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Max Hill v. Willis Nakai : Reply Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

IN THE MATTER OF THE ESTATE OF WILLIAM J. HANNIFIN, **Deceased.**	**Appellate Court Case No. 20111125-SC** **On Appeal from the Third District Court, Case No. 103900808** **Honorable Robert J. Hilder (Retired)** **Honorable Royal I. Hansen**
MAX HILL, as Special Administrator of the Estate **Appellant,** **vs.** **WILLIS NAKAI, Individually and as Personal Representative of the Estate,** **Appellee**	

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. MR. HILL PROPERLY COMPARED TESTACY WITH INTESTACY.

In Section I of his Appellant's Brief, Mr. Hill analyzed the purpose behind the intestacy statues by comparing those statutes to the role of personal planning through the use of wills and will substitutes. Appellant's Brief, § I at 1-4. It is the comparison of intestacy with testacy that drives Mr. Hill's argument. When a decedent dies testate, the probate code strives to discover that specific decedent's intent. When a decedent dies intestate, the Legislature chooses who will be heirs based on the presumed intent of the average decedent. George B. Reese, *Best Friends and Relations: Construing "Issue" in Instruments and Intestacy Statutes,* 4 Hofstra Prop. L.J. 71, at 71 (Fall 1990).

Rather than addressing the substance of Mr. Hill's argument, Mr. Nakai argues:

> The right of an individual to testamentary disposition of his or her property existed at the time of the Williams decision, and the concept that property may be disposed of by will has no relevance to equitable adoption. Further, this matter does not involve a will. Determinations regarding equitable adoption in the context of a will, as would any determinations regarding intestacy in the same context, would be nothing more than an advisory opinion.

Appellee's Brief, § I at 1. With one exception,[1] Mr. Hill agrees with these statements, but they do not address Mr. Hill's comparison and the lessons to be learned from making that

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[1] Because a will provision may fail, even when a will is admitted to probate, the probate court still determines who the decedent's heirs are. Utah Code Ann. §75-3-301(2)(b); §75-3-402(1)(b); §75-3-411(2011). Thus, equitable adoption could arise in the context of a valid will, but only because part of the will fails and estate property passes through intestacy.

comparison. *See* Appellant's Brief, § I at 1-4. Mr. Hill believes that it is the Legislature's role to determine to whom an estate descends in intestacy. *Id.* He further submits that, when a decedent chooses **not** to adopt a child, the average decedent would not want that child to be an heir. By limiting the definition of "child" to natural born and adopted children, the Legislature has eliminated any claim to heirship as an equitable adoptee. *Id.*

Similarly, Mr. Nakai argues: "Neither does anything cited by Appellant establish any type of legislative or societal indication of a shift in the basic tenets of adoption and intestate succession." Appellee's Brief, § I at 2. Even if this were accurate,[2] "a shift in the legislative or societal values" is but one basis for seeking reversal of *Williams' Estates*. *In re Williams' Estates*, 10 Utah 2d 83, 85, 348 P.2d 683, 685 (Utah 1960). Mr. Hill argued that *Williams' Estates* was wrongly decided by attacking its foundational basis. Appellant's Brief, § I at 1-4.

Mr. Nakai further argues that Utah law has expanded the class of adoptee/heirs. Appellee's Brief at 2 (citing the use of the word "descendants" rather than "issue").

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[2] The Legislature's repeal of its former probate code and its adoption of the Uniform Probate Code constituted a significant shift by the Legislature in the rights of intestate heirs, particularly spouses, and more remote descendants, in Utah's probate procedures, in the law governing contracts to make a will, in the rights of spouses to protection through the elective share provisions, and in a number of other areas. *Compare generally* Utah Code Ann. Title 74 and Title 75 (repealed by Laws 1975, ch. 150, §1) *with* Utah Code Ann. Title 75 (enacted by Laws 1975, ch. 150, §§2-9)

While Mr. Hill disputes Mr. Nakai's conclusion,[3] Mr. Hill argued that the adoption of the Utah Uniform Probate Code effectively overruled *Williams' Estates* and eliminated equitable adoptees as potential heirs. Appellant's Brief, § II A – E, at 4-10. Whether the Legislature otherwise expanded the class of heirs is irrelevant to this question. Mr. Hill acknowledges the right of the Legislature to expand or restrict the class of heirs. *See* Appellant's Brief, § II A at 4-5. *Williams' Estates* improperly expanded the class of heirs by judicial decree.

