

1995 CarswellOnt 822
Ontario Court of Justice (General Division)

Kiehn v. Murdoch

1995 CarswellOnt 822, 53 A.C.W.S. (3d) 460, 9 E.T.R. (2d) 76

EDITH ALICE KIEHN v. HUGH MURDOCH, DORIS C. MURDOCH (as representative of estate of JOHN DRENNAN MURDOCH), IRENE PALMER, DOROTHY MUIR, MARION DYER, ALLAN CHARLES GOODWAY, AUDREY ANNE CORNEIL, JUNE LORRAINE CORNFIELD, JEAN MARGUERITE NIEMI, BARBARA MAY LEBER, KATE ANN HILL, ANDREW LINDSAY WILSON, GARY D. WILSON (on behalf of MARY LINDSAY DEAN and THELMA ROBERTS JON TODD), JOYCE LAVERTY, HUGH CHALMERS WILSON IV, SUSAN BUCK, KEN WILSON, RICHARD WILSON, BRUCE WILSON and SUSAN IGNACZEWSKI

Flinn J.

Heard: December 16, 1994
Judgment: January 16, 1995
Docket: Doc. 75046

Counsel: *R. L. Benke*, for applicant.
Gary D. Wilson, for some respondents.

Subject: Estates and Trusts

Related Abridgment Classifications

Estates and trusts

I Estates

I.1 Intestate succession

I.1.d Inheritance by ancestors and collaterals

I.1.d.ii Representation

Headnote

Estates --- Intestate succession — Inheritance by ancestors and collaterals — Representation

Intestate succession — Inheritance by ancestors and collaterals — Representation — Wording of s. 47(4) of Succession Law Reform Act being clear — Grandnieces and grandnephews excluded from sharing in estate by operation of section — Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 47(4).

The deceased died intestate on July 15, 1992. He had no children and left no widow. His parents were deceased. One sister and one brother, children of deceased brothers and sisters, and children of the deceased children of the brothers and sisters, survived him. The administratrix of his estate applied for the direction of the court as to whether benefits passed under s. 47(4) of the *Succession Law Reform Act* (Ont.) to the grandnieces and grandnephews.

Held:

The grandnieces and grandnephews were not entitled to receive a share of the estate.

In the circumstances of the case at bar, s. 47(4) appeared to be very clear and it was unnecessary to go to another section or subsection of the Act to ascertain its meaning. As the deceased was not survived by any spouse, issue or parent, his property should be distributed among the surviving brothers and sisters equally, with the further provision that if any brother or sister predeceased him, the share of that deceased brother or sister should go to the children of the deceased brother or sister. Accordingly, the grandnephews and grandnieces were excluded by the operation of s. 47(4).

Table of Authorities

Statutes considered:

Succession Law Reform Act R.S.O. 1980, c. 488 [R.S.O. 1990, c. S.26]—

s. 1 "child" [R.S.O. 1990, c. S.26, s. 1 "child"]

s. 1 "issue" [R.S.O. 1990, c. S.26, s. 1 "issue"]

Succession Law Reform Act, R.S.O. 1990, c. S.26 —

s. 47

s. 47(1)

s. 47(2)

s. 47(4)

s. 47(5)

s. 47(6)

Application for opinion, advice and direction of court as to entitlement of grandnieces and grandnephews to share in estate under s. 47(4) of *Succession Law Reform Act* (Ont.).

Flinn J.:

1 This is an application to the court for the opinion, advice and direction of the court dealing with s. 47(4) of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, arising out of the administration of the estate of James Lindsay Wilson. The question is whether benefits pass under s. 47(4) to the children of the deceased children of the brothers and sisters of the testator.

2 There is no dispute with respect to the facts. The applicant is the administratrix of the estate of James Lindsay Wilson, who died intestate on the 15th day of July, 1992. He had no children and left no widow, and his parents were deceased. There were surviving him one sister and one brother, children of deceased brothers and sisters, and children of deceased children of deceased brothers and sisters, sometimes referred to as grandnieces or grandnephews. The question is whether the grandnieces and grandnephews are entitled to share under s. 47(4) of the *Succession Law Reform Act*.

3 Schedule 1 is a copy of the surviving members of the families [p. 80, post], and I have attached as Schedule 2 the whole of s. 47 [p. 81, post].

4 In the 3rd edition of *Probate Practice*, Macdonell, Sheard, Hull, p. 236, is found the following:

Where the deceased leaves no surviving spouse or issue The Succession Law Reform Act provides a scheme of distribution which is considerably more simple than that which formerly existed under The Devolution of Estates Act. In such a case any surviving parent of the deceased will have priority and will be entitled to the whole of the intestate estate. If both parents survive they will be entitled in equal shares. If there is no surviving parent, any surviving brothers or sisters will, with one exception, be entitled in precedence to other surviving relatives. The exception permits the children of any deceased brother or sister to take the share which their parent would have received if he had survived. Like the rules which permit representation by **nieces** and nephews under The Devolution of Estates Act the exception applies only if there is at least one surviving brother or sister of the deceased and, it seems, that it is confined to children of a deceased brother or sister and does not extend to more remote issue.

