

1949

William F. Kidman v. Garland Yonk, et al : Petition for Rehearing

Utah Supreme Court

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FILED IN THE SUPREME COURT
OF

THE STATE OF UTAH.

CLERK, SUPREME COURT, UTAH

IN THE MATTER OF THE ESTATE

OF

CHARLES YONK, Deceased.

WILLIAM F. KIDMAN, Administrator :
Appellant.

PETITION

FOR

VS

REHEARING.

GARLAND YONK, et al, Respondents.

Comes now appellant, administrator in the above estate, and prays for a rehearing and reconsideration of the decision rendered in the above matter, upon the following grounds:

1. The decision failed to observe and adhere to the rule that a mere reclassification of nieces and nephews (from next of kin to collateral heirs) is not sufficient, that there must be by statute, a corresponding grant of estate to them in their new status as collateral heirs.

2. The decision failed to observe or give any weight to the fact that in not a single instance in all eight sub-sections of our Succession Statute, Sec. 101-4-5, is the

principle of representation applied, where the heirs are all of equal degree of kindred to the decedent; that in all such cases the heirs share equally on a per-capita basis, that only where the heirs are in unequal degree of kindred to the decedent is the principle of representation applied.

3. The decision fails to note or lend any importance to the fact that, (except for decedent being a minor), sub-sections (7) and (8) are comparable in meaning and intent to (4) and (6) respectively, and thus by analogy indicate the intent and meaning of our succession statute on two important questions here involved:

(a) That (4) applies only if a brother or sister survives the decedent; and

(b) That if all the issue (of deceased brothers and sisters) are in the same degree of kindred to the deceased "they share in the estate equally otherwise they take by right of representation."

4. While the decision as rendered recognizes that "It is a familiar principle of statutory construction that where a statute has received a judicial construction and is afterwards adopted by another state it will be presumed to have been enacted with that construction placed upon it, "yet the decision fails to follow or adhere to that rule of construction, and fails to state why said rule of construction is not followed, or why it is "deemed clearly wrong."

- The decision likewise, quotes from 50 Am. Jur. 465, to the effect that " it is a settled rule of construction that... the legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation," yet the decision fails to follow or abide by that rule although it concedes that prior to 1933 (4) applied only if a brother or sister survived.

5. The decision, furthermore is in error, for it fails to be governed by other familiar principles of statutory construction, namely:

"Where the provisions of a statute are carried forward and embodied in a section of a revision or codification, in the same words, or in words which are substantially the same and not different in meaning, the latter provision will be considered a continuance of the old law and not as a new and original enactment....."

"As an aid in the construction of a statute, it is to be assumed or presumed that the legislature was acquainted with and had in mind the judicial construction of the former statute on the subject."

"It is a general rule of law, in statutory construction, that it is proper to resort to the decisions of courts of other states, construing statutory language which is identical or of similar import."

"In the enactment of statutes reasonable precision is required. Indeed one of the prime requisites of any statute is certainty, and legislative enactments may be declared by the courts to be inoperative and void for uncertainty in the meaning thereof."

"However, there are cases in which the words of a statute are so meaningless or inconsistent with the intention of the legislature, otherwise plainly expressed in the statute, that they may be rejected as surplusage and omitted, eliminated or disregarded."

6. The decision ignores or fails to answer or pass upon the points argued and cited by appellant to the effect that the change in (4) was trivial and did not and could not in the slightest degree change

the meaning of (4), which the decision concedes had a definite meaning and construction prior to 1933, e.g. that it (4) applied only if a brother or sister survived.

7. The decision likewise fails to answer or take any note of appellant's points and argument that reading (4) and (6) together, as they now stand, not only makes the statute ambiguous, indefinite and uncertain, but presents the possibility of part of the estate escheating to the State.

8. While the decision recognizes the rule that "a change in the language of a revised statute does not necessarily indicate an intention to alter the law, and the presumption is that no such purpose was intended," it also failed to abide by or be guided by that rule of construction.

