

1985

In the Matter of the Estate of Dean Charles  
Burnham, Lois M. Borden, personal representative  
of the estate of the decedent, Dean Charles  
Burnham v. Dean Charles Burnham, Jr. and Anna  
Marie Burnham, children of the decedent : Brief of  
Appellant

Utah Supreme Court

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Mark S. Miner; Attorney for Respondents.

William L. Crawford, Hal J. Pos; Parsons, Behle and Latimer; Attorneys for Appellant.

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UTAH SUPREME COURT  
BRIEF

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IN THE SUPREME COURT  
STATE OF UTAH

\* \* \* \* \*

IN THE MATTER OF THE ESTATE OF )  
DEAN CHARLES BURNHAM, )  
 ) Supreme Court No. 20775  
 )  
 ) District Court Probate No.  
 ) P84-1110  
Deceased. ) District Court Judge  
 ) Philip R. Fishler  
 )

\* \* \* \* \*

APPELLANT'S BRIEF ON APPEAL

\* \* \* \* \*

On Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
The Honorable Philip R. Fishler Presiding

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FILED

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IN THE SUPREME COURT  
STATE OF UTAH

\* \* \* \* \*

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LIST OF ALL PARTIES

1. Appellant, Lois M. Borden, Personal Representative of the Estate of the decedent, Dean Charles Burnham, and represented by William L. Crawford and Hal J. Pos of Parsons, Behle & Latimer, 185 South State Street, Suite 700, Salt Lake City, Utah 84147.
2. Respondents, Dean Charles Burnham, Jr. and Anna Marie Burnham, children of the decedent, and represented by Mark S. Miner, 525 Newhouse Building, 10 Exchange Place, Salt Lake City, Utah 84111.

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### STATEMENT OF ISSUE ON APPEAL

Lois M. Borden, Appellant-Personal Representative in the above-referenced matter, presents on appeal the following issue:

Are the children of the decedent, Dean Charles Burnham, pretermitted heirs under Section 75-2-302 of the Utah Uniform Probate Code, and thus entitled to an intestate share of decedent's estate, irrespective of the express terms of decedent's Last Will and Testament, which leaves his entire estate to his wife, Charlotte L. Burnham, and precludes any "beneficiary, legal heir, heirs of issue" from taking a share of the decedent's estate?

### DETERMINATIVE STATUTE

Section 75-2-302 of the Utah Uniform Probate Code relied upon by Appellant, Lois M. Borden, is attached herewith as Exhibit "A".

### STATEMENT OF THE CASE

This is an appeal from the granting of a Motion for Summary Judgment for Respondents, Dean Charles Burnham, Jr. and Anna Marie Burnham, in the probate of the Last Will and Testament of Dean Charles Burnham. The motion by the Respondents that they are pretermitted heirs and are entitled to receive an intestate share of decedent's estate pursuant to Section 75-2-302 of the Utah Uniform Probate Code was granted and



entered by the Honorable Judge Philip R. Fishler of the Third Judicial District Court for Salt Lake County, State of Utah.

#### STATEMENT OF FACTS

On July 28, 1984, Dean Charles Burnham executed a Last Will and Testament (hereinafter referred to as the "Will"). At the time of the execution of the Will, the decedent was ill with cancer, and in fact, died on August 1, 1984. The decedent married Charlotte L. Burnham on July 22, 1983, after having known and lived with her for over ten years. At the time of said marriage, decedent had children from a previous marriage, two of whom, Dean Charles Burnham, Jr. and Anna Marie Burnham, (hereinafter referred to as the "Claimants") challenged the Will on the basis that they were pretermitted heirs under Section 75-2-302 of the Utah Uniform Probate Code. The relevant provisions of the decedent's Will provide, in pertinent part:

FOURTH: I GIVE, BEQUEATH AND DEVISE ALL OF MY PROPERTY, REAL AND PERSONAL, OF EVERY KIND AND NATURE WHATSOEVER, AND WHERESOEVER SITUATE TO MY WIFE, CHARLOTTE LANE.

FIFTH: IN THE EVENT any beneficiary, legal heir, heirs of issue may claim under this Will, singly, or in connection with any other person or persons, or shall contest in any Court the validity of this Will, or shall seek to obtain an adjudication of any proceedings in any Court that any provision of my Last Will and Testament is void, or

shall seek otherwise to void, nullify, or set aside any of its provisions, then and in that event, the right of said person or persons shall be determined as if that person or persons had predeceased me, and the execution of all provisions of this declaration of my last Will and Testament without surviving issue. My executrix is directed to defend at the expense of my estate any contest or other attack of any nature whatsoever on this, my last Will and Testament or any of the provisions thereof.

A copy of the Will is attached herewith as Exhibit "B".

