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# In the Matter of the EState of Albert J. Duquesne, Also Known As A. J. Duquesne : Brief of Appellants

# In The Supreme Co
# of the State of U

In the Matter of the Estate
of
ALBERT J. DUQUESNE, also
known as A. J. DUQUESNE,

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## BRIEF OF A

An appeal from the Judgment
Court, In and For Salt Lake
Gordon R. Hall, Judge.

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By N
Glen
800 C
Salt L
*Attor*

James W. Beless, Jr.
Walker Bank Building
Salt Lake City, Utah
*Attorney for Respondent*

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## STATUTES CITED

# In The Supreme Court of the State of Utah

In the Matter of the Estate
of
ALBERT J. DUQUESNE, also
known as A. J. DUQUESNE,
*Deceased.*

Case No.
12908

## BRIEF OF APPELLANTS

### *Statement of the Case*

This is an appeal from a summary judgment determining that Respondent is an heir at law of the decedent and from denial of the Appellants' Motion for a Summary Judgment determining that Appellants are the heirs at law of the decedent.

### *Disposition in Lower Court*

Counsel for Appellants and Respondents upon stipulated facts filed Motions for Summary Judgment determining heirship, supported by memoranda of law. After oral argument, Respondent's Motion was granted and Appellants' Motion was denied.

### *Relief Sought on Appeal*

Appellants, Marguerite Hornberg and Jeannette Radke, seek reversal of both the summary judgment determining Respondent to be the decedent's heir at law, and of the order denying Appellants' Motion for a Summary Judgment determining that they are decedent's heirs at law.

### *Statement of Facts*

This controversy came before the District Court on a Petition for Determination of Heirship filed by the Appellants, Jeannette Radke and Marguerite Horberg [Record at 22-27], supported by a Memorandum [Record at 28-29] which incorporated by reference documentary evidence as Exhibits "A" through "O" which were attached thereto [Record at 30-118]. The Petitioners are nieces of the decedent, that is, they are children of his half-sister Eugenia. But for the allegations of Respondent, that the mother of Appellants was born illegitimate in Illinois, there would be no question that Appellants would be the heirs at law of the decedent. In response to Appellants Petition, Tracy-Collins Bank & Trust Company, the Administrator of the Estate, filed a Petition for Determination of Heirship [Record at 128-132]. The Court ordered the matter to be set on the trial calendar and fixed December 6, 1971 as the final date on which interested parties could appear in opposition to Appellants' Petition [Record at 134]. Respondent, Andrew J. Scherer, en-

tered an appearance, answering the Petition of Radke and Hornberg for determination of Heirship, and alleging that he is a cousin-german of the decedent, as an issue of the brother of decedent's deceased mother, and that the class of cousins-german of the decedent given notice by the Administrator of the probate proceeding as the next of kin are the decedent's heirs at law [Record at 165-67].

Respondent, Andrew J. Scherer, and Appellants, Radke and Hornberg, the only real parties in interest who filed appearances, mutually desiring that heirship be determined at the earliest possible time, entered into and filed a Stipulation of Facts [Record at 172-174]. It was stipulated that Exhibit "A" attached to Appellants' Memorandum in Support of Petition for Determination of Heirship, accurately shows the relationship of Radke and Hornberg to the decedent, *i.e.* nieces of the half-blood, who are daughters of decedent's half-sister, Eugenia. For the convenience of the Court, Exhibit "A" is reproduced in Appendix "A" to this brief. Although Respondent claims that the father of the decedent was never married to the grandmother of Radke and Hornberg, it is admitted that he duly acknowledged their mother as his daughter. The Stipulation further provided, that Exhibits "A" through "O" attached to Appellants' Petition be admitted into evidence and that, in the event the Court should determine that Radke and Hornberg do not succeed to the Estate of the decedent as children of the decedent's sister pursuant to Utah Code Annotated, section 74-4-5(4), 1953, the class of

cousins-german of the decedent to which Respondent belongs succeeds to the Estate per capita as next of kin pursuant to Utah Code Annotated, section 74-4-5(6), 1953, being related to the deceased in the same fourth degree of collateral consanguinity and claiming through the same ancestor pursuant to Utah Code Annotated, section 74-4-16, 1953. Although the relevancy of the Illinois law of legitimation is contested as a matter of law, the mother of appellants having been born and reared in Illinois, it was stipulated that, under Illinois law then in force, an illegitimate child was not an heir of its father unless its parents inter-married and the illegitimate child was acknowledged by the father as his child.