9. The decision errs and is not consistent in comparing the changes made in (3) and (5) with those made in (4) and (6) and in concluding therefrom that the changes made in the succession statute "were substantial changes and point to an intent to alter the succession of estates," for:

a. Sub-sec. (3) and (5) deal with a different question, the relative right of succession between surviving husband or wife as against surviving children of deceased brothers and sisters, and operates differently.

b. Sub-sec. (3), like (4) was not changed so far as children of brothers and sisters are concerned.

c. The same word or words "nor children or grandchildren" in the two sections are not given the same meaning by the decision, for in (5) "nor" means that these children or grandchildren do not exist--did not survive the decedent. In

(6) "nor" does not mean that at all, according to this decision. It means that these " children or grandchildren " (whom the statute assumes to be non-existent) have simply been reclassified from the " next of kin class " to collateral heirs; that they have thus been excluded from taking under (6) , and without the statute saying so, the decision proceeds to hold that these heirs must now take by representation under (4), whether or not a brother or sister survived. The decision concedes that this contrary to the admitted meaning and interpretation of (4) prior to 1933, but holds that the legislature must have so intended, even though the clear and unequivocal wording in (6), assumes as its premise, that these heirs (nieces and nephews) are non-existent - that the decedent did not leave them surviving.

10. The paragraph which follows the quote, (middle of page 4) is also in error when it says "The revision of this sub-section (5) clearly indicates an intent to have the children of a deceased brother and sister....share in an estate ahead of other kin not so closely related." for there were no other kin specified in the statute, (who were not so closely related) who inherited under (5) prior to 1933. Furthermore, not even children of deceased brothers and sisters shared in the estate under (5) prior to 1933, hence the analogy between (5) and (6) is not helpful in this case.

11. The analogy between (5) and (6) further fails, and the decision is in error in stating "The important changes intended by the revision are apparent when (5) and (6) of the later enactment are compared with the same sections of the earlier statute." For, sub-sec. (5) as amended in

connection with (3), cuts down or limits the rights of the surviving husband or wife, when children of deceased brothers or sisters do survive the decedent. Whereas (5) in connection with (4), as now interpreted and by this judicial decision, has the unique function of not only reclassifying children of deceased brothers and sisters (from next of kin to collateral heirs), but also of granting to them an estate by representation when they do not survive the decedent. Hence (5) "extends preference" to these children, if they do not survive the decedent, "over the less preferred, next of kin, class."

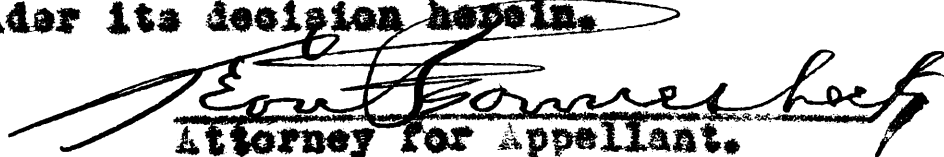
12. The decision further errs in failing to observe the rule that where the construction of a revision in inheritance statute is in doubt, the court will adhere to the prior statute, or will give such construction as will result in justice and equity.

13. This court erred in holding and concluding that the "legislature intended children or grandchildren of any deceased brother or sister to take under (4) and not under (3)...regardless of whether any brother or sister" survived the deceased.

LEON FOMMELBECK
Attorney for Appellant

The undersigned respectfully states and submits that the above cited errors are meritorious and committed; that the decision herein ought to be reconsidered and re-examined.

Therefore the petitioner prays that this Honorable Court grant a rehearing and reconsider its decision herein.


Attorney for Appellant.

7.

ARGUMENT.

In the interest of brevity, I shall refer to the alleged errors above stated, by number, without restating them; and shall then proceed to argue each one separately. When I refer to page, (pg-), the reference is to page in appellant's main brief, unless otherwise stated.