In Sections I and II of his Appellant's Brief, Mr. Hill also argued that the equitable adoption principle should be applied, if at all, to the rights and duties of children and putative adopting parents, and not to a person's rights of succession in intestacy. *Id.* Finally, Mr. Hill explained that the Legislature had the duty and right to establish who a decedent's intestate heirs were and that no one has any vested right to inherit a decedent's estate. Appellant's Brief, § II A, at 4-5. Mr. Nakai did not address these arguments.

Overturning *Williams' Estates* will remove a flawed doctrine and analysis from Utah law. Further, it will respect the Legislature's right and duty to determine who is and who is not an heir. Finally, it will fulfill one of the fundamental policies of the Utah

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[3] Utah law recognizes that "issue" and "descendants" are synonymous. *Compare* Utah Code Ann. §75-1-201(9) (definition of descendant) *with* §75-1-201(25) (definition of "issue" cross references to subsection (9)); *see also Makoff v. Makoff*, 528 P.2d 797, 799 (Utah 1974) ("issue" includes "descendants in any degree").

Uniform Probate Code – the expeditious settlement of estates. *See* Appellant's Brief, § II A at 4-5; §II D at 8.

The class of people who would be harmed by such a ruling is limited to children who are (i) subject to an adoption contract, (ii) where the contract is fully performed except for the formal adoption decree, but (iii) only when the putative parent failed to use a will or will substitute to distribute the parent's property at death. Only in that limited circumstance would a child's rights be affected. This is a very limited class of persons to protect on the basis of the application of an equitable principle applied by the courts when the power to determine a decedent's heirs rests entirely with the Legislature. Thus, the good from overruling *Williams' Estates* outweighs the potential harm.

II. THE LEGISLATURE'S ACTION IN REPEALING IN ITS ENTIRETY THE FORMER UTAH PROBATE CODE AND ITS ADOPTION OF THE UNIFORM PROBATE CODE EFFECTIVELY OVERRULED *WILLIAMS' ESTATES.*

A. The Presumption That a Legislature Is Aware of Case Law Is Rebuttable and Varies Depending on the Facts.

In Section II, A – E at 4-11, Mr. Hill argues that the Legislature expressly excluded as children, and therefore as heirs, the very persons who would be most likely to have the relationship upon which to claim equitable adoption – foster children and stepchildren. He quoted the relevant statutory language verbatim and applied that language to the equitable adoption doctrine.

In response, Mr. Nakai argues that the Legislature could have expressly overruled *Williams' Estates* by specifically referring to equitable adoption. Appellee's Brief at 5. Thus, he argues:

> [T]he legislature has not specifically abolished equitable adoption in the more than 50 years since the Williams case, there is no basis for this Court to assume such legislative intent through a tortured[4] reading of the statutes.

Appellee's Brief, § II at 5.

In support of his argument, Mr. Nakai cites *State v. Houston,* 2011 UT App 350, 263 P.3d 1226. "We presume the Legislature is aware of our case law." ¶12 (citation omitted). While the Court may presume that the Legislature is aware of its case law, like any presumption, it is subject to rebuttal. Moreover, even when there is no express statement that a particular precedent is overruled, it remains possible for the Legislature to effectively overrule that precedent. *See* Appellant's Brief, § II E at 9-11. For example, the Legislature effectively overruled the three cases cited by the Supreme Court in *Williams' Estate* as forming the legal foundation for its decision, notwithstanding there was no reference to any of the cases when the Uniform Probate Code as adopted. *See* Appellant's Brief, § I E at 10-11.