Approximately four months after decedent's death, the Personal Representative filed a petition for a formal probate of decedent's Will and for her formal appointment as Personal Representative of the estate. On or about December 13, 1984, the Claimants challenged the probate of decedent's Will on the basis that the Will was not valid. On or about February 1, 1985, the Claimants filed a Motion for Summary Judgment seeking both to invalidate the Will and a determination that the Claimants were pretermitted heirs. Shortly thereafter, the Personal Representative filed a Motion for Summary Judgment seeking both to validate decedent's Will and a determination that the Claimants were not pretermitted heirs under Section 75-2-302(1)(a) of the Utah Uniform Probate Code.

In his Memorandum Decision of March 21, 1985, the Honorable Judge Philip R. Fishler found the Claimants to be pretermitted heirs and granted, in part, their Motion for Summary Judgment. In a subsequent Order on Memorandum Decision, Admitting Will to Probate, and Appointing Personal

Representative, (hereinafter referred to as the "Final Order") dated May 31, 1985, Judge Fishler ordered, among other things, that the Claimants receive an intestate share of the decedent's estate as pretermitted heirs pursuant to the aforesaid Memorandum Decision. On or about July 28, 1985, the Personal Representative filed a Notice of Appeal within thirty days from the aforesaid Final Order pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure.

#### SUMMARY OF ARGUMENT

Section 75-2-302(1)(2) of the Utah Uniform Probate Code provides that if a testator fails to provide for his children in his will, the omitted children receive a share of the testator's estate equal to what the children would have received had the testator died intestate, unless, among other things, it appears from the will that the omission was intentional. The provisions under the decedent's Will clearly demonstrate that the decedent intentionally omitted his children, including the Claimants, from taking a share of the his estate. The decedent left his entire estate to his wife, Charlotte L. Burnham, pursuant to paragraph FOURTH, and then provided in paragraph FIFTH that if any "beneficiary, legal heir, heirs of issue" made any claim under decedent's Will, then such person would be deemed to have predeceased the decedent without surviving issue, and thus take nothing. Thus,

decedent's complete disposition of his estate to his wife, together with language that precludes his children as heirs from taking a share of his estate, evinces a definite intent that decedent intentionally omitted his children from the provisions of his Will. Moreover, the in-terrorem clause under paragraph FIFTH of decedent's Will which, in part, precludes any heirs as a class from taking under the Will is, in effect, both an in-terrorem and a disinheritance provision. Therefore, the provisions of the decedent's Will clearly satisfy the requirements under Section 75-5-302(1)(a) of the Utah Uniform Probate Code, and effectively preclude the Claimants as heirs from taking an intestate share of decedent's estate as pretermitted heirs.

#### ARGUMENT

##### I.

#### THE CLAIMANTS ARE NOT ENTITLED TO INHERIT AS PRETERMITTED HEIRS

##### A. Complete Disposition of Decedent's Estate, Together with Language Disinheriting Will Contestants, Clearly Demonstrates Decedent's Intent to Disinherit the Claimants.

The pretermitted heir statute under section 75-2-302, Utah Uniform Probate Code, provides, in pertinent part:

(1) If a testator fails to provide in his will for any of his children or issue of a deceased child, the omitted child or issue receives its share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(a) It appears from the will that the omission was intentional; . . .

The Utah Supreme Court has not decided any cases concerning the above section of the Utah Uniform Probate Code, which was adopted effective July 1, 1977. However, the decision of In re Newell's Estate, 78 Utah 463, 5 P.2d 230 (1970), decided under the former pretermitted heir statute which, essentially identical to Section 75-2-302(1)(a) of the Utah Uniform Probate Code, provided that omitted children and issue of deceased children would take an intestate share in the estate unless their omission from the will was intentional, may be of significance in the instant matter. In Newell's Estate, the decedent's grandchild challenged the distribution of decedent's estate on the basis that the will failed to mention descendants of a deceased child of the decedent. The will provided for the distribution of the entire estate to certain named individuals and charitable institutions. After reviewing all the facts and circumstances in the matter, the Utah Supreme Court noted:

Under the statute it thus is clear that such omitted heir does not share in the estate of a testator when it appears, either by the will or by evidence dehors the will, or by both, that the omission was intentional. Language of a will and bequests and devises may be of such character as to lead to but one conclusion, that all others except those mentioned in the will were intended to be excluded. Such is well illustrated by the cited case of Hawhe v. Chicago & W.I.R. Co., [165 Ill. 561, 46 N.E. 240] where no mention was made of any of the children of the testator, and where he devised and bequeathed all his estate, real, personal and mixed and of every kind, whatsoever, to

his wife . . . In such case, and as the Illinois court held, language could not have been used which would more clearly express an intention that the wife and she alone was to take and hold the testator's estate to the exclusion of all others including his children. [Emphasis supplied.]

