

IN THE SUPERIOR COURT IN AND FOR SEMINOLE COUNTY, OKLAHOMA.

Corabelle Harjo, a minor by her  
Guardian, H. T. Thompson,

Plaintiff,

vs.

No. 709.

Lucinda Harjo Joshua, et al,

Defendants.

ANSWER BRIEF OF PLAINTIFF.

In response to the brief heretofore filed by the defendants, we first call the court's attention to the fact that the only question raised in defendants brief is:

"That Cheparnoche Harjo was not the father of Corabelle; that the marriage of Cheparnoche Harjo to Mary Bruner, his step-daughter, was incestuous and void, made so by Sec. 1667 O.S. 1931. This being a void marriage, the plaintiff herein is not entitled to the ordinary presumption of legitimacy of children born to a lawful marriage during wedlock."

Before discussing the above proposition, we desire to call the court's attention to the facts Cheparnoche Harjo and Mary Bruner were married about 1917 by license; Cheparnoche and Mary separated in June, 1919, and this child Corabelle Harjo was born December 1, 1919.

It is our contention that Sec. 1619 O.S. 1931, which provides that:

"The issues of all marriages null in law, or dissolved by divorce are legitimate."

Assuming for the fact of this argument that the contention of the defendants is correct and that Cheparnoche and Mary could not marry by reason of the relation between them, yet they did do so, and even though it is a void marriage their child, the plaintiff herein, would be legitimate and would inherit. This has been held repeatedly to be the law by our own Supreme Court.

The first case at which we have had our attention directed is that of Copeland et al vs. Copeland et al, 175 Pac. 764.

In that case, Joe Copeland had a living wife from whom he had been divorced. To he and Martha Copeland there were children born, and it was contended that because the marriage was void by reason of the incompetency of the parties to contract a marriage that the issues could not inherit.

6. Guy  
6. Guy + now  
comes in part  
Wanna  
area  
now  
comes  
etc

The court in answer to that contention, said:

"We have considered all of the evidence carefully, and believe that it amply sustains the contention of the plaintiffs that no divorce had been granted, and hold that the second marriage was void for the reason that at the time said marriage was entered into Joe Copeland had a living wife, and no divorce had been decreed. This raises the question as to the status of the child born, Elizabeth Copeland, of the second marriage. Revised Laws of 1910, Sec. 8420, provides:

'The issue of all marriages null in law, or dissolved by divorce, are legitimate.'

This provision of this statute has never been construed by the Supreme Court, its language seems too plain for construction, and, if it means what it says, a child born of a marriage contracted and consummated in accordance with the law, though void on account of the disability of one of the parties, such as having a living spouse undivorced, is legitimate, and, being legitimate, as a natural sequence, it would inherit from its parents as though it were born in lawful wedlock. This statute, however, or statutes identically the same, have been construed by the Supreme Courts of California, Missouri, and Wisconsin. The Supreme Court of California held, under this provision of the statute, in the case of Graham vs. Bennet, 2 Cal. 503, that children of a void marriage were legitimate and the heirs of their parents. The Supreme Court of Wisconsin, 62 Wis. 512, 22 N.W. 720, Watts v. Owens, held under a similar statute:

'A child born within the wedlock of a regular marriage which for any reason (as that the woman had another husband living) is null in law is nevertheless the legitimate child and heir of both parents.'

The Missouri Supreme Court in the case of Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359, held under statute identical with ours:

'Under section 8, p. 328, Rev. Stat. 1825, which provides that the issue of all marriages deemed null in law \* \* \* shall nevertheless be legitimate, a child of such a marriage will inherit and transmit by descent the same as if born of a lawful marriage.'

Under this statute, and the decisions construing similar provisions, it is very evident that Elizabeth Copeland is the legitimate child and the heir of Joe Copeland and Martha Copeland, and inherits and transmits by descent property the same as if she had been born of lawful wedlock. From this view of the case this court holds that the heirs of Joe Copeland are Samantha Copeland, J. C. Copeland, and Elizabeth Copeland, each entitled to one-third of the property of Joe Copeland."

This case was followed in the case of Brokesholder vs. Brokesholder, 204 Pac. 284, and has been universally followed by our court.

The court relies solely upon one case, to-wit: In Re: Willis's Estate, 265 Pac. 1064, and the defendants quote from the syllabus of that case, but in that case the facts were that the

presumed father was in the penitentiary and without opportunity of access to the mother, and the court held there could be no presumption of legitimacy, and said, among other things, that it was necessary before the presumption of legitimacy arise that the contending party should show probable access to the mother.

We met this condition fully by showing that Harjo and his wife lived together until in the month of June, 1919, as husband and wife, and fixed the date of the birth definitely at December 1, 1919.

This being true, the case cited by counsel is not in point and will be of no assistance to the court in determining the case at bar. We respectfully submit that judgment should be entered for the plaintiff in this cause, as prayed for.

A handwritten signature in cursive script, appearing to read "H. H. Edwards", is written over a horizontal line.

Attorney For The Plaintiff.

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