Whatever weight that presumption should have in other situations, where the statute at issue is part of a complete repeal of Utah law on a given subject (here the

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[4] The concept of "torturing" a reading of a statute raises images of water-boarding members of the Court until they agree with Mr. Hill's interpretation of the statute. Mr. Hill denies any intent to use torture in any form to prevail in this case.

former probate code) and the enactment of an entirely new set of laws (here the Uniform Probate Code), the presumption should have little or no weight. The Legislature is far more likely to be aware of judicial precedent when repealing, modifying, or enacting a single statutory provision than in repealing Titles 74 and 75 of the Utah Code and in enacting a new Title 75 of the Utah Code. Laws 1975, ch. 150, § 1 (repeal of Titles 74 and 75); Laws 1975, ch. 150, §§2-9 (enactment of Title 75).

In any event, the weight of any presumption must be based on the facts and circumstances of the individual case. When the legal precedent is both of ancient origin and oft-repeated, the presumption has greater weight. *Olseth v, Larson*, 2007 UT 29, ¶¶26-36, 158 P.3d 532 (holding Legislature accepted judicial interpretation of statute that was ninety years old and repeatedly interpreted by Utah's Appellate Courts). But the presumption is entitled to little or no weight when there is a single case precedent and the Legislature effectively overrules that precedent as part of the repeal of two entire Titles (74 and 75) of the Utah Code and the enactment of an entirely new Title (75).

B. Neither the North Dakota Nor the New Mexico Courts Have Considered the Arguments Raised by Mr. Hill Regarding the Application of the Uniform Probate Code to the Equitable Adoption Doctrine.

Mr. Nakai claims:

> Further, other jurisdictions which, like Utah, have adopted the Uniform Probate Code continue to recognize the application and viability of equitable adoption within that legal framework.

Appellee's Brief, § II at 5. In support of this claim, Mr. Nakai cites two cases. While the cases recognize equitable adoption, neither case recognizes equitable adoption "within [the] legal framework [of the Uniform Probate Code]."

In *Johnson v. Johnson,* 617 N.W.2d 9 (N. D. 2000), the North Dakota Supreme Court addressed two issues. First, the trial court had ruled that the equitable adoption doctrine was a "stranger to North Dakota jurisprudence." *Id.* at ¶7. In response, the Court cited a number of North Dakota cases decided prior to its adoption of the Uniform Probate Code, and it concluded that equitable adoption was not a stranger to North Dakota jurisprudence. *Id.* at ¶¶8-17.

The North Dakota Court then turned to the second issue: Whether the equitable adoption principle could be used under the facts of that case[5] with regard to child support obligations incident to a couple's divorce. *Id.* at ¶¶18-24. In Mr. Hill's view, that is the proper place for considering whether an equitable adoption occurred – in determining rights and obligations for parents and children. Appellant's Brief, § I B at 3. The Court ruled that the equitable adoption doctrine could be used to set child support obligations. *Johnson, supra* at ¶¶ 34. Not once did the Court refer to North Dakota's version of the Uniform Probate Code. *Id., seriatim.*

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[5] The couple were active duty members of the United States Air Force. They had started formal adoption proceedings on several occasions, but transfers had prevented them from completing the formal adoption proceedings. *Id.* at ¶3. Having not completed those actions, they then divorced.

In *Poncho v. Bowdoin,* 138 N.M. 857, 126 P.3d 1221 (N.M. App. 2005), the New Mexico Court of Appeals reviewed a trial court ruling regarding child support obligations. The trial court had placed those obligations on a putative father it found to have equitably adopted the child rather than upon the child's biological father. *Id.* at ¶14.[6] The appeal was uncontested. *Id.* at ¶15. In analyzing the issue on appeal, the Court did not discuss any provisions of the Uniform Probate Code adopted in New Mexico. *Id.*, *seriatim.* While it discussed *Johnson v. Johnson,* it chose not to follow its holding. *Id.* at ¶¶19, 21, 22, 31-33. It therefore reversed the trial court determination and remanded for a determination of the biological father's child support obligations. *Id.* at ¶38.