In re Newell's Estate, 78 Utah at 481, 5 P.2d at 237. Thus, under Utah law, complete disposition of a decedent's estate to designated beneficiaries effectively demonstrates sufficient intent on the part of the decedent to exclude his children or issue of deceased children from taking under a will.<sup>1</sup>

Similarly, in In the Matter of the Estate of Hester, 671 P.2d 54 (Okla. 1983), the Oklahoma Supreme Court held that a false statement that the decedent had no children, coupled with a complete disposition of the decedent's estate constituted sufficient intent to disinherit the decedent's son. In that case, decedent's son, who claimed to be a pretermitted heir of the decedent, appealed from a lower court decision upholding the decedent's will. Concluding that the

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<sup>1</sup>However, under case law in other jurisdictions, language of a will leaving everything to the decedent's spouse may not, in and of itself, be sufficient to exclude the children. The Oklahoma Supreme Court, in In the Matter of the Estate of Crump, 614 P.2d 1096 (Okla. 1980), held that:

Testorial disposition of the entire estate does not alone affirmatively evince an intent to omit to provide for a child or a deceased child's issue.

Matter of the Estate of Crump, 614 P.2d at 1099.

decedent intentionally excluded his children from taking under the will, the Oklahoma Supreme Court held that:

[A] specific denial of the existence of members of a class to which the claimant belongs, coupled with a complete disposition of the estate by will, evinces a definite intent that all members of the named class are intentionally omitted from the provisions of the testator's will.

Matter of the Estate of Hester, 671 P.2d at 55.

Applying the rationales of Newell and Hester to the instant matter, decedent's Will clearly demonstrates that the decedent intentionally omitted his children. The decedent left his entire estate to his wife, Charlotte L. Burnham, pursuant to paragraph FOURTH, and then provided in paragraph FIFTH that if any "beneficiary, legal heir, heirs of issue" made any claim against his estate, then such person would take nothing. Accordingly, the disinheritance provision in paragraph FIFTH, together with the complete disposition of the decedent's estate by his Will to his wife, evinces a definite intent that the decedent intentionally omitted his children, including the Claimants, from taking under the provisions of his Will.

B. An In-Terrorem Clause Precluding "Heirs" as a Class from Taking Under a Will Constitutes An Effective Disinheritance Provision.

It is well-established that in-terrorem clauses precluding heirs as a class from taking under a will are

sufficient to preclude operation of the pretermitted heir statute. In In the Matter of the Estate of Hilton, 649 P.2d 488 (N.M. 1982), a decedent pursuant to his Last Will and Testament left all of his real property to his wife, and upon her death, to his three daughters. The decedent's will made no mention of a deceased son or of the son's two surviving children. The will provided that the decedent had only three children and "that if any other person claims to be a child or heir of mine and establishes such a claim in a court of competent jurisdiction, I give to such person the sum of One Dollar." The children of the deceased son challenged the will as pretermitted heirs under the New Mexico statute which, like Utah's statute, requires that the intention of the decedent to disinherit heirs appear from the language of the will itself. In holding that the provisions of the in-terrorem clause satisfied the requirements of the New Mexico pretermitted heir statute, the New Mexico Supreme Court, in a case of first impression, concluded:

[T]he language contained in paragraph VII [an in-terrorem clause] of testator's will stating that if any person claims to be an 'heir of mine and establishes such a claim in a court of competent jurisdiction' amounts to an expression by the testator of an intention to exclude appellants as heirs from taking under his will as a class.

As noted in 45 Cal. L. Rev. 220 (1957): The ordinary no-contest clause, disinheriting or leaving a



nominal sum to 'any other person or persons' or 'anyone who may contest this will,' has been held insufficient to show the required intent to exclude. On the other hand, clauses excluding or making nominal provisions for 'heirs' or 'persons claiming to be heirs' have been held specific enough to prevent descendants from claiming under the pretermitted heir statute. [Emphasis supplied.]

Matter of the Estate of Hilton, 649 P.2d at 495. The Hilton Court further relied upon an article which states, in pertinent part:

The California Courts in interpreting this [pretermitted heir] statute . . . in the past have evolved certain rules and principles which they now seem to use as guides. For example, it appears that it is not essential that the claimant be named or identified specifically by the Will. The use by the testator of a word which describes a class of persons, such as 'children' or 'relatives' is generally considered sufficient to exclude the application of the pretermitted heir statute. Also, the use of the word 'heirs' in a will to describe the class of persons who are not to participate in the testator's estate has been held sufficient to show the intention of the testator to exclude his children from participating in the estate. [Emphasis supplied.]

Note, Wills: Rights of Pretermitted Heirs Under California Probate Code, Section 90, 8 Hastings L.J. 342-343 (1957).