Appellants and Respondent each filed Motions for Summary Judgment based on the Stipulation [Record at 172-74]. After oral argument, Judge Gordon R. Hall granted Respondent's Motion for Summary Judgment and denied Appellants' Motion for Summary Judgment, on the grounds that section 74-4-10 of Utah Code Annotated, 1953, is a legitimation statute rather than a succession statute only, that the law of status in force at the situs of the birth of Appellants' mother, therefore, governs Appellants' capacity to inherit through their mother, and that the cases of *In re Forncy's Estate,* 43 Nev. 227, 184 P. 206 (1919) and *Popp v. Roth,* 9 Utah 2d 96, 338 P.2d 123 (1959) govern this case [Record at 240].

## POINT I.

## THE TRIAL COURT ERRED IN HOLDING THAT THE FIRST SENTENCE OF SECTION 74-4-10, UTAH CODE ANNOTATED, 1953, IS A LEGITIMATION STATUTE.

The first sentence of Utah Code Annotated, section 74-4-10 (1953) governs the capacity of an illegitimate to inherit the estate of a Utah intestate, but does not purport to affect his or her status as an illegitimate. Neither does this provision by its terms require legitimation as a precondition to inheritance as do the statutes of many other states, including Illinois.

In addition to the obvious internal arguments, that the first sentence of the section appears in the Utah Probate Code, and that it is specifically directed solely to the heirship of illegitimates, there is Utah case law directly on point holding that it does not affect the status of an illegitimate, but affects only his capacity to inherit.

The Utah Supreme Court examined this provision (formerly section 2833 of Revised Statutes of Utah, 1898) along with the legitimation statute which is now Utah Code Annotated, 1953, section 78-30-12 (formerly section 10 of Revised Statutes of Utah, 1898) in *In re Garr's Estate*, 31 Utah 57, 86 P. 757 (1906). Although the Court found that there was sufficient evidence of adoption by acknowledgment to satisfy the

legitimation statute, it held that legitimation was not necessary for inheritance under what is now section 74-4-10. The Court reviewed the statutory history of the provisions, deciding that:

> "[t]o discover the true object of this particular enactment and the general policy of the state it becomes important to examine and consider other statutes made previously upon this subject. For such purpose all such legislation should be examined and construed together. The general doctrine and policy of the statute, expressed in anterior legislation, may constitute potent factors in determining the intent of the last expression of legislative will." *Id.* at 761.

Accordingly the Court reviewed the identical predecessor statute repealed by section 11 of the Edmunds-Tucker Act which expressly declared the issue of plural marriages illegitimate and revoked the right of illegitimates to inherit in Utah. Act of March 3, 1887, Ch. 397, § 11, 24 Stat. 637. The Court concluded that "in enacting this section [§ 11 of the Edmunds-Tucker Act] the Congress of the United States must have recognized the fact that, as the laws of the territory stood up to that time [Laws of 1884, p. 75, § 4] *illegitimate* children had the right to inherit from their fathers..." *In re Garr's Estate, supra,* at 762, (emphasis added). The Utah Supreme Court also reviewed the prior in-

terpretation of the identical predecessor statute by the Supreme Court of the United States in *Cope v. Cope*, 137 U.S. 682 (1891), which held that:

> "[This section] *does not declare the children of polygamous marriages to be legitimate; in fact, it treats them as illegitimate,* or, rather, it does not, except by indirection or inference, mention them at all; but it puts all illegitimate children, whether the fruits of polygamous or ordinary adulterous or illicit intercourse, upon an equality and vests them with inheritable blood." *Id.* (Emphasis added).