C. Mr. Hill Properly Cited Utah Code Ann. §75-1-102(2) and §75-2-701.

Mr. Nakai claims that Mr. Hill failed to cite a relevant part of Section 75-1-102(2) (the underlying purposes of the probate code) that provides that one underlying purpose is "to discover and make effective the intent of a decedent in distribution of his property." Appellee's Brief, § II at 6. A decedent's intent is only relevant when the decedent undertakes personal planning through wills or will substitutes. "An intestate transfer, on the other hand, presents by definition no effective indication of the decedent's intentions." George B. Reese, *Best Friends and Relations: Construing "Issue" in*

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[6] The equitably adopting father filed an affidavit in which he alleged that, after receiving legal advice from his attorney, he believed "it would be in Child's best interest that he, [the equitably adopting father], be adjudicated as the adoptive father of Child in lieu of [the natural father] and relieve the [natural father] of that obligation." *Id.* at ¶10.

Instruments and Intestacy Statutes, 4 Hofstra Prop. L.J. 71, at 71 (Fall 1990). The Legislature's identification of a decedent's intestate heirs is applied regardless of the wants or intent of any specific decedent. Until the passage of Section 75-2-101(2) in 1998, the Legislature's identification of heirs controlled even when the decedent expressly disinherited a potential heir. *See Matter of Gardner's Estate,* 615 P.2d 1215, 1218 (Utah 1980) (decedent's will **expressly** disinherited grandchildren; Supreme Court noted that, if will failed to distribute all of the decedent's property, grandchildren would inherit estate in intestacy even though expressly disinherited in will); *compare* Utah Code Ann. §75-2-101(2) (1998) (authorizing disinheritance of an heir in decedent's will); *see* Appellant's Brief, § I B at 3, fn. 5.

Mr. Nakai also argues that Section 75-2-701 (1975) (requiring contracts to make or not make a will to be in writing) is different from equitable adoption. Appellee's Brief, § II at 6. Whether the distinction he draws has any significance, Mr. Nakai did note a singular similarity. Mr. Nakai noted that the purpose for enacting Section 75-2-701 was that "oral contracts not to revoke wills have given rise to much litigation in a number of states." Appellee Brief, § II at 6. As the ALR article on the modern status of equitable adoptions demonstrates, that same criticism applies with equal or greater force to the equitable adoption doctrine. 122 A.L.R. 5th 205, "Modern Status of Law as to Equitable Adoption or Adoption by Estoppel" (2004), *seriatim.*

III. MR. HILL HAS SHOWN THAT, BASED ON *WILLIAMS' ESTATES*, MR. NAKAI WAS NOT EQUITABLY ADOPTED.

A. The Adoption Contract must Be Valid at its Inception.

Regarding the application of *Williams' Estates* to the facts of this case, Mr. Nakai argues:

> Appellant's basic premise from which his arguments flow is that a valid enforceable contact must be determined to be 'valid when executed' regarding promises made and promises fulfilled. Appellant ignored and failed to mention the clear direction in Williams and in other cases to the effect a contract to adopt "may be proved by circumstantial evidence" (*Id.*), and instead propounds his own set of requirements which he claims must be proven by clear and convincing evidence.[7]

Appellee's Brief, § III at 9. Mr. Hill acknowledges that his argument addresses whether the adoption agreement was valid when executed, since that correctly states Utah law when a single oral discussion of an alleged contract is at issue. *McKelvey v. Hamilton,* 2009 UT App 126, ¶28, 211 P.3d 390 (formation of contract requires offer and acceptance). Moreover, in his Trial Memorandum, Mr. Nakai himself identified the conversation between his mother, grandfather, and Father Hannifin in 1958 as the basis of his equitable adoption claim:

> In 1958, two years after Father Hannifin and Nakai met, Father Hannifin became acquainted with Nakai's mother and grandfather. At that time, Father Hannifin approached Nakai's mother and grandfather about raising Nakai. Nakai's mother

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[7] Mr. Hill identified the requirements set forth in *Williams' Estates* and applied them to the facts of this case. *Compare Williams' Estates,* 10 Utah 2d at 85, 348 P.2d at 684-85 *with* Appellant's Brief, § at 14. The Supreme Court set the burden of proof as clear and convincing evidence, not Mr. Hill. *Williams' Estates*, 10 Utah 2d at 85, 348 P.2d at 685.

