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Emily Youngberg Petersen and John Gary Petersen v. Philip E. Jones : Brief of Appellants on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

EMILY YOUNGBERG PETERSEN
and JOHN GARY PETERSEN,
Plaintiffs and Appellants,

— vs. —

PHILIP E. JONES,
Defendant and Respondent.

Case
No. 10156

Appellants' Brief On Appeal

Appeal From a Judgment of the Second District Court
of Davis County,
HONORABLE THORNLEY K. SWAN, *Judge*

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STATEMENT OF KIND OF CASE

This is a civil action for wrongful death brought by the heirs of the decedent under 78-11-7, *Utah Code Annotated*, 1953.

DISPOSITION IN THE LOWER COURT

Prior to answering plaintiff's amended complaint, defendant moved that said complaint be dismissed on the ground that there had been no previous judicial determination that plaintiffs were the heirs of the decedent. Defendant's Motion to Dismiss was granted by the District Court.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the order of dismissal and reinstatement of the action in the District Court.

STATEMENT OF FACTS

Plaintiffs' amended complaint alleges that they are the sole heirs of John William Petersen; plaintiff Emily Youngberg Petersen is the widow and plaintiff John Gary Petersen is the only son of said decedent. It is alleged that defendant wilfully shot and killed John William Petersen and damages are sought pursuant to the Utah Wrongful Death Statute.

The complaint contains no allegation to the effect that plaintiffs had been judicially determined by a probate court to be the heirs of the decedent. The action was dismissed by the District Court because of the failure to make such allegation.

ARGUMENT

POINT I.

THE UTAH WRONGFUL DEATH STATUTE DOES NOT REQUIRE A JUDICIAL DETERMINATION OF HEIRSHIP AS A CONDITION PRECEDENT TO THE BRINGING OF AN ACTION.

(a) *The wrongful death statute itself does not require a judicial determination of heirship.*

Section 78-11-7, *Utah Code Annotated,* 1953, the statute under which plaintiffs bring this action, provides as follows:

> "78-11-7. Except as provided in chapter 1, of Title 35, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representative for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsibile for his conduct, then also against such other person."

It is to be noted from the above language that the statute authorizes a suit for wrongful death to be brought by the personal representative of the decedent for the benefit of the heirs, or, in the alternative, by the heirs themselves. In the case at bar, plaintiffs, as heirs, have elected to bring the action directly rather than to have a personal representative or administrator appointed.

Wrongful death suits filed directly by the heirs are not uncommon and there are many reported cases where such procedure has been followed. See e.g. *Mingus* v. *Olsson,* 114 Utah 505, 201 P.2d 495; *Van Wagoner v. Union Pacific Railroad,* 112 Utah, 189, 186 P.2d 293; *Johanson v. Cudahy Packing Company,* 107 Utah 114, 152 P.2d 98; *Robinson* v. *Industrial Commission,* 72 Utah 203, 269 Pac. 513; *Parmley v. Pleasant Valley Coal Company,* 64 Utah 125, 228 Pac. 557; *Spiking* v. *Consolidated Railway and Power Company,* 33 Utah 313, 93 Pac. 838. Although the precise question was not raised, there is nothing in any of the above cases or any other cases which

plaintiffs have discovered which indicated that a prior determination of heirship was obtained or required. Nor is there any mention of, or illusion to, such a requirement in the wrongful death statute itself.

It would seem that the District Court in requiring a judicial determination of heirship has imposed a new requirement not provided for in the statute. The imposition of such requirement is not within the prerogative of the court and runs counter to our constitutional form of government distributing the powers of government among the legislative, executive and judicial branches. The District Court has no legislative authority and may not under the guise of interpretation write into a statute provisions or extensions which are not therein manifest. See 50 *Am. Jur. Statutes,* Sections 228-229. The Utah Supreme Court has recognized the above principle as a cardinal rule of law and has stated in the case of *Mountain States Telephone & Telegraph Company* v. *Public Service Commission,* 107 Utah 505, 155 P.2d 184, as follows:

> "The interpretation (of a statute) must be based on the language used, and the court has no power to rewrite a statute to make it conform to an intention not expressed."

Inasmuch as a wrongful death action is an action created by statute, it is submitted that in the absence of any statutory imposition no prior determination of heirship should be required.

(b) *The statutes in our probate code relating to the determination of heirship are not applicable and do not require a prior*

adjudication in an action for wrongful death.