The Utah Supreme Court thus concluded:

> "Evidently the intention was that illegitimate children should have vested in them inheritable blood and the right to inherit from the father, when acknowledged by him, in the same manner and to the same extent as if they had been born legitimate. This is also clear from the context of the statute, especially when interpreted in light of the doctrine of the law hitherto prevailing within this jurisdiction. Such being the case, the right, when once vested in the illegitimate, extends to his descendants, and they likewise become heirs in the event of the death of their father. This interpretation thus placed upon the statute in this case is in consonance with the presumption, which is that, when the design or object of an enactment is

not manifestly apparent, the Legislature intended the most beneficial construction to be placed upon it." *In re Garr' Estate, supra,* at 763.

The Supreme Court of South Dakota in *Moen v. Moen,* 16 S.D. 210, 92 N.W. 13 (1902), construed its statute, which in all relevant respects is the same as the first sentence of section 74-4-10 of the Utah Code, in a context in which the father died intestate in South Dakota and the claimant was his illegitimate child born in Norway. (It is immaterial for present purposes that most such statutes require the acknowledgment to be in writing.) The Court's holding described the statute as follows:

"It describes a class of persons, and declares that persons of that description shall inherit. It does not refer to or create a status. . . . If the acts constituting the acknowledgment are in themselves such as the statute prescribes, they confer the right to inherit in the state where the real property is situated, without reference to the intent with which they were performed. . . . It is, therefore, wholly immaterial what law existed in Norway relating to the recognition of illegitimate children when the writing in this case was signed by the plaintiff's father. It may be conceded that he neither knew nor intended that its execution

would confer upon the child the right to inherit his property in any jurisdiction." *Id.* at 15-16.

The Supreme Court of Iowa similarly construed its statute, which is also in all relevant respects the same as section 74-4-10 of the Utah Code, in a case in which the claimant, an illegitimate child of his deceased father, was born in New Jersey which had no statute allowing an illegitimate to inherit. *Van Horn v. Van Horn,* 107 Iowa 247, 71 N.W. 846 (1899). The Court held that, the decedent's estate being within the state of Iowa, the Iowa statute which allowed illegitimates to inherit must be applied.

"It may be that the plaintiff's status is to be determined by the law of his mother's domicile, or, in the event of her death, by that of his own, or of his father's; but with that question we have nothing to do. The sole inquiry here is, is he entitled to inherit the real estate and personal property situated in this state, under the facts presented in evidence? Our conclusion is that the laws of New Jersey are wholly immaterial and that the trial court was right in sustaining plaintiff's demurrer." *Id.* at 839.

In *In re Wehr's Estate,* 96 Mont. 245, 29 P.2d 836 (1934), the Supreme Court of Montana construed its statute, which is also in all relevant respects the same as section 74-4-10 of the Utah Code, in a case where

an illegitimate child, born and living in Germany laid claim to his biological father's Montana estate. The Court held that the illegitimate child was an heir under the Montana law, quoting from the Illinois case of *Hall v. Gabbert,* 213 Ill. 208, 72 N.W. 806, 809.

> "'As we view the law, it is immaterial what the laws of Indiana or Ohio, or any other country are or were. We look to our own law, and read it as it is written: Then to the facts, and, if the facts bring the claimant within our law, then he is entitled to its benefits, whatever may be his status elsewhere.'" *In re Wehr's Estate, supra,* 839.

*Blythe v. Ayres,* 96 Cal. 532, 31 P. 915 (1882), involved a father at all times domiciled in the State of California and a mother and illegitimate child at all relevant times domiciled in England. The case considered two California statutes, one a legitimation by subsequent marriage statute and the other a statute which in all relevant respects is the same as section 74-4-10 of the Utah Code. As regards the latter statute, the Court said:

> "It is unnecessary to decide whether this provision affects the *status* of the child or whether it is alone a statute of descent. If it either directly or indirectly touches upon her *status,* our views upon the question, as herein previously expressed, are applicable. If it is a

> statute of descent pure and simple, — and Estate of Magee, 64 Cal. 414, seems to so declare in explicit terms, — then the plaintiff is entitled to all the benefits of it, regardless of domicile, status, or extraterritorial operation of laws." *Id.* at 924.

In a subsequent consideration of this statute *In re Lloyd's Estate,* 170 Cal. 85, 148 P. 522 (1915), the California Supreme Court declared that this statute is "simply a statute of succession or inheritance." *Id.* at 523.