Furthermore, in In the Matter of the Estate of McClure, 214 Cal. App. 2d 590, 29 Cal. Rptr. 569 (1963), a decision principally relied upon by the Hilton Court, the daughter of a predeceased son was not named in her

grandmother's will and the will specified that the testatrix left one dollar to anyone who contested the will and claimed to be an heir to the estate. Rejecting the granddaughter's claim as a pretermitted heir, the California appellate court concluded:

[A] provision in a will bequeathing a nominal amount to any person claiming to be an heir of the testator refers to a child of the testator not otherwise provided for therein, and satisfies the requirements of [the pretermitted heir statute] that it appear therefrom that he had such child in mind at the time of executing his will, and intentionally omitted making any other provision therefor. [Citations omitted.] Such a provision is equivalent to a disinheritance clause. [Citations omitted.] [Emphasis supplied.]

Matter of the Estate of McClure, 214, Cal. App. 2d at \_\_\_, 29 Cal. Rptr. at 571.

Under the rationales of both Hilton and McClure, paragraph FIFTH of the decedent's Will in the instant matter clearly demonstrates that the decedent intentionally excluded the Claimants, as heirs, from taking under his Will. Paragraph FIFTH clearly pertains to the decedent's children, two of whom are the Claimants, inasmuch as the paragraph refers to any "legal heir" who claims under the Will. Moreover, the decedent's intent to exclude the Claimants from taking under the Will is further substantiated by decedent's complete disposition of his estate to his wife in paragraph FOURTH of the Will. Thus, the in-terrorem clause under paragraph FIFTH

constitutes, in effect, both an in-terrorem and a disinheri-  
tance provision.

Finally, In the Estate of Leonetti, 115 Cal. App. 3d at 378, 171 Cal. Rptr. 303 (1981), an executor of the decedents' estate appealed from a judgment determining that decedents' grandchildren were pretermitted heirs. The children of the predeceased daughter were not named in their grandparents' wills. Paragraph Thirteenth of both wills, entitled "Contest Provision" provided that "if any person or persons, whether an heir of mine or not, shall contest this Will, or any other provisions hereof, I give to such person or persons so contesting or objecting, the sum of One Dollar. . . ." The provision further disinherited any heirs seeking a claim against the wills. Concluding that the in-terrorem provision clearly established decedents' intention to disinherit all heirs not otherwise provided for in the wills, the California appellate court noted:

No-contest clauses precluding heirs as a class from participating are in effect both no contest and disinheritance provisions. Such provisions are upheld against contentions that they lack sufficient specificity to prevent the operation of the pretermisison statute. (See Estate of Szekely (1980) 104 Cal. App. 3d 236, 163 Cal. Rptr. 506k; Estate of Bank, supra, 248 Cal. App. 2d 429, 433, 56 Cal. Rptr. 559; Estate of McClure, supra, 214 Cal. App. 2d 590, 593, 29 Cal. Rptr. 569; Estate of Brown, (1958), 164 Cal. App. 2d 160, 161, 330 P.2d 232.) [Emphasis supplied.]

In re Estate of Leonetti, 115 Cal. App. 3d at 383, 171 Cal. Rptr. at 306. See also, Van Strien v. Jones, 46 Cal. 2d 705, 229 P.2d 1 (1956) (holding that the language "any person who if I died intestate would be entitled to share in my estate" is sufficient to disinherit a child or grandchild not otherwise provided for under a Will).

In the instant matter, paragraph FIFTH of decedent's Will is clearly more than just an in-terrorem clause. This provision further provides that if any "beneficiary, legal heir, heirs of issue" make any claim under the Will, then such person will be deemed to have predeceased decedent without surviving issue, and thus take nothing. The language in paragraph FIFTH of decedent's Will amounts to an expression by the decedent to exclude the Claimants as heirs from taking under the Will. Thus, the in-terrorem clause under paragraph FIFTH amounts, in effect, to both an in-terrorem and a disinheritance provision. Accordingly, paragraph FIFTH precludes the operation of Utah's pretermitted heir statute, and thus the Claimants are not pretermitted heirs under Section 75-2-302 (1)(a) of the Utah Uniform Probate Code.

Since the in-terrorem clause in paragraph FIFTH is also a disinheritance clause, the Personal Representative respectfully submits that the Third Judicial District Court decision, granting the Claimants' Motion for Summary Judgment that they are pretermitted heirs and are entitled to receive an

intestate share of the decedent's estate, should be reversed. In the Memorandum Decision, dated March 21, 1985, Judge Philip R. Fishler concluded that paragraph FOURTH, which left the decedent's entire estate to his wife, did not effectively rebut the statutory presumption in favor of pretermitted heirs. (Memorandum Decision, p.4.) However, the Personal Representative never contended that paragraph FOURTH, in and of itself, amounted to a disinheritance provision. Rather, the Personal Representative contended that paragraph FOURTH, together with paragraph FIFTH, adequately rebutted any presumption that the Claimants were pretermitted heirs. Obviously, when the decedent leaves his entire estate to his wife, and then further provides that any "legal heir" who makes any claim against his estate is to take nothing, clearly there is but one conclusion--that the decedent intentionally omitted to provide for his children, including the Claimants.