1. It should be kept in mind that prior to 1933, Utah (4) and (6) were identical with California Civil Code Sec. 1386 (3) and (5), (pg. 6,11). That in 1931 the California legislature changed its succession statutes, and (3) and (5) became known as secs. 225 and 226 of Probate Code, and respectively provide.- See page 15,14. Thus Sec. 225 (formerly the same as Utah (4)) was changed to grant the estate "...in equal shares to his (decedent's) brothers and sisters and to the descendants of deceased brothers and sisters by right of representation."

Thus California not only reclassified nieces and nephews to take by representation, instead of equally as next of kin, but on a broad basis the California statute granted the estate to them (to all descendants of deceased brothers and sisters) direct in their new status as collateral heirs, to take by representation instead of equally as next of kin. This our revised code does not do.

In a similar manner the New Jersey statute granted the estate "...equally to brothers and sisters and to representa-
tives of deceased brothers and sisters.
(pg. 31).

The New Jersey Supreme Court observed that the terms of the statute " are not mere words of description, but are clearly intended to indicate the capacity in which

the representatives of deceased brothers and sisters shall take or share in the estate." (pg. Reply Brief). The Minnesota and Tennessee Statutes, were likewise clear on a grant of estate to these heirs in their new representative capacity (pg 30-31). The most that can possibly be claimed for our code change are mere words of description, and even that is equivocal. "This court supplies the grant of estate by holding the legislature intended these heirs should take under (4) and not under (6), whether or not a brother or sister survived the deceased. That is error for that is pure and simple legislation by the court. The bar reader tried to enact new legislation by a short cut.

2. I set forth the granting part of each of the eight sub-sections of our succession statute (pg. 28, 29). They show one uniform important principle applied throughout all eight sub-sections, - that where the heirs are equally related to the decedent they share equally in his estate; also, that the representative principle is applied when and only when the heirs are unequally related to the decedent; and that this is true of both collateral and lineal heirs.

Hence, as the amendment by the bar reader or code commission is not only in conflict with the original act and theory of our succession statute (as I further show under No. 3), but is a substantial alteration therefrom, and this Court should be slow to accept the same, but should, for this reason, hold that the act as originally passed by the legislature controls. Authorities (pg. 25).

3. It must be conceded under the express provisions of (8) that if the decedent Charles Yonk, had been a minor, under the age of 21 years, then his estate would be

distributed under sub.sec. (8) to his 24 nieces and nephews herein equally, on a per capita basis.

Why should his estate be distributed to his heirs on a per capita basis, if decedent was under 21 years of age, and on a representative basis if he was over 21 years? It is unreasonable to assume that the legislature intended any such conflict, inconsistency or contradiction in our inheritance statute.

Furthermore, the fact that his (minor's) estate would pass under (7), comparable to (4) only if a brother or sister survived, (which was not changed), is strong evidence that the legislature did not intend that decedent's estate should pass to his nieces and nephews under (4), when no brother or sister survived.

Certainly the bar reader and the code committee had in mind the judicial construction placed on (4) and (6), for in their report to the legislature (pg 12) they refer to "the decisions of its (California's) courts under a statute identical with ours."

In view of this fact and the familiar principle, which the decision frankly admits, and in view of the further fact that (4) was not changed in any material respect, I submit it follows (under the familiar rule of construction acknowledged in the opinion) and it will be presumed, that the code revision was enacted with that judicial construction in mind, as placed upon (4) and (6) by the California Supreme Court, (for California (3) and (5) were identical with Utah (4) and (6), and that the legislature so intended.

Hence it follows that the legislature understood and had in mind that (4) had been construed to apply only if a brother or sister survived the decedent; and so intended the succession law to be continued in this State, for they made no change in (4) so far

as the heirs herein are concerned.

