1949

William F. Kidman v. Garland Yonk, et al : Reply Brief

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

In the Matter of the Estate of
CHARLES YONK,
Deceased.

Reply Brief

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We shall try to reply to respondent's brief in short clear statements. Although we pointed out in our main brief that the amendments to sub. Sec. 4 and 6 were made by the **Code Committee,** and that a change so made is not entitled to the same weight as a legislative enactment (pg. 25) counsel nevertheless continues to say and repeat, time and again, that said amendments "were made (or enacted) **by the legislature."**

We cannot agree with their statement on the middle of page 3, that, in Sec. 101-4-5 the legislature placed heirs in **three classes:** (1) lineal, (2) collateral, and (3) next of kin. Sec. 101-4-13 expressly provides for only two classes:-(1) direct line or lineal consanguinity, and (2) those who "do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity." Sec. 101-4-15 provides how degress in the direct line (lineal) are counted; and sec. 101-4-16 provides how degrees of consanguinity are counted in the collateral line. There is no classification of next of kin as a separate and third class of heirs in our statute.

Nor do we agree with counsel's statement on page 3, and again at the bottom of pg. 23 that sub. secs. 7 and 8 deal with lineal descendants. We submit that those two sections deals with collateral heirs. Thus, sec. (7) provides for the estate of a deceased unmarried minor child, to go to his brothers and sisters,—"the other children of the same parent and to the issue of any such other children who are dead, by right of representation." Sec. (8) provides that if the brothers and sisters of such deceased minor child are all dead, "then the estate that came to the deceased child

by inheritance from his parents, descends to the issue of all other children of the same parent, and **if all the issue are in the same degree of kindred to the child, (uncle) they share the estate equally, otherwise** they take by right of representation."

Counsel did not answer our argument (page 29) when we submitted (8) as practically controlling the case at bar, to show the intent of the legislature, and the meaning of legislature, and the meaning of our statute as a whole. Why not give the court the benefit of their answer, if they have one? We again submit that (8) should be held to be largely controlling in case at bar.

Instead of meeting and answering that argument, they content themselves by erroneously classifying sec. (8) as dealing with "lineal descendants." They say, (page 27) "There is no dispute that the legislature provided that in all instances where the lineal descendants of a decedent are in equal degree, they inherit equally. (sub-sections 1, 2, 7 and 8)."

At the bottom of page 4, counsel say, "The purpose of this amendment (adding 'or grandchildren' to sub. sec. 4) was to bring the law in harmony in all its aspects regarding the distribution of property to collateral heirs, thus providing that in each instance, collateral heirs to and including grandchildren of deceased brothers and sisters should inherit by representation."

Just how that amendment to (4) brought "the law in harmony in all its aspects regarding the distribution of

property to collateral heirs" counsel fails to explain.

Counsel likewise carefully avoid answering our argument (set forth point by point on pages 12-26) wherein we claim that (4) and (6) are ambiguous, indefinite and uncertain as they now stand, (if they are to be read together) and why we contend that the negative phrase "nor children or grandchildren of any deceased brother or sister" in (6) should be disregarded by the court, because of its confusion, uncertainty, and ambiguity; and the heirs herein should be held to take equally as next of kin under (6), as they did prior to that purported amendment.

It is no answer to say, as counsel do on page 6, that "prior to 1933, collateral heirs, after brothers and sisters were treated as next of kin, where there was no surviving brother or sister (6)," nor that "by the amendment our legislature provided that children or grandchildren of any deceased brother or sister of decedent would not thereafter inherit as next of kin under (6),—that they were expressly excluded from its provisions." To point out where the heirs herein were **excluded,** merely shows a negative, a mere vacancy. Why don't they point out, if they can, wherein the heirs herein, have been positively provided for under our statute? Where the statute states in what capacity they shall take or share in this estate?

For the sake of argument we conceded (on page 26) that the apparent purpose of inserting that negative phrase in (6) was to take nieces and nephews out of their former classification as next of kin, and classify them as collateral heirs. But we there stated mere re-classification was not enough. That "there must be a corresponding grant of

succession of estate to them as such collateral heirs, otherwise there is a hiatus in the statute. Mere changing of the classification is not sufficient."

Why didn't counsel answer that point? Counsel merely say, (pg. 6) "but they would inherit as collateral descendants under subsection 4."

Thus they beg the very question at issue. Why don't they explain, if they can, how or why the heirs herein would "inherit under (4)," when that subsection had theretofore been construed (as they admit in their brief) to apply only where a brother or sister survived? Why don't they tell the court how they avoid the rule that if a section has been codified from a judicial decision, it is to be construed in the light of such prior judicial construction? That the prior court interpretation is presumed to be continued as the legislative intent after the amendment? That "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 (4) on the subject."

We cited and pointed out those rules of construction on pages 9-10 and 19-23, of our main brief, citing the authorities. But counsel make no answer. We submit that their silence amounts to an admission that said rules of construction should apply here; that adding the words "or grandchildren" in (4) did not and could not change the meaning, operation and effect of section (4) from the prior judicial interpretation given that section, and hence it should and will be presumed in case at bar that the legis-

lature intended that (4) should still apply only if a brother or sister survived.—And the fact that the heirs herein have been excluded by the amendment in (6) cannot change or affect the meaning of (4), but only shows how ambiguous and uncertain (6) now is, and why the purported amendment to (6) should be ignored and disregarded until the legislature sees fit to clarify the statute.

We think counsels' analysis (page 15) of the two California cases—Estate of Nigro—156 P. 1019, and the Ross Estate 202 P. 614 is incorrect and unsound. They say the California court's conclusion "was the result of the interpretation of subsections 3 and 5 of the California act and not only subsection 3 thereof as appellant would have the court believe. The court said that subsections 3 and 5 of the act must be construed together. Subsection 3 of the California act and subsection 4 of our act are substantially the same, whereas subsection 5 of the California act and subsection 6 of our act are materially different."