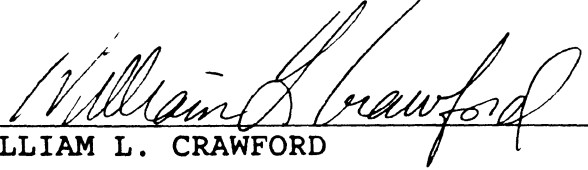
Finally, the probate court, in its Memorandum Decision, concluded that paragraph FIFTH could not be construed to preclude the Claimants from taking an intestate share of decedent's estate, since the Claimants, who challenged the Will as pretermitted heirs, were not contesting the Will but rather were seeking an intestate share in spite of the Will. (Memorandum or Decision, pp. 4-5.) Although the Claimants claim a share of decedent's estate in spite of the Will, the Personal Representative respectfully submits that paragraph FIFTH


clearly amounts to more than an in-terrorem provision. In addition to the standard in-terrorem language, this paragraph provides that any heir who claims an interest in the decedent's estate is to be determined to have predeceased the decedent without surviving issue, and thus take nothing. Thus, paragraph FIFTH amounts to a disinheritance provision, which when viewed together with paragraph FOURTH, effectively rebuts the presumption that the Claimants are pretermitted heirs. Accordingly, paragraph FIFTH of decedent's Will clearly satisfies the requirements of Section 75-2-302(1)(a) of the Utah Uniform Probate Code, and effectively precludes the Claimants from taking an intestate share of decedent's estate as pretermitted heirs.

#### CONCLUSION

Based upon the foregoing, the Personal Representative respectfully submits that decedent's Will, in and of itself, clearly demonstrates that the decedent intentionally omitted to provide for his children, and thus precludes operation of Utah's pretermitted heir statute in favor of the Claimants. Accordingly, the Personal Representatives respectfully requests that this Court find that the Claimants are not pretermitted heirs under Utah law, and thus reverse the summary judgment in favor of the Claimants, entered by Judge Phillip R. Fishler of the Third Judicial District Court.

Respectfully Submitted this 12TH day of September,  
1985.

  
\_\_\_\_\_  
WILLIAM L. CRAWFORD

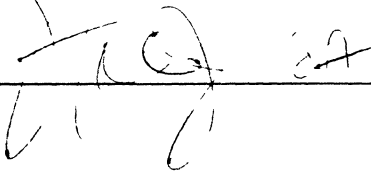
  
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered, four (4)  
true and correct copies of the foregoing APPELLANT'S BRIEF ON  
APPEAL to the following on this 2nd day of September, 1985:

Mark S. Miner, Exq.  
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10 Exchange Place  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

0904J

## ADDENDUM

### APPENDIX A

75-2-302. Pretermitted children--(1) If a testator fails to provide in his will for any of his children or issue of a deceased child, the omitted child or issue receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(a) It appears from the will that the omission was intentional;

(b) When the will was executed the testator had one or more children and devised substantially all his estate to or for the exclusive benefit of the other parent of the omitted child, or of the deceased child whose issue are omitted; or

(c) The testator provided for the child or issue by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(3) In satisfying a share provided by this section, the devises made by the will abate as provided in section 75-3-902.

(4) If the issue of a deceased child takes the share of the deceased child under section 75-2-605, the issue shall not be considered pretermitted and shall not receive a share of the estate under this section.



(5) If it appears from the will that the omission of a child of the testator was intentional and if no express provision is made in the testator was intentional and if no express provision is made in the will for the issue of the child, the testator will be considered to have intended to also omit the issue.

0904J

APPENDIX B

I, DEAN CHARLES BUPNHAM

289-1100

H. D. B. & Co. 1000 1000 1000

of ORANGE COUNTY

State of CALIFORNIA, being of sound and disposing mind and memory and not acting under duress, menace, fraud, or the undue influence of any person whomsoever, do make, publish, and declare this to be my last **WILL AND TESTAMENT** in manner following, that is to say:

**FIRST**, I am married to CHARLOTTE LANE AND ALL REFERENCES IN THIS WILL TO MY WIFE ARE TO HER ONLY.

**SECOND**: I direct that upon my demise, my remains be cremated.

**THIRD**: I direct that my executrix hereinafter named pay my just debts and funeral expenses as soon after my demise as may be practicable.

**FOURTH**: I GIVE, BEQUEATH AND DEVISE ALL OF MY PROPERTY, REAL AND PERSONAL, OF EVERY KIND AND NATURE WHATSOEVER, AND WHERESOEVER SITUATE TO MY WIFE, CHARLOTTE LANE.