The Tenth Circuit Court of Appeals has held a similar Kansas statute to be one of descent which had no effect upon the status of the child, its only purpose being to give an illegitimate child the right to inherit from the father following public recognition of paternity. *Pheifer v. Wright,* 41 F.2d 464 (10th Cir. 1930). The statute involved in that case provided in language similar to section 74-4-10:

> "Illigitimate children inherit from the mother, and the mother from the children.
>
> "They shall inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing. . ." *Id.* at 466-67, quoting Kansas Revised Statutes of 1923, Sections 22-121 and 22-122.

After holding that the statute did not "change the status of a child from illegitimate to legitimate", the Court went on to conclude that it, therefore, had no extraterritorial application in Oklahoma being only a statute of inheritance concerned solely with Kansas property rights. *Id.* at 467-68.

A comparison of the language of the first sentence of section 74-4-10 with the language of Utah's two legitimation statutes will readily disclose a disparity of both language and manifest purpose between the former and the latter. The legitimation provisions, it will be noted, both specifically provide that the theretofore illegitimate child, following compliance with their terms, becomes legitimate, while section 74-4-10 provides only that the (still) illegitimate child, following acknowledgment inherits from its father *as if* born in lawful wedlock.

*Succession Statute*:

> U.C.A. § 74-4-10. *Illegitimate children—Inheritance by.*—Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child, and in all cases is an heir of his mother; and *inherits* his or her estate, in whole or in part, as the case may be, in the same manner *as if* he had been *born in lawful wedlock.* The issue of all marriages null in law, or dissolved by divorce are legitimate. [Emphasis added].

*Legitimation by Adoption Statute*:

> U.C.A. § 78-30-12. Adoption by Acknowledgment.—The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon *deemed for all purposes legitimate* from the time of its birth . . . [Emphasis added].

*Legitimation by Marriage Statute*:

> U.C.A. § 77-60-14. Marriage of parties legitimates child—Exception.—If the mother of any such child and the father shall at any time after its birth intermarry, the child shall *in all respects be deemed to be legitimate,* and the bond for its support shall become void; [except in cases where the mother or parents have previously consented to its adoption] . . . [Emphasis added].

Comparison of the foregoing provisions also invites contrast of their requirements. It cannot be gainsaid that complete legitimation requires more formality and additional unequivocal action under our statutes, than does acknowledgment for inheritance purposes only. If legitimation could be accomplished by mere com-

pliance with the first sentence of section 74-4-10, the more onerous requirements of sections 77-60-14 and 78-30-12 would be mere surplusage in the law, since, in virtually all cases, facts constituting acknowledgment are present contemporaneously with the facts satisfying the requirements of the latter statutes. Section 78-30-12 illustrates this point, inasmuch as by its terms acknowledgment is only the first of several necessary steps to legitimation.

It may be argued that the final sentence of section 74-4-10 is a legitimation provision and that it, by inference, colors the preceding sentence of that section with a presumption of similar legislative intent. However, the initial premise of this argument is fallacious, since the final sentence is not a legitimation statute as that term is generally understood, but is a definitional provision which simply declares that the issue of marriages null in law, or dissolved by divorce, were never illegitimate, thus making both, legitimation by some act of the parent, and acknowledgment, wholly unnecessary where such issue is concerned. Furthermore, that final sentence was added to the statute at the time of its reinactment by the legislature as part of the codification of 1898, following admission of Utah to statehood. It was intended to undo *nunc pro tunc* the gratuitious illegitimation declared with respect to thousands of Utah children by the Edmunds-Tucker Act of 1887. It simply represented a restoration of the status of *legitimacy* rather than a statutory opportunity for *legitimation*. The basic language of the preceding sentence on the

other hand dates back to section 714 of the Territorial Laws of 1876. *See Garr's Estate, supra,* at 762.

## POINT II.

### THE TRIAL COURT ERRED IN HOLDING THAT DETERMINATION OF STATUS OF APPELLANTS' MOTHER AS AN ILLEGITIMATE UNDER THE ILLINOIS LAW OF HER DOMICILE WOULD RESULT IN DISHERITANCE OF APPELLANTS UNDER UTAH LAW OF INTESTATE SUCCESSION.