> and grandfather agreed with Father Hannifin to allow him to take Nakai in and raise him as his own son. While the terminology based on the mutual understanding of Father Hannifin and Nakai's mother and grandfather of Navajo familial culture and law may have been different from legal adoption in certain aspects, there can be no doubt but that the parties understood the terms of the adoption agreement.

"Willis Nakai's Trial Memorandum" at 7, R.539.

Similarly the trial court pointed to this conversation as the basis for Mr. Nakai's claim of equitable adoption. R. 568-569, ¶¶ 8-12; *specifically* ¶10 (finding Mr. Nakai's father did not participate in "the 1958 discussions which formed the alleged contractual basis for Mr. Nakai's equitable adoption claim").

Moreover, scrutinizing later circumstantial evidence is done expressly to determine whether "an agreement of adoption **must have existed**." *Williams' Estates*, 10 Utah 2d at 85, 348 P.2d at 685 (emphasis added). The trial court understood that an adoption contract was essential to its ruling. It concluded: "the sixty-year relationship and bonds between Father Hannifin and Mr. Nakai were consistent in all respects with the formation of and performance of an adoption contract." Findings ¶31, R.579. Further, the trial court identified the "only question to be determined herein is whether [Father Hannifin's] role was as adoptive parent, with full rights of parentage, rather than as a foster parent, in *loco parentis* or another quasi parent-child relationship." Findings ¶14, R.570. Whether a valid adoption contract was entered and performed determined what Father Hannifin's role was in the life of Mr. Nakai. Thus, Mr. Hill properly focused on the formation of the

alleged contract and explained why the trial court's findings showed that there was no valid contract in the first instance. Appellant's Brief, § IV A - D at 13-20.

B. For an Adoption Contract to Exist and Support a Claim for Equitable Adoption, the Parents must Promise to and must Actually Relinquish Their Parental Rights.

Mr. Hill has never argued that there is any magical word that needs to be stated in order to relinquish one's parental rights. *Compare* Appellant's Brief, § IV B-C at 14-19 *with* Appellee's Brief, § III A at 11. Indeed, there was no need to do so. The trial court found there was no actual relinquishment. Findings, ¶¶25-27, R.575-576.

In Utah, for an equitable adoption to exist, the "child's parents [must] agree with the adoptive parents to relinquish all their rights to the child," and then the child's parents must fully perform that agreement. *Williams' Estates*, 10 Utah 2d at 85, 348 P.2d at 685. When the natural parents relinquish their parental rights, whether in a formal adoption or an equitable adoption, the adopting parent assumes **those relinquished rights**. There is no place for joint ownership of parental rights. One party has parental rights while the other does not. Without a relinquishment, there are no rights for the adopting parent to assume. Without the assumption of these rights, the adopting parent cannot fulfill the "role of an adoptive parent . . ." Findings, ¶14, R.570. Thus, without an actual relinquishment, Father Hannifin assumed the role of a "foster parent, in *loco parentis* or another quasi parent-child relationship" while the parental rights remained fully vested with Mr. Nakai's natural parents. Findings, ¶14, R.570.

