

1979

# In The Matter of The Estate of Annie B. Gardner, Aka Annie Butler Gardner And Gloria G. Fenton And Tess G. Sorenson v. Gaylord W. Gardner : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Sumner J. Hatch; Attorney for Appellants H. Ralph Klemm; Attorney for Respondent

---

## Recommended Citation

Brief of Respondent, *Gardner v. Gardner*, No. 16418 (Utah Supreme Court, 1979).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/1728](https://digitalcommons.law.byu.edu/uofu_sc2/1728)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF  
ANNIE B. GARDNER, aka  
ANNIE BUTLER GARDNER,

Deceased.

GLORIA G. FENTON and  
TESS G. SORENSON,

Appellants,

-vs-

GAYLORD W. GARDNER,

Respondent.

Case No. 16418

BRIEF OF RESPONDENT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE CHRISTINE M. DURHAM  
District Judge

H. RALPH KLEMM  
510 Ten Broadway Building  
Salt Lake City, Utah 84101  
Attorney for Respondent

SUMNER J. HATCH  
72 East 4th South, Suite 330  
Salt Lake City, Utah 84111  
Attorney for Appellants

FILED

SEP 18 1979

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF  
ANNIE B. GARDNER, aka  
ANNIE BUTLER GARDNER,

Deceased.

GLORIA G. FENTON and  
TESS G. SORENSON,

Appellants,

- vs -

GAYLORD W. GARDNER,

Respondent.

Case No. 16418

BRIEF OF RESPONDENT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE CHRISTINE M. DURHAM  
District Judge

H. RALPH KLEMM  
510 Ten Broadway Building  
Salt Lake City, Utah 84101  
Attorney for Respondent

SUMNER J. HATCH  
72 East 4th South, Suite 330  
Salt Lake City, Utah 84111  
Attorney for Appellants

## TABLE OF CONTENTS

	PAGE
NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF THE FACTS . . . . .	2
ARGUMENT . . . . .	5
POINT NO. I   THE DISTRICT COURT PROPERTY RULED THAT DECEDENT'S ESTATE SHOULD BE DISTRIBUTED IN ACCORDANCE WITH UTAH LAWS OF INTESTATE SUCCESSION . . . . .	5
POINT NO. II  THE DISTRICT COURT WAS NOT REQUIRED TO ENTER FINDINGS OF FACT & CONCLUSIONS OF LAW . . . . .	9
CONCLUSION . . . . .	11

## CASES CITED

Auerbach v. Samuels, 9 U2d 261, 342 P2d 879 . . . . .	8
In re Beal's Estate, 117 U 189, 214 P2d 525(1950) . . . . .	6
In re Corwin's Estate, 383 P2d 339 . . . . .	8
In re Jackson's Estate, 464 P2d 1011, 11 Ariz. App. 424 . . . . .	8
Larsen v. Paskett, 29 U.2d 360, 510 P2d 520 . . . . .	6
Nichols v. First Security National Bank of Baker, 264 P2d 451, 191 Ore 659 . . . . .	7

## STATUTES CITED

Utah Code Annotated, 24-4 . . . . .	7
Utah Code Annotated, 72-2-31 . . . . .	5
Utah Code Annotated, 74-1-1 . . . . .	7
Utah Code Annotated, 74-2-30 . . . . .	5
Utah Code Annotated, 75-3-1001(1) . . . . .	4, 9
Utah Probate Code, 75-2-101 . . . . .	7

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF  
ANNIE B. GARDNER, aka  
ANNIE BUTLER GARDNER,

Deceased.

GLORIA G. FENTON and  
TESS G. SORENSON,

Appellants,

-vs-

GAYLORD W. GARDNER,

Respondent.

Case No. 16418

BRIEF OF RESPONDENT

NATURE OF THE CASE

This case involves the construction and interpretation of the testamentary provisions of decedent's holographic Will.

DISPOSITION IN LOWER COURT

Upon the Petition of decedent's grandson, Gaylord W. Gardner, the District Court of Salt Lake County, with the Honorable Christine M. Durham presiding, ruled as a matter of law that decedent's holographic Will failed to make any disposition of decedent's property and that decedent's estate shall be distributed in accordance with and pursuant to the Utah laws of intestate succession, as set forth in the Utah Probate Code. The court ruled further that the petitioner and his brothers and sisters are heirs by representation of the decedent and are thereby entitled to share in her estate.