The primary question before this Court is not the status of the mother of Appellants as legitimate or illegitimate, it being conceded *arguendo* that the grandmother of Appellants, Radke and Hornberg, was never married to the father of the decedent, but rather the issue involves capacity of children of an Illinois illegitimate to take property of their uncle by intestate succession under Utah law.

Succession to the Utah probate estate of an intestate, who dies domiciled within the State of Utah, is determined exclusively by the law of intestate succession of the State of Utah. The law of status, even if determinable under Illinois law, is thus not dispositive of the issue. It should be noted, however, that Utah is not constitutionally required to determine Appellants'

status by reference to Illinois law. See *Olmsted v. Olmsted*, 216 U.S. 386 (1910).

The question of legitimacy or illegitimacy of any person is an issue of status referable to the law governing such status at that person's domicile, according to the most commonly applied choice of law rule. The question of heirship, on the other hand, is an issue of succession rights in property referable to the law of the situs of the property. The situs of real property is fixed by natural and political geography while the situs of personality is fixed by the domicile of the owner. In the instant case the undisputed situs of all property of the decedent, both real and personal, is within the State of Utah.

The cases and textual authorities are unanimous in holding that, "The law of the situs of the property determines what class of persons will inherit property in the state, since that is a question of descent and not of status. . ." 87 A.L.R.2d 1289, § 7. See *Bancroft's Probate Practice*, 2d Ed., § 1129; 10 Am. Jur.2d, § 152 *Bastards*, p. 952. This is the position taken by the *Restatement (Second) of Conflicts*, "The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs." *Id.* at § 236(1). "Whether a person must be legitimate in order to inherit any interest in land upon intestacy or to receive a forced share therein is determined by the law that would be applied by the courts of the situs. These Courts would usually apply

their own local law in determining this question." *Id.* at § 237(1).

> The general choice of law rule is that:
> "[I]f the statute of the situs is one of descent by which the children born out of wedlock, or certain defined classes of illegitimates, may inherit irrespective of whether or not they have been legitimated by their personal law, or other type of statute regarded, on one basis or another, as a statute of inheritance, the child born out of wedlock in another state may inherit at the situs even though by his personal law he has not been given the status of a legitimate and could not have inherited property there, although there is some authority to the contrary." 10 Am. Jur.2d, § 152, *Bastards,* pp. 953-54. *See, Ester, Illegitimate Children and Conflict of Laws,* 36 *Ind. L. J.* 163, 177 (1960).

Were the situation reversed, the Illinois Courts would uniformly determine that the Illinois law of intestate succession would apply to inheritance of Illinois probate property by one having the status of an illegitimate in Utah.

> "[T]he state in which land is located has the power to control it, and jurisdiction to adjudicate questions as to its ownership; accordingly, it is the general principle that all questions

> of title to land are decided in accordance with the law of the state where the land is. In applying this general principle, it is uniformly held that the devolution of real property on the death of its owner intestate follows the course prescribed by law of descent of the state in which the land is situated."

*McNamara v. McNamara*, 303 Ill. 191, 135 N.E. 410 (1922). See, *Fuhrhop v. Austin*, 385 Ill. 149, 52 N.E.2d 267 (1943); *Stoltz v. Doeing*, 112 Ill. 235 (1885).

It is, therefore, submitted that Illinois law is not and cannot be concerned with Utah's method of intestate distribution and that there is, in fact, no conflict of law question involved here.

## POINT III.

## THE LOWER COURT ERRED IN HOLDING THAT THE RESPONDENT'S AUTHORITIES, PARTICULARLY THE *FORNEY* AND *POPP* CASES, GOVERN THE INTERPRETATION OF SECTION 74-4-10, UTAH CODE ANNOTATED, 1953, AS APPLIED TO INTESTATE SUCCESSION CASES.