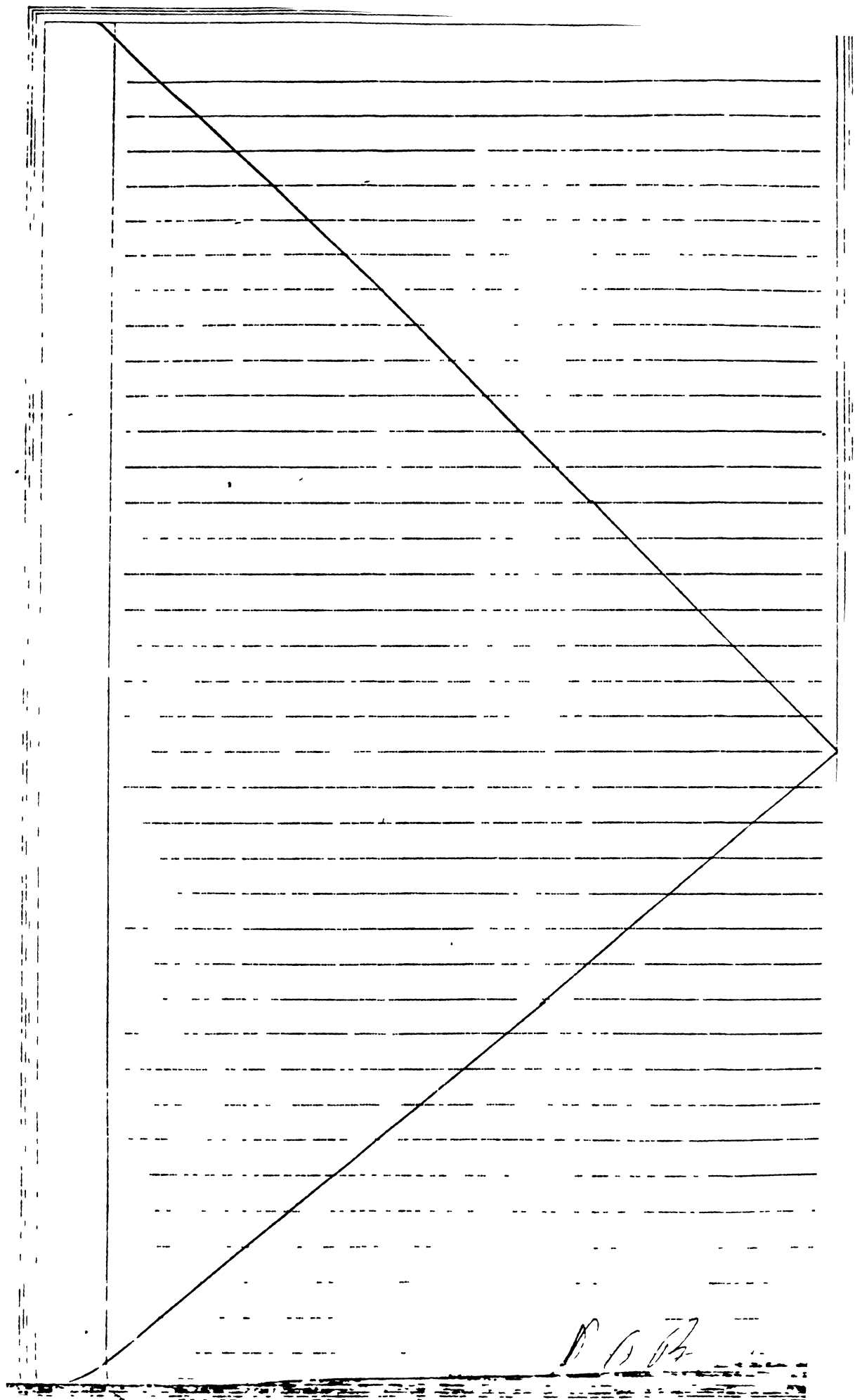
**FIFTH**: IN THE EVENT any beneficiary, legal heir, heirs of issue make claim under this Will singly or in conjunction with any other person or persons, or shall contest in any Court the validity of this Will, or shall seek to obtain an adjudication of any proceedings in any Court that any provision of this my last Will and Testament is void, or shall seek otherwise to void, nullify, or set aside any of its provisions, then and in that event, the right of said person or persons shall be determined as if that person or persons had predeceased me, and the execution of all provisions of this declaration of my last Will and Testament without surviving issue. My executrix is directed to defend at the expense of my estate any contest or other attack of any nature whatsoever on this my last Will and Testament or any of the provisions thereof.

**SIXTH**: A. I nominate and appoint LOIS M. BORDEN as Executrix of this my Last Will and Testament, to serve without bond.

B. If Lois M. Borden shall for any reason fail to qualify or cease to act as executrix, I then nominate Charlotte Lane Bupnam also to serve without bond.

**SEVENTH**: I REVOKE ALL WILLS AND CODICILS THAT I HAVE PREVIOUSLY MADE.

MICROFILMED  
DATE 12/14/88  
BY D. Borden



the execut \_\_\_\_\_ of this my last will and testament, and direct that no bond be required  
of \_\_\_\_\_ for the faithful performance of  
\_\_\_\_\_ duties as such \_\_\_\_\_

and hereby revoke all former wills by me made.