### RELIEF SOUGHT ON APPEAL

Appellants are asking the Supreme Court to reverse the Order of the District Court that decedent's estate be distributed in accordance with Utah laws of intestate succession and to remand the case to the lower court with instructions to distribute the estate solely to the two daughters of the decedent.

### STATEMENT OF THE FACTS

Annie B. Gardner died in Salt Lake City, Utah, on March 28, 1976, leaving an estate consisting of substantial real and personal property. Decedent was survived by her husband, Wilford W. Gardner, and two daughters, Gloria G. Fenton and Tess S. Sorenson. Her only son, Wilford B. Gardner, preceded her in death, leaving 6 children surviving him. The Respondent is one of those children, and he is acting for himself and for the other 5 children in connection with the probate of his grandmother's estate.

The decedent left a holographic Will that disposed of her entire estate in the following language: (R.38-9)

"In the event my husband precedes me in death I leave all I posess (sic) to our daughters Tess Sorenson and Gloria Fenton to be evenly divided between them and their children shall take over their mothers share if either Tess or Gloria have passed on."

No other provision in the Will purports to dispose of any of decedent's property, and the Will contains no residuary clause. Since decedent's husband survived her by about two years, the condition precedent was never fulfilled.

On May 28, 1976, Gloria G. Fenton filed her Petition For Appointment of Executor, requesting that her mother's Will be admitted to probate. Respondent objected to the admission of the Will to probate on the ground that it failed to make any disposition of decedent's property and that probate of the Will would have no useful purpose. Respondent asserted that all gifts made by the decedent were contingent upon the prior death of her husband, which contingency had failed to occur. The District Judge sustained the objection and denied the admission of decedent's Will to probate. (R.28)

On appeal, this court reversed that decision and ordered that the Will be admitted to probate. (R.53, see 561 P.2d 1079) The court recognized and confirmed that none of Mrs. Gardner's estate was disposed of by her Will, but the court reasoned as follows:

"The fact that her estate will be distributed to others than the two daughters does not make the Will invalid or give any basis for refusing probate."

However, the court disposed of the question of whether Mrs. Gardner had effectively devised away her property in the following language:

"Annie's husband survived her and since the bequest and/or devise to the two daughters was conditioned upon the husband's prior death, the estate is not disposed of by Will." (Emphasis added)

Pursuant to the Supreme Court decision, decedent's holographic Will was admitted to probate on September 21, 1977. (R.77-8) For a period of 18 months, the co-administratrixes did nothing to further the probate of the estate except to obtain approval for an isolated sale of real property.

In February, 1979, the Respondent filed his Petition with the Probate Court of Salt Lake County requesting, pursuant to the provisions of Utah Code Annotated, Title 75-3-1001(1), that the court determine that decedent's estate must be distributed in accordance with the Utah laws of intestacy, with the petitioner and his brothers and sisters sharing as heirs by representation. The Petition also sought to have the court compel the co-administratrixes to account for and distribute the assets of the estate to decedent's heirs within a reasonable time. (R.101) After hearing was held on Respondent's Petition, the court entered its Order (on April 4, 1979), granting Respondent's Petition and ordering that decedent's estate be distributed in accordance with the Utah laws of intestate succession. In making her oral ruling in open court, the District Judge expressly referred to the language of the Supreme Court about the estate not being disposed of by Will. (R.121)

The court's Order also provided that the Respondent and his brothers and sisters are heirs by representation of the decedent and are entitled to share in her estate. The court further ordered that steps be taken to complete the probate of the estate within a reasonable time. The co-administratrixes have appealed from the entry of that Order.