In *In re Forney's Estate*, 43 Nev. 227, 184 P. 206 (1919), *rch. den.* 186 P. 678 (1920), a California domicilliary died intestate leaving a daughter born out of wedlock in California and a bank account located in a

Nevada bank. Nevada and California each had a legitimation by adoption statute identical to section 78-30-12 of our Code. Each state also had a provision allowing acknowledged illegitimates to inherit from their fathers, but the statutes of both states required the acknowledgment to be in writing subscribed by a credible witness. These statutes providing for inheritance by acknowledged illegitimates were, therefore, not even raised in the case, because there was no evidence that the decedent, had ever acknowledged the daughter in writing. Since the decedent died domiciled in California, and since the Nevada bank account was personalty having a legal situs in California, the Nevada Court properly applied California law to determine both the status of the daughter and her right to inherit. She was determined to be illegitimate under the California statute, because the decedent had no family to take her into, his public acknowledgment of paternity nothwithstanding, and since the succession by illegitimates statutes were not involved, the common law applicable in California, which denied to illegitimates the right to inherit, was applicable. Therefore, the daughter was not entitled to the bank account.

It is readily apparent that the holding of the *Forney* case has no application at all to this case since the Utah statute expressly abrogating the common law rule is applicable in this case, no requirement of written acknowledgment being present. At most, *Forney* can only be cited for the general principles, admitted by the Ap-

pellants at the outset, that the law of the domicile of the claimant determines her status as legitimate or illegitimate, and that the law of the legal situs of property, *i.e.* California, controls succession rights in such property.

In *Popp v. Roth,* 9 Utah 2d 96, 338 P.2d 123 (1959), one claiming to be the natural father of a child, placed for adoption by its mother, brought a habeas corpus proceeding to recover custody of the child from the adoptive parents, claiming that the child was legitimated under the adoption provision of section 78-30-4 of Utah Code Annotated, 1953, and that, therefore, it could not be adopted without his consent. This Court properly held that, since the child was born illegitimate in Illinois, since the purported marriage of its parents took place in Illinois, and since Illinois was, at the times of both events, the domicile of the child, the question of its legitimation was determinable under Illinois law, rather than Utah law. Under Illinois law the child was determined to have the status of an illegitimate because the marriage of the parents was void, and the writ was accordingly denied. Neither, application of section 74-4-10, nor the question of inheritance by the child, was at issue, and neither could have been, since the father was a living litigant in the case. The *Popp* case, therefore, also simply stands for the well worn rule that the law of the domicile of the child governs its status.

It is submitted that neither of the two cases prin-

cipally relied upon by the lower court is even remotely in point, and that they have no application whatever to the issues presented by the parties' respective Motions for Summary Judgment determining heirship.

The other Utah cases relied upon by the Respondent, *Rohwer v. District Court,* 41 Utah 279, 125 P. 671 (1912), and *Manfield v. Neff,* 43 Utah 258, 134 P. 1160 (1913), are equally inapplicable to the issues before this Court. Neither case is concerned with section 74-4-10 of the Utah Code or its predecessor statutes. Each case deals with a legitimation statute which provided that the issue of plural marriages born prior to certain specified dates were legitimated. The other cases and authorities which have been cited by the Respondent either stand for propositions which have been acknowledged by Appellants, or which are totally irrelevant to this case or, which support the position of Appellants.

## POINT IV.

## THE LOWER COURT ERRED IN HOLDING THAT RADKE AND HORNBERG ARE NOT THE HEIRS OF THE DECEDENT UNDER SECTION 74-4-5(4) UTAH CODE ANNOTATED, 1953.

The father of the decedent openly and repeatedly acknowledged that he was the father of the mother of Appellants, Radke and Hornberg. [Record at 34, 35,

47, 76 and 103.] The acknowledgment is not contested. Utah Code Annotated, 1953, section 74-4-10 provides that an illegitimate child is an heir of the person who acknowledges himself to be the father of such child and inherits his estate in full or in part as the case may be in the same manner as if he had been born in lawful wedlock. In light of the legislative history and intent behind this Section, the Utah Courts have interpreted the statute in an enlightened manner and have determined that it is intended to treat the duly acknowledged, illegitimate child in the same manner for purposes of inheritance as his legitimate brothers and sisters, without actually legitimating him.

In interpreting this statute, the Utah Courts have been "mindful of the fact that in this state, contrary to the general rule that statutes in derogation of the common law must be strictly construed, such statutes are to be liberally construed with a view to effect the objects of the statutes and to promote justice." *In re Garr's Estate, supra,* at 761. In *Garr's Estate* it was "urged that under our laws the rights of an illegitimate and of his descendants, whatever they may be, are strictly lineal, never collateral, and that, therefore, the Appellants have no claim to the estate." *Id.* at 761. The Court rejected this contention.