The trial court found that Mr. Nakai's father acquiesced in the adoption agreement between Father Hannifin and Mr. Nakai's mother and grandfather. Findings, ¶30, R.576. Mr. Nakai claims the evidence of his father's acquiescence was "uncontroverted." Appellee's Brief, § II B at 14. There was no positive finding that supported the trial court's conclusion. For example, there was no finding that Mr. Nakai's father was even aware of the alleged contract. Instead, the trial court relied on the absence of evidence to conclude that the natural father, who was living on the reservation at the time of the 1958 conversation, acquiesced to an agreement reached in that conversation even though Mr. Nakai's father took no part in that conversation. Findings, ¶¶30, R.576; ¶10, R. 568 . A lack of evidence is difficult to controvert, especially when Mr. Nakai had the burden of persuasion by clear and convincing evidence. *Williams' Estates*, 10 Utah 2d at 85, 348 P.2d at 685. The trial court should have required Mr. Nakai to produce evidence that his father relinquished his rights.

Paragraph 30 of the trial court's findings effectively placed the burden of persuasion on Mr. Hill to prove that Mr. Nakai's father had not relinquished his rights. Since the burden of persuasion was on Mr. Nakai, it never occurred to Mr. Hill to put on evidence regarding the continued relationship between Mr. Nakai and his father. Although minimal, there was evidence before the trial court of the continued relationship between Mr. Nakai and his father. R.17. *See* Appellant's Brief, § IV C at 18-19.

Finally, acquiescence may be sufficient for other states to find an equitable adoption, but in Utah, where the equitable adoption doctrine expressly requires each parent to promise to "relinquish" and to "relinquish" the parent's parental rights, acquiescence is not enough. *Id.*

C. The Indian Child Welfare Act Further Establishes That Mr. Nakai Is Not Entitled to Be Treated as an Equitably Adopted Son.

Mr. Nakai's citation to the Indian Child Welfare Act further supports Mr. Hill's position. Section 1911 of the Act grants the tribe exclusive jurisdiction over child custody proceedings for tribal children living on the reservation, although subsection (b) authorizes a transfer of jurisdiction to state courts in certain circumstances. 25 U.S.C.A. §1911(a) and (b). Under Section 1913 of the Act, for an Indian parent's consent to be effective to authorize a foster placement or the termination of the parent's parental rights, the consent must be in writing and recorded before a state or tribal court. 25 U.S.C.A. §1913(a). In addition, an Indian parent may withdraw consent "for any reason at any time" until the entry of a final order authorizing foster placement or terminating parental rights. 25 §1913(c). When consent is withdrawn, the state must return the child to the Indian parent. *Id.* None of these provisions are compatible with the equitable adoption doctrine. Indeed, where Navajos are not concerned with the termination of legal rights, where the obligation to tribal children extends beyond the parents to other family members, and where adoption is informal and practical rather than legal, there is no place in Navajo law for the operation of the equitable adoption doctrine. *See In the Matter of*

J.J.S., a Minor, 4 Navajo Rptr. 192, ¶40 (Navajo D. Ct. 1983). The trial court found that Navajos "never voluntarily relinquish their [parental] rights . . .." Findings ¶25, R.575. While Mr. Nakai may petition a Utah court under Utah law for recognition as an equitably adopted child, he must, like anyone else seeking such relief, meet the requirements of Utah law irrespective of any Navajo laws or customs.

D. Mr. Nakai's Description of the Equitable Adoption Doctrine Is Inaccurate.

Mr. Nakai argues that equitable adoption is "an equitable and fluid concept based on the 'doctrine that equity regards as done what should have been done.'" Appellee's Brief, § III C at 16. The doctrine is not fluid. It cannot be applied absent a binding adoption contract that is fully performed except for the entry of a decree of adoption. *Williams' Estates,* 10 Utah 2d at 85, 348 P.2d at 684-85. The adoption contract is required before equity can be applied to complete the contract (treat as done what should have been done). *Id.* In essence, Mr. Nakai seeks to transform the doctrine from a limited doctrine used only when an adoption contract was executed and performed in all respects except for the entry of a decree of formal adoption into an unstructured analysis of how close and loving the parties were. That is contrary to *Williams' Estates* and the role of the Legislature in determining the identity of a decedent's heirs.