In view of this fact, and also in view of the further rule of construction, acknowledged in the opinion, that "the legislative intent to change the former statute must be clear before it can be pronounced...", I submit it follows, and this Court should hold:

(a) That (4) was not changed and was not intended to be changed, and

(b) That the negative, self-contradictory, inconsistent and meaningless phrase in (5) "nor children nor grandchildren of any deceased brother or sister" should be disregarded, and the original act by the legislature held to control.

Certainly this would be in harmony with the general principle of our statute, that the heirs share equally when they are equally related. It would also be in harmony with the general rules of law to that effect. Cited, (pg. 27, 28). Clearly this would also be in the interest of justice and equity, for the heirs herein are all equally related to decedent.

"The result which will follow one construction or another of a statute is often a potent factor in its interpretation."

".. The law is presumed to be equitable, and it is a reasonable and safe rule of construction to resolve any ambiguity in a statute in favor of an equitable operation of the law." Authorities cited (pg. 36-38.)

If the law of succession in Utah is going to penalize large families, when pioneer religious and social economy has been based on large families in this State, I submit that such important change and departure from our inheritance statute, should be made by the legislature, as the representatives of the people, and not by a code committee, or bar reader.

5. The authorities supporting these stated general rules and principles of statutory construction are cited, (pg. 9, 23, 34, 35.)

6. The court cannot properly decide upon the law which applies, until it first determines the facts. In this case we contend the fact to be that (4) was not substantially changed or amended, indeed it was not changed or amended at all so far as the heirs herein are concerned. Are we correct in that contention? Appellant is, I submit, entitled to have the court definitely decide and pass upon that question, for it is one of the pivotal points upon which this case turns.

General *a priori* statements in the decision, that the code revision change as made is "clear-substantial-material" and shows a clear intent on the part of the legislature to change the succession statute of this State," etc. are not sufficient, for such general statements not only avoid the specific question presented, but assume or beg the very important question presented in this appeal.

I believe the court will agree that we are within our rights when we insist that the court pass upon the important question here presented. So we ask again, was (4) changed in any substantial or material respect? If the court agrees with us that it was not, then we are entitled to that ruling. If this court disagrees with us and holds that (4) was substantially changed, then we are entitled to have this court state how, by merely adding "or grandchildren" in (4) could substantially change or alter the meaning of that section, so far as the heirs herein are concerned?

If the court holds with our contention that (4) has not been substantially changed, then definite questions of statutory construction at once present themselves:

If (4) has not been amended, is the

6) not only makes the code revision on this matter meaningless, inconsistent, uncertain and ambiguous, but also because it presents the possibility of escheat of part of the estate (pg.18-21).

The last point, -possibility of escheat, should not be lightly waived aside. For the case which we supposed (where the third deceased brother left only great-grandchildren) were the facts in the California Ross case, the injustice of which the bar reader sought to correct.

Respondent's counsel failed to answer our question, - who would inherit the 1/3 share of decedent's estate, which would otherwise have gone to the third deceased brother (who left only great-grandchildren), had he survived the decedent? This decision also, fails to answer or pass upon that important question.

We submit there is no answer, except that said 1/3 share would escheat to the State. For the children of the first brother, are limited to take by representation their father's 1/3 share and no more. Likewise are the grandchildren of the second deceased brother, limited by representation to take their father's 1/3 share and no more. The great-grandchildren of the third brother could not take as next of kin under (6), for they are not the next of kin; the children of the first deceased brother are in fact the next of kin. The court will observe that this problem of escheat is presented because of the wording used by the code committee, - "children or grandchildren of deceased brothers or sisters."

The court cannot ignore this question of escheat merely because it is not here involved, or because it may be considered a remote possibility. The facts which we supposed, actually occurred in the Ross Case.

When passing upon the validity of a code revision, the court must carefully check the workability of the revision from every possible angle, to decide its validity

and ascertain if the legislature so intended. If the possibility of escheat lurks in the code revision, I submit that becomes a strong argument for its validity, for the legislator could not have so intended.

