

1951

# Dora B. Goddard and John A. Bundy v. Lovina R. Bundy : Reply Brief of Appellants

Utah Supreme Court

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Thatcher & Young; Attorneys for Appellants;

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[ 7540

Case No. 7540

IN THE SUPREME COURT OF THE  
STATE OF UTAH

In the matter of the Estate of ORA  
BUNDY, Deceased.

DORA B. GODDARD and JOHN A. BUNDY,  
Appellants,

vs.

LOVINA R. BUNDY, as Administratrix  
and personally,  
Respondent.

APPELLANTS' REPLY  
BRIEF.

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Ogden, Utah.

ATTORNEYS FOR  
APPELLANTS.

**FILED**

JAN 16 1951

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Clerk, Supreme Court, Utah

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Personally,  
Respondent.

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ADDITIONAL ARGUMENT ON  
APPELLANTS' POINT 1.

Point 1: Furniture, the property of  
the estate, has not been but should be  
inventoried and accounted for by respondent  
administratrix.

Respondent in her brief has presented  
a theory and raised an argument not con-  
sidered in appellants' brief nor in the  
court below and after some consideration

we have come to the conclusion that it will be helpful to the court if we present briefly our views with respect thereto. Briefly the argument of the respondent is that under Section 101-4-6, Utah Code Annotated 1943, respondent as the surviving widow was entitled to all of the furniture, fixtures, etc., of the decedent as property exempt from execution, and therefore should not be required to account for the same.

We submit that the argument is not valid.

In the first place this point was never raised nor argued nor submitted in the court below. At the trial below the respondent took no position with respect to the demand for the accounting as to the furniture, etc., except to state that she would charge herself with the value of the furniture taken from the Brigham City home (which she did

not do) and the court took the position that all of the furniture was joint property passing to the widow by survivorship as indicated by the court's findings.

The failure to raise this point below might well be conclusive on respondent here, for it's elementary that points not raised below may not be heard for the first time on appeal.

Huber vs. Newman  
106 Utah 363  
145 Pac. 2nd 780.

Summit County v. Gustavson  
18 Utah 351, 54 Pac. 977.

Mansfield vs. Sinaloa  
Land and Fruit Company  
43 Utah 417, 134 Pac. 1017.

However, having in mind that the spirit of the new rules of procedure contemplates that all issues should be heard on the merits wherever possible, we desire to discuss briefly the merits of respondent's contention. It is

submitted that the point attempted to be made by respondent fails on the merits.

In the first place the respondent-widow-administratrix never had the property appraised and set aside to her as exempt as required and contemplated by the statute on which she attempts to rely and that statute itself obviously contemplates the inventorying of the property and its setting apart on petition after notice and hearing. In effect the statute requires the administratrix to account for such exempt personal property by including it in an inventory and then having it removed therefrom by order of the court setting it apart to the widow and/or minor children.

In the second place under a statute not cited by respondent all such property

so set apart to her should in any event be charged against her as a part of her distributive share and this the widow and the court below have refused to do.

Under Section 104-37-13 the following furniture might have been claimed by the widow under section 101-4-6, if she had included it in the inventory, and then petitioned to have it set apart to her.

Tables, chairs and desks to the value of Two Hundred and 00/100 Dollars (\$200.00).

The library (if any).

Necessary household table, and kitchen furniture to the value of Three Hundred and 00/100 Dollars (\$300.00).

One sewing machine (if any).

All pictures and their frames.

All carpets in use.

All wearing apparel.



"All beds or bedding of every person or family."

The decedent's home was lavishly and expensively furnished. Furniture and furnishings were still in wartime shortage and values were high. Second hand stoves, refrigerators and miscellaneous furniture in good condition were selling at little reduction from the price of new materials. Moreover, the Brigham City house occupied by Jack also had furniture of substantial value.

And yet the respondent-administratrix, notwithstanding her trust obligations, chose not to follow the procedure fixed by law for setting apart exempt property, but rather to resolve in her own favor the conflict between her personal interests and her official duties, and to appropriate, in violation of her trust, this valuable property to her own use without even advising the court of its

existence, or giving the official appraisers a chance to fix the value thereof, and to see whether it was all exempt.

Until it was set apart to her by the Court on petition and notice, she held this property only as custodian for the court and the heirs, and had no right whatever to convert it to her own use. The law has a harsh name for those who, without authority, convert property in their custody to their own use.

We submit that the Administratrix should be compelled to inventory all of the household property, and to have it appraised at its value as of the date of death, and then to distribute it (or its value, if she has disposed of it) in accordance with law and the direction of the Court.

Moreover, it must be observed that

under the provisions of Section 101-4-8, U.C.A., 1943, (which respondent failed to cite)

"The value of such part of the..... exempt personal property as may be set aside to the surviving wife..... shall be deducted from the distributive share provided for such survivors."

In this case the widow-administratrix has appropriated both exempt and non-exempt property without any due process of law, and still refuses to charge herself therewith as required by law, or to make any accounting therefor. The low<sup>er</sup> court's refusal to compel her to account should be reversed, and she and her bondsman should be required to account for this property, and respondent should be charged with its value on the final distribution.

It is therefore submitted that the appellants' point 1 is well taken and that the judgment of the court below should be reversed and the cause remanded

with instructions to require the  
administratrix to account for all of  
the personal property of the decedent,  
including household furniture and fur-  
nishings.

Respectfully submitted,

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