In his Statement of the Case, Mr. Nakai states:

> During his lifetime Father Hannifin ensured that the bulk of his assets, including his Episcopal life insurance policy, bank accounts and investment accounts, transferred to Mr. Nakai upon his death.

Appellee's Brief at x. What Mr. Nakai fails to note, however, is that Father Hannifin transferred his investment accounts pursuant to a beneficiary designation that he executed on June 18, 2007. T. Exh. 111. In Father Hannifin's handwriting, Father Hannifin identifies Mr. Nakai's "relationship" to Father Hannifin as his "foster son." Where Section 75-1-201 (3) (1975) expressly excludes "foster" children from the definition of "child," Father Hannifin's own statement of his relationship to Mr. Nakai merited some discussion in the trial court's findings of fact. But there was none. Findings, R.566-581, *seriatim*. Like Mr. Nakai, the trial court improperly treated the equitable adoption doctrine as a "fluid" concept and reached its result in spite of, not because of, *Williams' Estates.*

In his argument in Section III C of his Appellee's Brief, Mr. Nakai argues that the equitable adoption doctrine does not require the child to show compliance with all statutory requirements for a formal adoption. Appellee's Brief, III C at 15. This is not what Mr. Hill is arguing. Instead, Mr. Hill is arguing that the child must show clearly and convincingly that the natural and adopting parents fully complied with the requirements established by the Supreme Court in *Williams' Estates.* Appellant's Brief, § IV D at 19-20. It is *Williams' Estates* that established what must be proven. Applying *Williams' Estates* to the facts of this case, Mr. Nakai does not qualify as an equitably adopted child.

IV. IF THE COURT REVERSES THE TRIAL COURT DECISION, IT SHOULD REMAND FOR FURTHER PROCEEDINGS REGARDING THE ATTORNEY FEE AWARD.

Mr. Nakai obviously does not want the award of attorney fees to be reviewed by the trial court. His legal basis for claiming that the Supreme Court should not remand is: "Mr. Nakai was appointed the personal representative of the estate. Appointment requires the applicant to be an interested person." This is misleading. The definition of an interested person is broader than the persons who have the right to serve as a personal representative. *Compare* Utah Code Ann. §75-1-201(24) (definition of interest person includes fiduciaries representing interested persons and the settlor of a trust, among others) *with* Utah Code Ann. §75-3-203 (identifying those entitled to appointment as personal representative and their order of priority). Mr. Nakai would only have a claim to appointment as a personal representative **after** the trial court found him to be equitably adopted. But he had no right whatsoever prior to that point. On the other hand, Mr. Hill (and other collateral heirs) would have had the right to appointment from the beginning, even if Mr. Nakai were later determined to be an equitably adopted child. Utah Code Ann. §75-3-203(1) (d) (granting priority to "other heirs"). Under these circumstances, the Court should remand the attorney fees issue for further proceedings **if** the Court reverses the trial court's decision on equitable adoption.

CONCLUSION

Based on these arguments, the Supreme Court should reverse the trial court, order it to enter judgment in favor of Max Hill as special administrator of the estate on behalf of the collateral heirs, order it to appoint Max Hill general personal representative of the estate, remand for reconsideration of the attorney fee award, and direct it otherwise to administer the estate pursuant to provisions of the Utah Uniform Probate Code.

CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(1)

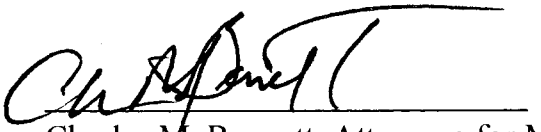
1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 4,816 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2. This Brief complies with the typeface requirements of Utah R. App. P.27(b) because it has been prepared in proportionally spaced Times New Roman typeface, font size 13, using WordPerfect X5.

3. The PDF version of the Brief was converted from WordPerfect X5 by its conversion engine.

Dated this 12 day of June, 2012.

CHARLES M. BENNETT, PLLC



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CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of June, 2012, I mailed two copies of the **APPELLANT'S REPLY BRIEF** to:

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