8. I think this Court will concede that it is hardly fair to appellant, and certainly of little help to the bar or the courts, for future reference, for this Court to recognize and admit many of the statutory rules of construction contended for by appellant, and then brush them aside and fail to follow them, because "in this case the intent of the legislature is clear," etc.

9. I submit it is not helpful to compare the changes made in (3) and (5) with those made in (4) and (6), for (3) and (5) deal with different questions and operate differently. The negative phrase "nor children or grandchildren of deceased brothers and sisters" in (5) assumes that these children or grandchildren are not in existence, hence the surviving wife takes all the estate.

I submit that the same negative phrase in (6) should be construed to mean the same thing,--that these children and grandchildren are assumed by the statute to be non-existent, that the decedent did not leave them surviving. That is one big reason we contend that when that negative phrase is inserted in (6) it makes the statute ambiguous, meaningless, indefinite and uncertain, if we still have to assume that the legislature figured these heirs were alive and intended they should take under (4).

But the decision holds that this negative phrase in (6) cannot be ignored, that it must be given some meaning, so it holds that the legislature intended that the heirs herein (whom the statute supposes to be non-existent) have been excluded in (6) and must be held to take under (4) whether or not a brother or sister survived.

10. I do not understand what the court means by its statement " share in the estate ahead of other kin not so closely related." What other kin?

11. I believe further consideration and comparison of (5) and (6) of the later enactment, with the same sections prior to 1933, will not only show that the bar reader's recommendations (pg. 12), did not "follow amendments made by the California Legislature" as the Code Committee reported, but was a short-cut method of attempted important legislation, which is not workable, is self contradictory, and has resulted in utmost confusion and uncertainty.

I have already pointed out, and the decision agrees, that the prefix "nor" in (5) means that said "children or grandchildren" of brothers or sisters are not in existence,-- did not survive the decedent. Why does not the same prefix "nor" with the same inserted wording in (6) mean the same thing in (6) ? --that said children or grandchildren of deceased brothers or sisters are not in existence-- did not survive the decedent?

I submit the court should recognize and hold that (6) is now written and based upon the premise that the heirs herein, did not survive the decedent. Sub-sec. (6) reads: If the decedent leave neither issue, husband, wife, father, mother, brother nor sister, nor children or grandchildren of any deceased brother or sister, the estate goes to the next of kin in equal degree.

The decision holds that (6) excludes the heirs herein. But does it? Why exclude any one who did not survive? who is not in existence? It just does not make sense.

On the other hand (5), prior to 1933, did not give nieces and nephews any part of the estate, unless a brother or sister survived. But the amendment to (5) in connection with (3) grants them 1/2 of the estate above \$25,000.00.

Whereas (6) prior to 1933, clearly granted the estate to the heirs herein equally. Thus the heirs herein had definite

estate rights under (6) which they did not have under (5), prior to 1933. The code revision granted them definite estate rights under (5), but left them in doubt and confusion under (6).

I submit that (6) as now written is not in reality an exclusion of the heirs herein, it just assumes that these heirs did not survive decedent. But they did survive.

We contend the premise in (6) is wrong, as to the heirs herein, hence (6) is not an exclusion of them. They are all alive. They all survived the decedent. They are in fact the next of kin, equally related to him. They have not been properly reclassified, so why should they not share equally in his estate?

12, 13. I can only hope and pray that this Court carefully consider the points herein, and will agree with at least some of the points I have attempted to set forth, to the end that this Honorable Court will apply the rule that where the construction is in doubt in a code revision, the court will adopt and apply the prior statute, enacted by the legislature; or will apply the rule which requires that such construction should be reached as will result in justice and equity (pg. 9, 25, 37, 38).

Either or both of these rules will lead to the same results, and will also carry out the stated general policy in our succession statute, that where the heirs are equally related to the decedent, they share equally in his estate.

Respectfully submitted,

LEON FONNESBECK
Attorney for Appellant.