ARGUMENT

POINT NO. I

THE DISTRICT COURT PROPERLY RULED  
THAT DECEDENT'S ESTATE SHOULD BE  
DISTRIBUTED IN ACCORDANCE WITH  
UTAH LAWS OF INTESTATE SUCCESSION

This case comes before the Supreme Court for the second time. The first appeal was taken from the District Court's refusal to admit decedent's holographic Will to probate. The District Judge had ruled that admission to probate would have no useful purpose because the Will failed to dispose of any of decedent's estate. The Supreme Court unanimously reversed that ruling on grounds that the Will might have other provisions that would be useful in settling decedent's affairs. In handing down its decision, however, the Supreme Court settled the question of the testamentary value and effect of the Will by stating emphatically that decedent's estate was not disposed of by her Will.

Referring expressly to that language, (R.121) the District Court has ruled that decedent's estate must be distributed in accordance with Utah laws of intestate succession. That ruling conforms to established Utah law.

Utah statutes in effect at the time of decedent's death, as set forth in Utah Code Annotated, former Title 74-2-30, provided that a condition precedent in a will is one which is required to be fulfilled before a particular disposition takes affect. Former Title 72-2-31 stated that where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled.

All gifts made by Mrs. Gardner in her holographic Will were contingent upon the prior death of her husband, Wilford W. Gardner, who survived her by at least 2 years in time. The condition precedent can never be performed or fulfilled. Therefore, the disposition of decedent's entire estate has failed, and none of her property has been disposed of by her Will. No other reasonable construction is possible under these circumstances.

Appellants admit that decedent's Will is clear and unambiguous, but they assert that the District Court has ignored established rules of interpretation in declaring that the Will fails to dispose of decedent's estate. In reality, the language of the Will must govern, and that language is clear and unequivocal in this instance. All gifts were made contingent upon the prior death of decedent's husband, and since that contingency has failed in its entirety, the court must look to other avenues for distribution of decedent's property.

In referring to the former rule that testacy is preferred over intestacy, the Supreme Court of Utah made the following statement in the case of In re Beal's Estate, 117 U 189, 214 P.2d 525 (1950):

"The rule that testacy rather than intestacy is preferred does not relieve courts from the obligation to construe the language of the Will according to the legal effect of the words used."

That statement is appropriate in the instant case and should be applied by the court in resolving the issues raised on this appeal.

In Larsen v. Paskett, 29 U.2d 360, 510 P.2d 520, the Supreme Court of Utah had an occasion to deal with the "vesting" concept of

probate law. The words of the court in that case can be of assistance to us in the matter. The language of the court is as follows:

"But the trial court adopted the view, with which we are in accord, that the rule as to immediate vesting of property in the heir of the devisee upon the decedent's death does not apply where it appears from the Will that the testatrix had a different purpose in mind and the Will states conditions precedent to such vesting."

There can be no doubt that the ownership of decedent's property never vested in anyone as a result of the terms of her Will. Every gift failed when the condition precedent failed. The Will contained no residuary clause, so the property didn't pass to anyone.

Under the provisions of former Title 74-1-1, any part of decedent's estate not disposed of by Will is succeeded to as provided in Chapter 4 of Title 24. Under that Chapter, the Legislature has set forth the manner in which property must be distributed in the absence of a Will or marriage contract. In other words, when decedent's property is not disposed of by Will, then her property should be distributed in accordance with the Utah laws of intestacy.

The new Utah Probate Code, as set forth in 75-2-101, has the same provision as the one referred to above. The law has not been changed by the introduction of the new Code.

Utah law is not unique in this regard. The courts of other states have held that where a contingent gift fails, such gift falls back into the estate of the decedent to be distributed under the laws of intestacy in the absence of a residuary clause. See Nichols v. First Security National Bank of Baker, 264 P.2d 451, 191 Ore. 659.

The Arizona courts have held that where a contingent beneficiary under a Will has predeceased the testatrix, the Will was inoperative as to the portion belonging to the deceased beneficiary, and such lapsed share remains undisposed of under the Will. See In re Jackson's Estate, 464 P.2d 1011, 11 Ariz. App. 424.

Our sister state of Idaho held in 1963 that property not disposed of by Will containing no residuary clause must descend in accordance with Idaho laws of intestate succession. See In re Corwin Estate, 383 P.2d 339.

Appellants insist that the court failed to give credence to the intention of the testatrix in holding that the Will did not dispose of decedent's property. The question of intent is not paramount in this instance because the condition precedent, which is clear and unambiguous, never took place, and the court had no duty to look further to the intention of the testatrix regarding what should have been done if the condition had been fulfilled.