The big point which counsel overlook, is, that in both of said California cases, a number of the heirs, (grandnieces and grandnephews and great-grandnieces and great-grandnephews) were claiming that the estate should be distributed under (3) by **representation**. But the court held, in both of said cases, that (3) did not apply, when no brothers or sisters survived the intestate; and hence the court, in both of said cases, distributed the entire estate under (5), equally (per capita) to the next of kin,—to the nieces and nephews. Thus the more distant heirs were excluded, who would however, have participated if the estate had been distributed under (3) on a representative

basis.

When counsel concedes that "Subsection 3 of the California act and subsection 4 of our act are substantially the same" we submit counsel must also concede that, at least so far as said California cases are concerned, Utah (4) does not apply unless a brother or sister survives the intestate.

Counsels' further analysis and conclusion is equally unsound. They say, "In contrast to this, however, our act (6) provides that 'children or grandchildren of a deceased brother or sister' are expressly excluded from inheriting as next of kin under subsection 6, and they can only inherit under subsection 4, which provides for inheritance by representation." We have already answered that argument: that merely because these heirs are excluded in (6) is no reason why they should be held automatically to take under (4), when (4) does not apply to them.

Just why the court should do some legislation here (so that respondents could take the lion's part of this estate), counsel does not explain. When it is conceded that (4) did not apply, and had been construed not to apply, unless a brother or sister survived, how can the court now be asked to hold that (4) automatically applies, because of some abortive change or amendment in (6)?

That is why we contend that the purported amendment to (6), make both (4) and (6) ambiguous and indefinite, especially if counsels' argument is followed. That is why we also contend that because of the confusion and uncertainty, caused by that (abortive) amendment to (6),—inserting the negative phrase "nor children or grandchildren

of any deceased brother or sister" in (6), this court is warranted in disregarding and ignoring said amendment and in distributing this estate under the provisons of (6), pror to the purported amendment, equally to the next of kin; under which all of the heirs herein will share or take on a per capita basis.

We have no quarrel with counsels' statement (pages 9 to 10) of the Minnesota statute and decision. As far as quote is applicable we think it supports appellant's contention in case at bar.

Their cited statute and quotation (pg. 11-13) from New Jersey are not helpful in case at bar. For the New Jersey statute was clear and definite; it was not subject to all the ambiguity, uncertainty, and possibility of escheat, which now exists under Utah (6) under the purported amendment.

The quote by counsel from the New Jersey court, (at the bottom of page 12 and top of page 13) supports our contention that mere words of description or reclassification is not enough, but that there must be a statutory grant stating in what capacity these heirs shall take or share in this estate. The New Jersey court observed that the effect of the amended statute was to deprive nieces and nephews of distribution to them on a per capita basis, as next of kin, "for the terms of the statute, in its reference to the representative of deceased brothers and sisters, **are not mere words of description, but are clearly intended to indicate the capacity in which the** (children) **representatives of deceased brothers and sisters shall take or share**

in the estate."

The quotation from the Tennessee court, (pg. 13-14) is not helpful, for that statute was obviously different from (4) and (6) of our statute.

The quotation from the California court in case of Van Tiger vs The Superior Court, 60 P. 2nd 851, (pg. 16-18) to the effect that California has now held, that under the late amendments, (Sec. 225, 226, California Probate Code) that nieces and nephews now take by representation, and not per capita, does not help respondents. That decision was made under the new California Probate Code, where Cal. (3), (Utah (4), was entirely rewritten and reworded so as to overcome the prior California decisions that (3) applied only when a brother or sister survived.

We discussed these amendments in the California law and compared them with the Utah amendments, on pgs. 13-15 of our main brief. Although we had not then run across the Van Tiger case, we anticipated that such would now be the interpretation of the new sections 225, and 226, and so stated on page 14. No claim is made that Utah (4) has been similarly amended; and no such claim could logically be made.

On page 20 counsel say they can dispose of our concern of **escheat** in a few words. "In his hypothetical case, the property would all vest in the surviving heirs, the heirs of the surviving brothers. There would be no escheat to the estate. This is elementary." But in the case we supposed (pg. 16-18) there were no surviving brothers. All three brothers had predeceased the intestate. So will counsel

please try again? If it is so elementary, who would take or inherit the share which would have gone to the third brother who left him surviving, only great grandchildren?

Neither do counsel answer the dilemma, which we said contestants were in, (at bottom of page 24 and top of pg. 25 of our brief) although we asked them to do so. At the top of pg. 25 we said, "We hope counsel will clear up, if they can, the **confusion, ambiguity, uncertainty, injustice,** and possibility **escheat** which is now packed in (6)."

We do not think it is helpful to the court for counsel merely to keep saying that the amendments to (4) and (6) "are clear and unambiguous", when they fail or refuse to answer the specific points of ambiguity, uncertainty, confusion, injustice and possibility of escheat, which we raised and pointed out in our main brief.

Counsel say that we dscuss too much the "injustice" of the effect of the amendments to (4) and (6), (if construed as contended for by the respondents), that the question of the justice or injustice of inheritance statutes is for the legislature and not the courts.

Our reason for this discussion on "injustice" (pg. 12), was the statement of the Code Committee, that said amendments had been made "to meet the injustice resulting from the decision of its (California) courts under a statute identical with ours."

We showed in our main brief that this so called "injustice" had not been remedied by the Code Committee, but had in fact been aggravated, if (4) and (6) are to be in-

terpreted and construed as contended for by respondents. Why didn't counsel answer our argument in that respect, if they had an answer?

Respectfully submitted,
LEON FONNESBECK,
Attorney for Appellant