In Witness Whereof I have hereunto set my hand this 28th  
day of JULY one thousand nine hundred and EIGHTY-FOUR  
at DANA POINT, ORANGE COUNTY, CALIFORNIA

*Dean Charles Burnham*

The Foregoing Instrument consisting of  
two pages, besides this one, was, on the day it bears date,  
by the said DEAN CHARLES BURNHAM  
signed, published by as, and declared to be HIS  
last will and testament, in the presence of us, who, at  
HIS request in HIS presence, and in the  
presence of each other, have subscribed our names as  
witnesses thereto.

*Serge M. Nelson*  
residing at 33852 Zaneta

*Dana Point, Ca 92629*  
*Nelson Cormier*  
residing at 1485 Mt Rose St Reno, NV 89509

*Lucretia Nelson*  
residing at 33852 Zaneta Dana Pt., Ca. 92629

STATE OF UTAH }  
COUNTY OF SALT LAKE }  
I, THE UNDERSIGNED CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.  
WITNESS MY HAND AND SEAL OF OFFICE  
THIS 28th DAY OF JULY 1984

WARNING: This will must be witnessed by at least two disinterested persons  
If the undersigned proper witnesses this will will be declared invalid

APPENDIX C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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IN THE MATTER OF THE ESTATE OF	:	MEMORANDUM DECISION
DEAN CHARLES BURNHAM,	:	PROBATE NO. P-84-1100
Deceased.	:	

-----

This matter comes before the Court on cross Motions for Summary Judgment.

Lois M. Borden filed a Petition in this Court for formal probate of the Will of the deceased Dean Charles Burnham. At the time of his death, the deceased was married to Charlotte L. Burnham and had two sons and two daughters.

Two of the children have objected to the probate of the Will claiming that they were not mentioned in the Will, and therefore under Section 75-2-302, Utah Code Ann., 1953 as amended, they are entitled to a share of the estate.

The pertinent parts of the Will are as follows:

FOURTH: I give, bequeath and devise all of my property, real and personal, of every kind and nature whatsoever, and wheresoever situate to my wife, Charlotte Lane.

FIFTH: In the event any beneficiary, legal heir, heirs of issue make claim under this Will, singly, or in conjunction with any other person or persons, or shall contest in any Court the validity of this Will, or shall seek to obtain an adjudication of any proceedings in any Court that any provision of this my last Will and Testament

is void, or shall seek otherwise to void, nullify, or set aside any of its provisions, then and in that event, the right of said person or persons shall be determined as if that person or persons had predeceased me, and the execution of all provisions of this declaration of my last Will and Testament without surviving issue. My executrix is directed to defend at the expense of my estate any contest or other attack of any nature whatsoever on this my last Will and Testament or any of the provisions thereof.

Section 75-2-302(a)(5), Utah Code Ann., 1953 as amended, provides as follows:

**75-2-302. Pretermitted children.--**(1) If a testator fails to provide in his will for any of his children or issue of a deceased child, the omitted child or issue receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:  
(a) It appears from the will that the omission was intentional;  
(5) If it appears from the will that the omission of a child of the testator was intentional and if no express provision is made in the will for the issue of the child, the testator will be considered to have intended to also omit the issue.

Utah adopted the Uniform Probate Code in 1975. The legislature in doing so made several modifications, one of which relates to Section 75-2-302, Utah Code Ann., 1953 as amended. The section of 75-2-302 is in fact a hybrid of the Uniform Probate Code and the former law. See, Utah Legislative Survey, 1977 Utah Law Review 521.

No Utah cases have been cited for the Court dealing with this statute although Matter of the Estate of Hilton, 649 P.2d 488 (N.M.App 1982) involves similar facts being applied to similar law.

The New Mexico statute is also a hybrid, but it is similar to the Utah statute in that it also provides that if a testator fails to provide in his will for any of his children or issue, the child will receive a share in the estate. See, N.M. Stat. Ann., 1978, Section 45-2-302.

In the Estate of Hilton, supra, case it was claimed that the trial court erred in receiving extrinsic evidence to determine the intent of the testator. In ruling on this point the court stated:

Although under Section 45-2-302(A)(1), supra, extrinsic evidence is not admissible to overcome the presumption against disinheritance and the intention to disinherit must appear in the language of the will itself, extrinsic evidence is admissible under the statute to attempt to prove the testator's intent to disinherit under the situations contemplated by Section 45-2-302(A).

649 P.2d at 491

It is clear from the holding in Estate of Hilton, supra, and the language of the statute itself that the intent of the testator in this matter must be determined from the face of the Will alone. For this reason Summary Judgment is appropriate.