Appellants rely heavily on the Utah case of Auerbach v. Samuels, 9 U.2d 261, 342 P.2d 879, in connection with their argument about the testator's intent. Respondent hastens to point out that the Auerbach case did not involve a condition precedent. The case concerned a testamentary trust and the issue was whether the trust could be accelerated if a previous life estate was released. The court was required to interpret the language of the Will to determine the intent of the testator because the Will said nothing about the acceleration of the trust provisions. No such a problem is present in the case now before the court.

POINT NO. II

THE DISTRICT COURT WAS NOT REQUIRED TO  
ENTER FINDINGS OF FACT & CONCLUSIONS OF LAW

Appellants assert that the District Judge erred in failing to enter Findings of Fact and Conclusions of Law. Under the circumstances and law of this case, the entry of such pleadings was not necessary.

The Petition filed in the District Court under the terms of Utah Code Annotated, Title 75-3-1001(1), set forth a lengthy history and factual background in support of the relief sought therein. Paragraphs 1 through 12 were essentially factual in nature, and Paragraphs 13 through 17 were conclusionary assertions setting forth a legal basis for relief. (R.101-105)

The Appellants filed a pleading entitled "Traverse of Petition" in which they stated that they had no quarrel with Paragraphs 1 through 12 of the Respondent's Petition. (R.90) Therefore, the factual basis for the Order of the District Court was not disputed, and no evidentiary proceedings were necessary.

The court recognized the agreement of the parties on the facts, and made its ruling as a matter of law. The basis for the decision is recited in the Order as follows:

"NOW, THEREFORE, the court having heard arguments of counsel relative to the issues raised by the Petition, and the Judge having fully reviewed the files and records of the court pertaining to this probate matter, including the prior decision and opinion of the Supreme Court related thereto; and the co-administratrixes having agreed that the facts stated in

Paragraphs 1 through 12 of the Petition are true and correct, and the co-administratrixes having shown no good cause for the delay in the completion in the settlement of the estate, and it appearing from the language of the Will that the testator intended to impose a condition precedent on all bequests and devises contained in the Will, and the parties having heretofore agreed that the condition precedent has not taken place or been fulfilled, and the court having ruled as a matter of law that the Will fails to make any disposition of decedent's property and that disposition of decedent's entire estate by Will has failed, and the court being fully advised in the premises, and good cause appearing therefor,"

The above language points out that the District Court gave consideration to the matters found in the files and records of the court (including the prior decision and opinion of the Supreme Court), the condition precedent set forth in the decedent's Will, the matters agreed to in Respondent's Petition, and other pertinent matters in making its ruling on the questions raised by the Petition. It is obvious that the resolution of the issues before the court were matters of law, and no Findings of Fact or Conclusions of Law were necessary in connection with the entry of the Order of the court.

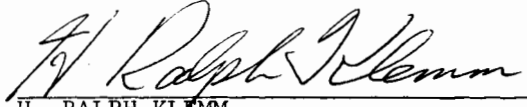
Elementary in the law of Wills is the principle that the construction and interpretation of a Will that is clear and unambiguous on its face is a matter of law for the court. The Appellants have conceded that decedent's holographic Will is clear in its terms and language, so its construction was a question for the court and not one for the jury. No Findings of Fact or Conclusions of Law separate from the above recital in the court's Order were necessary here. There would not have added anything to assist the court or the parties on this appeal.

CONCLUSION

If the court reverses the ruling of the District Judge on this appeal, it effectively reverses itself because the governing principle applied by the lower court was laid down by this court in its prior decision in the same action. The District Judge followed and applied that principle, and her decision should be affirmed.

DATED this 15<sup>th</sup> day of September, 1979.

RESPECTFULLY SUBMITTED,



H. RALPH KLEMM  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the 17<sup>th</sup> day of September, 1979, two copies of the Respondent's Brief on Appeal was mailed to Sumner J. Hatch, Attorney for Appellants, 72 Esat 400 South, Suite 330, Salt Lake City, Utah, 84111, by United States Mail, postage prepaid.



Attorney for Respondent