In dismissing plaintiffs' action, the lower court apparently relied on Sections 75-12-33, 34, *Utah Code Annotated*, 1953. These are the only sections of our probate code relating to the determination of heirship and provide as follows:

> "75-12-33. DETERMINATION OF HEIRSHIP — PETITION — Whenever letters of administration or letters testamentary have not been applied for, any interested person may, at any time after the expiration of three months from the decedent's death, present to any court that would have jurisdiction to appoint an administrator or an executor a verified petition setting forth the name and residence of the decedent, the date of his death, the fact that he died testate or intestate, the names and addresses of the heirs so far as he knows, a description of any real property concerning which a determination of heirship is desired, and praying for a decree determining the heirs of such deceased. Upon the presentation of such petition notice by posting or publication shall be given and notice mailed to all the heirs of the decedent so far as known.
>
> 75-12-34. DECREE.—When the facts are established to the satisafction of the court a decree shall be given specifying who are the heirs of such deceased person and such decree is conclusive upon the parties and their successors in interest with respect to such property."

It is difficult to find any mandatory language or implication in a statute which simply provides in certain instances that "any interested person *may* . . . present

. . . a petition'' for the determination of heirship. The word ''may'' in a statute is generally construed to be permissive as opposed to ''shall'' or ''must,'' which are directive or mandatory. See 50 *Am. Jur. Statutes,* Sections 28-33.

The purpose of the heirship statute is not to impose upon people a useless cumbersome procedure to be strictly followed whenever any person dies, but rather to provide a method of determining disputes between hostile heirs. See *Bancroft's Probate Practice, Second Edition,* Section 1208. In other words, where there are conflicting claims of heirship, a procedure is provided for any interested person who may want to get the question of heirship judicially determined where a dispute exists. There are no disputes between heirs in the instant case.

Bancroft, in his work on probate practice, further makes the comment at Section 1207, that the exclusive jurisdiction of the probate court to determine heirship does not preclude a court of general jurisdiction from hearing evidence to determine prima facie an issue of heirship, which arises incidentally in litigation properly before the court. Thus it would seem that defendant in this case could properly raise in the main action the defense that plaintiffs are not the heirs of the decedent, in which event plaintiffs would be put to their proof to establish as an element of their case, that they are properly the heirs. In the case of *Sargent* v. *Union Fuel Company,* 37 Utah 392, 108 Pac. 928, it appears that just such an issue was raised in the main action; it was shown that the person bringing the action was not the sole heir of

the decedent, which ultimately resulted in a substitution of parties. In the instant case there is no logical reason why plaintiffs should be required to establish the fact of heirship in a separate proceeding.

Further, under the heirship statutes, it is questionable whether they apply to situations other than to determine claims against real property. Section 75-12-33, *Utah Code Annotated,* 1953, specifically requires a description of any real property to be included in the petition. Section 75-12-34, Utah Code Annotated, 1953, provides that the decree shall be conclusive with respect to such property. Bancroft has interpreted the Utah statute to authorize heirship proceedings only when a person dies intestate leaving realty within the state and letters of administration have not been applied for. See *Bancroft's Probate Practice, Second Edition,* Section 1221.

In any event, there is no reason whatsoever to petition for a determination of heirship in the instant case.

(c) *Defendant has no interest in the heirship question and thus has no standing even to attempt to require a determination of heirship.*

Defendant has never at any time claimed to be an heir of the decedent. He successfully argued, however, to the lower court, that he needed the protection of an heirship decree to avoid the possibility of any unknown heirs filing a multiplicity of suits against him. He did not, however, claim to know of any other heirs.

The conclusions of the above argument are directly contrary to the established case law of the State of Utah. In the case of *Parmley* v. *Pleasant Valley Coal Company,* 64 Utah 125, 228 Pac. 557, it was held that there can be but one action for wrongful death. The court indicated that all heirs should be made parties to the wrongful death suit, but nevertheless held that if for some reason an heir is excluded from the action, he could not thereafter maintain a separate action against the tort-feasor. His exclusive remedy would be against the other heirs to share in the recovery, if any.

In light of the *Parmley* holding it is difficult to see how defendant could in any way be adversely affected by reason of the exclusion in the suit of some unknown heir.

As stated in 39 *Am. Jur. Parties,* Section 10, a court should refuse to entertain any action at the instance of one whose rights have not been invaded or infringed, or where he seeks to invoke a remedy in behalf of another who seeks no redress.

CONCLUSION

Based upon all of the foregoing arguments and authorities, plaintiffs respectfully submit that the decision of the District Court be reversed and that plaintiffs' complaint be reinstated in said court.

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