> "The provisions are broad and comprehensive, and a full compliance with them would clearly seem to remove all disabilities existing at common law as to the right of such a child to in-

herit, and as to such right, place it upon the same basis as a legitimate child." *Id.* at 761.

Although Utah has at times been a leader, it has by no means been the only state to remove the remaining vestiges of the common law *filius nullius* concept. In interpreting statutes similar to Utah's, Courts have held that a child of an illegitimate parent can inherit from that parent's legitimate brothers and sisters, see e.g., *Hudson v. Reed,* 259 Ala. 340, 66 So.2d 990 (1953); *State v. Chavez,* 42 N.M. 569, 82 P.2d 900 (1938); *Grundy v. Hadfield,* 16 R.I. 579, 18 A. 186 (1889), and that an illegitimate child can inherit from its legitimate brothers and sisters, see e.g. *Blethyn v. Bidder,* 80 F.Supp. 962 (D.C. Colo. 1948); *re Klingaman's Estate,* 128 A.2d 31 (Del. 1957); *Rhode Island Hosp. Trust Co. v. Hodgkin,* 48 R.I. 459, 137 A. 381, reh den 138 A. 184 (1927). There are other cases, interpreting statutes in some respects similar to Utah's, which narrowly construe the statutes and refuse to place the illegitimate child on an equal footing with his legitimate brothers and sisters. It is submitted that these cases are vestigal relics of the feudal system's treatment of bastards as *filius nullius.* It is further submitted that the purpose of the common law harsh treatment of bastards was to protect estates from dissipation in a society which condoned the loose morality of upper class males. This principle does not have, nor has it ever had, any validity in Utah. We, therefore, ask this Court to continue the enlightened and compassionate Utah approach which is to treat acknowledged bastards

and their children in the same manner as if they had been born in lawful wedlock.

## CONCLUSION

Because the decedent left neither issue, husband, wife, father, mother, brother nor sister surviving him, his estate should be distributed to the children of his half-sister by right of representation, there being no living descendants of any other brother or sister. U.C.A. §§ 74-4-5(4), 74-4-17 (1953). The fact that the decedent's deceased half-sister is treated as illegitimate for purposes of the present controversy, does not result in disinheritance of her descendants, since she was acknowledged by the decedent's father. U.C.A. § 74-4-10. Respondent and the remainder of the class of cousins-german of the decedent, being more remote in degree of kinship to the decedent than are Appellants and claiming as against children of a deceased sister, are not next of kin and are not entitled to inherit any part of his estate. U.C.A. § 74-4-7(6).

Respectfully submitted,

FABIAN & CLENDENIN
By Narrvel E. Hall and
Glen E. Clark
*Attorneys for Plaintiffs-Appellants*

800 Continental Bank Bldg.
Salt Lake City, Utah 84101

and their children in the same manner as if they had been born in lawful wedlock.

## CONCLUSION

Because the decedent left neither issue, husband, wife, father, mother, brother nor sister surviving him, his estate should be distributed to the children of his half-sister by right of representation, there being no living descendants of any other brother or sister. U.C.A. §§ 74-4-3(4), 74-4-17 (1953). The fact that the decedent's deceased half-sister is treated as illegitimate for purposes of the present controversy, does not result in disinheritance of her descendants, since she was acknowledged by the decedent's father. U.C.A. § 74-4-10. Respondent and the remainder of the class of cousins-german of the decedent, being more remote in degree of kinship to the decedent than are Appellants and claiming as against children of a deceased sister, are not next of kin and are not entitled to inherit any part of his estate. U.C.A. § 74-4-7(6).

