court
P.O. Box 83720
Boise, ID 83720-0101

DOCKET NO. 38130-2010

(MAUREEN ERICKSON
(
(vs.
(
(JEROME S. McKEE

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on October 19, 2010, I lodged a transcript of 20 pages in length for the above-referenced appeal with the District Court Clerk of the County of Shoshone in the First Judicial District. I have lodged all assigned appellate transcript(s) requested in the Notice of Appeal.

12/14/09, Motion to dismiss

Byrl Cinnamon

Byrl Cinnamon

October 19, 2010

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS MCKEE, Deceased, MAUREEN ERICKSON, Personal Representative, Appellant, vs. JEROME S. MCKEE, Respondent.	SUPREME COURT NO. **38130-2010** DISTRICT COURT NO. **CV-2006-40** **CLERK'S CERTIFICATE**

State of Idaho)
County of Shoshone)

I, PEGGY WHITE, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents required by Appellate Rule 28, as well as those additionally requested in the Notice of Appeal.

I FURTHER CERTIFY that the Court Reporter's Transcript (from two different Court Reporters) will be duly lodged with the Clerk of the Supreme Court along with the Clerk's Record in the above entitled cause of action. **Please note** there were two other transcripts that were prepared in re: to hearings in Magistrate Court that are being forwarded to the Supreme Court.

Please further note that on page 104 and page 119 right next to the filing stamp there is a notation in re: to attachments, just to make the record clear the attachments that are attached to the

Amended Motion for Reconsideration are one and the same that were attached to the Affidavit of Lloyd Herman on page 119.

I FURTHER CERTIFY that there were no exhibits which were marked for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Wallace, Idaho this 17th day of February, 2011.

PEGGY WHITE, Clerk District Court

By Marla Anson Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

IN THE MATTER OF THE ESTATE OF NATALIE PARKS MCKEE, Deceased, MAUREEN ERICKSON, Personal Representative, Appellant, vs. JEROME S. MCKEE, Respondent.	SUPREME COURT NO. **38130-2010** DISTRICT COURT NO. **CV-2006-40** **NOTICE OF COMPLETION**

TO: **STEPHEN W. KENYON**, Clerk of Supreme Court; **LLOYD HERMAN** for the Appellant and **CHARLES DEAN** for the Respondent:

YOU ARE HEREBY NOTIFIED that I have personally served or mailed, by certified United States mail, one copy of the Clerks Record (consisting of four volumes) and one copy of two different Court Reporter's Transcripts along with two other transcripts from Magistrate Court in the above entitled cause upon each of the following:

LLOYD HERMAN
Attorney at Law
213 N University Rd
Spokane WA 99206

CHARLES DEAN
Attorney at Law
1110 West Park Place, Ste 212
Coeur d'Alene ID 83814

YOU ARE FURTHER NOTIFIED that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections are filed within the twenty-eight day period, the Record shall be deemed settled.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 17th day of February, 2011.

766

PEGGY WHITE, Clerk District Court
By Paula Anson Deputy