The statute in question creates a presumption in favor of pretermitted children. This presumption can be overcome but only by examining the Will. The personal representative takes the position that the testator made clear his intention to exclude his children by leaving his entire estate to his wife. If a clause similar to the fourth paragraph of the Will in question can rebut the statutory presumption, it is difficult to imagine a situation in which a pretermitted heir could take from the testator's estate.

In Crump's Estate v. Freeman, 614 P.2d 1096 (Okla. 1980) the Supreme Court of Oklahoma held that "Testatorial disposition of the entire estate does not alone affirmatively evince an intent to omit to provide for a child or a deceased child's issue." 614 P.2d at 1099.

This Court holds, therefore, that the petitioner has failed to overcome the statutory presumption.

The personal representative next argues that pursuant to the fifth paragraph of the Will the children are prohibited from taking from the estate. The actions taken by the children cannot be construed as a contest of the Will. When an omitted child takes the position that he or she is a pretermitted heir, the child is not contesting the will, but rather seeks to take from the estate in spite of the Will. See, Estate of Hirschi,



113 Cal.App.3d 681, 170 Cal.Rptr. 186 (1980); In re Estate of Hilton, supra, and Crump's Estate v. Freeman, supra.

For the reasons stated above the objector's Motion for Summary Judgment is granted. The children of the decedent will be allowed to take their share of the estate as if the decedent died intestate.

Dated this 21 day of March, 1985.

151 Philip R. Fishler  
PHILIP R. FISHLER  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following this 21 day of March, 1985:

William L. Crawford  
Attorney for Personal Representative  
185 S. State, Suite 700  
P. O. Box 11898  
Salt Lake City, Utah 84147

Peter L. Flangas  
Mark S. Miner  
Attorneys for Objectors  
525 Newhouse Building  
Salt Lake City, Utah 84111

K. Grotapras

APPENDIX D

MAY 31 1985

H. Dixon Hindley, Clerk 3rd Dist Court  
By Philip R. Fishler  
Deputy Clerk

WILLIAM L. CRAWFORD (A0749)  
of and for  
PARSONS, BEHLE & LATIMER  
Attorneys for Petitioner  
185 South State Street, Suite 700  
P.O. Box 11898  
Salt Lake City, UT 84147-0898  
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \* \*

IN THE MATTER OF THE ESTATE	)	ORDER ON MEMORANDUM DECISION,
OF	)	ADMITTING WILL TO PROBATE, AND
	)	APPOINTING PERSONAL
DEAN CHARLES BURNHAM,	)	REPRESENTATIVE
	)	
Deceased.	)	Probate No. P84-1100
	)	Judge Philip R. Fishler

\* \* \* \* \*

Petitioner's Motion for Entry of Order on Memorandum Decision filed with the Court on April 22, 1985 came on for hearing before the above-entitled court, the Honorable Philip R. Fishler presiding, on the 6th day of May, 1985, Petitioner being represented by counsel, William L. Crawford, of and for Parsons, Behle & Latimer and Dean Charles Burnham, Jr. and Anna Marie Burnham (the "Objectors") being represented by their attorney, Mark S. Miner. After hearing arguments of counsel, it is hereby

ORDERED:

1. Objectors' motion for summary judgment is granted for the reasons set forth in the Memorandum Decision heretofore

FILE 6-17-85  
.. N. H. H. H.

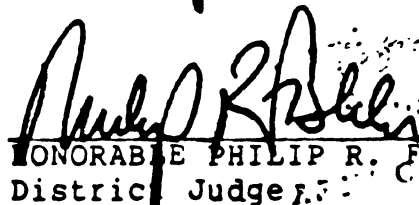
entered by the court on March 21, 1985, pursuant to which Dean Charles Burnham, Jr. and Anna Marie Burnham shall receive an intestate share of the estate as though Dean Charles Burnham had died intestate.

2. The Last Will and Testament of Dean Charles Burnham dated July 28, 1984 is a valid will and is hereby admitted to probate subject to the rights of Dean Charles Burnham and Anna Marie Burnham as pretermitted heirs as hereinabove set forth.

3. Lois M. Borden is appointed the personal representative of the estate, said appointment to be effective upon the filing by the personal representative of an acceptance of appointment, pursuant to § 75-3-602, U.C.A., and a bond pursuant to § 75-3-603, U.C.A., in an amount at least equal to the amount of the estate that will pass to Dean Charles Burnham and Anna Marie Burnham as pretermitted heirs, said bond to be for their exclusive benefit.

DATED this 31<sup>st</sup> day of May, 1985.

BY THE COURT:

  
HONORABLE PHILIP R. FISHLER  
District Judge

ATTEST:

H. DIXON HINDLEY  
CLERK

By K. Grotzger  
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Order of Memorandum Decision, Admitting Will to Probate and Appointment of Personal Representative to the following on this 8<sup>th</sup> day of May, 1985:

Mark Miner  
Attorney for Objectors  
525 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

7292D