Respectfully submitted,

FABIAN & CLENDENIN
By Narrvel E. Hall and
Glen E. Clark
*Attorneys for Plaintiffs-Appellants*

800 Continental Bank Bldg.
Salt Lake City, Utah 84101

# APPENDIX "A"

**KEY**

B - BIRTH
M - MARRIAGE
M(1)- FIRST MARRIAGE
M(2)- SECOND MARRIAGE
D - DEATH
(C) - CLAIMANT
(D) - DECEDENT
* - a/k/a EUGEANE, EUGEN
** - a/k/a EUGENE, EUGENIE
*** - a/k/a DUQUAINE, DUCAN

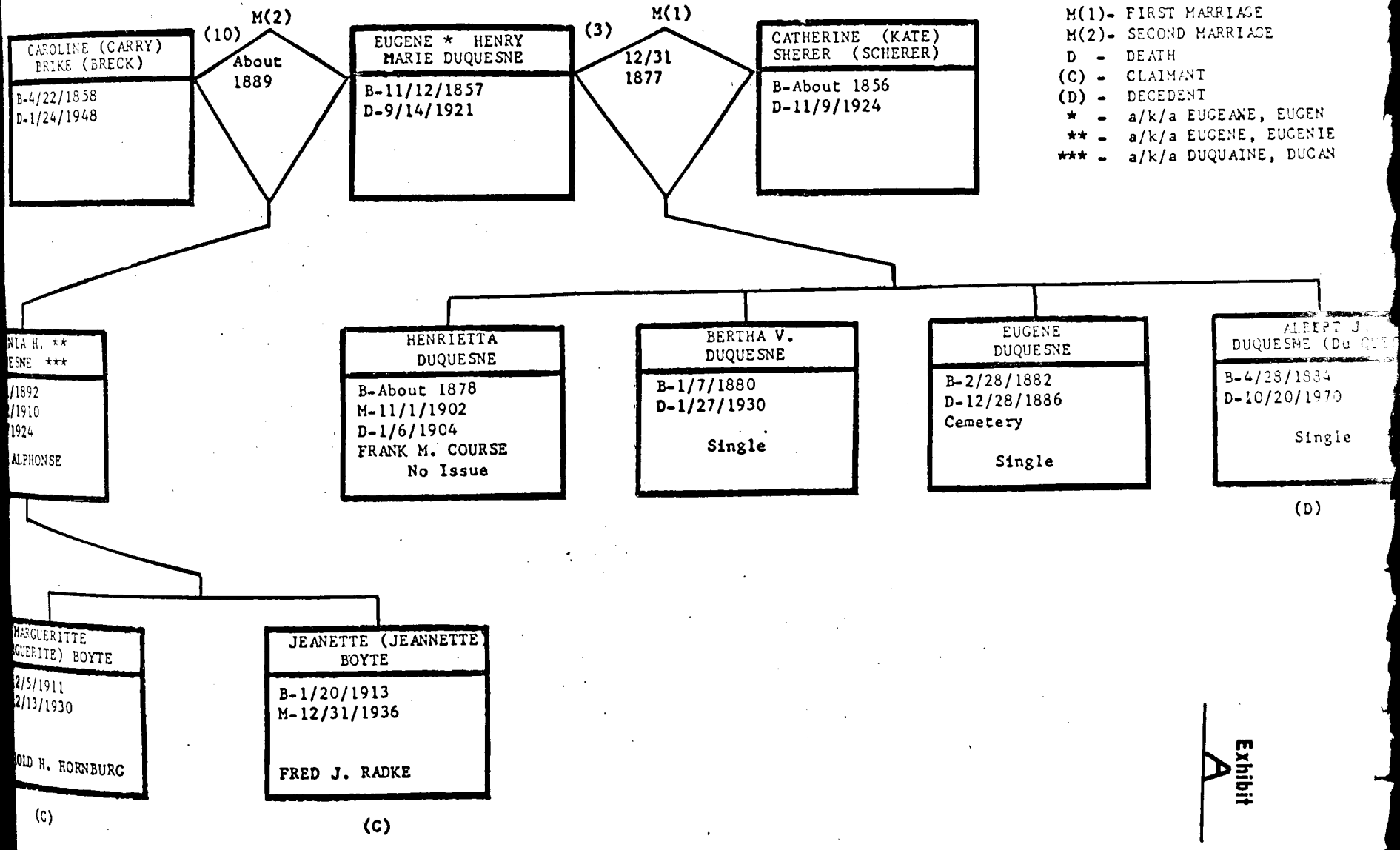


Exhibit A