If there are no surviving parents or brothers or sisters any surviving nephews or **nieces** will be entitled to the estate in equal shares.

5 Arguing for the grandnephews and grandnieces, counsel contended that it was the intention of the *Succession Law Reform Act* to be more inclusive of children and of children of children than had been the case under the former legislation, and that where the words "without representation" are used in subs. (5) and (6), there is an implication that the legislature intended representative distribution under subs. (4). In other words, because it excludes representation in subs. (5) or (6), subs. (4) must be read to include the children of deceased children, by representation.

6 He also argues that because the word "issue" was used in ss. 47(1) and (2) and being an all-inclusive word, the use of that term in those two subsections should direct an extended interpretation of s. 47(4).

7 "Child" is defined in the *Succession Law Reform Act*, s. 1, and includes a child conceived before the death of a parent and child by adoption. "Issue" is also defined as "any lineal descendant of a person, whether born within or outside marriage ..."

8 Where the provision of a section of a statute is clear, one does not have to go to other sections or subsections to ascertain its meaning unless it would conflict.

9 In these circumstances, subs. (4) appears to be very clear when applied to the estate of James Lindsay Wilson. He did not leave surviving any spouse, issue or parent. Therefore, his property should be distributed among the surviving brothers and sisters equally, with the further provision that if any brother or sister predeceases the intestate, the share of that deceased brother or sister should go to the children of the deceased brother or sister.

10 Accordingly, the court finds that the children of the deceased children of the deceased brothers and sisters of James Lindsay Wilson, that is his grandnephews and grandnieces, are excluded by the operation of s. 47(4).

11 The application asks two questions: (a) and (b) in the application.

12 The first answer is in the negative. Therefore, it is not necessary to deal with the second.

13 With respect to costs, I intend to order costs out of the estate, and in order to expedite the administration of the estate to fix the costs, I will hear representations from counsel with respect to quantum.

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Order accordingly.

APPENDIX 1

SURVIVING BROTHERS AND SISTERS

Name	Relationship	Date of Birth	Date of Death	Surviving Children
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Margaret Murdoch	Sister	May 23, 1889	April 6, 1970	Hugh Murdoch Estate of John Drennan Murdoch
Isabella	Sister	Sept. 14, 1890	Sept. 17, 1926	Dorothy Muir *Ann Todd deceased 1988 and survived by son John Todd and Joyce Laverty
John Wilson	Brother	July 3, 1892	August 1962	Thelma Roberts Marion Dyer *Ronald Wilson died in 1988 and is

				survived by his children, Ken Wilson, Richard Wilson, Bruce Wilson and Susan Ignaczewski
Annie McIlwraith	Sister	March 25, 1894	May 6, 1963	Alan Goodway, Audrey Corneil, June Cornfield and Edith Kiehn
James Lindsay	Brother	March 21, 1896	July 15, 1992	None
Hugh Chalmers II	Brother	May 4, 1898	August 13, 1973	Jean Niemi Barbara May Leber Kate Ann Hill *Deceased Hugh Chalmers III and survived by Hugh Chalmers IV and Susan Buck
Mary Lindsay Dean	Sister	July 1, 1900		
Jean	Sister	Oct. 2, 1902	Feb. 2, 1985	None
Agnes	Sister	Jan. 25, 1904	March 6, 1912	None
Andrew Lindsay Wilson	Brother	May 10, 1907		
William Chalmers	Brother	June 26, 1911	August 25, 1990	None

APPENDIX 2

Section 47 of the Succession Law Reform Act

47. — (1) Subject to subsection (2), where a person dies intestate in respect of property and leaves issue surviving him or her, the property shall be distributed, subject to the rights of the spouse, if any, equally among his or her issue who are of the nearest degree in which there are issue surviving him or her.

(2) Where any issue of the degree entitled under subsection (1) has predeceased the intestate, the share of such issue shall be distributed among his or her issue in the manner set out in subsection (1) and the share devolving upon any issue of that and subsequent degrees who predecease the intestate shall be similarly distributed.

(3) Where a person dies intestate in respect of property and leaves no spouse or issue, the property shall be distributed between the parents of the deceased equally or, where there is only one parent surviving the deceased, to that parent absolutely.

(4) Where a person dies intestate in respect of property and there is no surviving spouse, issue or parent, the property shall be distributed among the surviving brothers and sisters of the intestate equally, and if any brother or sister predeceases the intestate, the share of the deceased brother or sister shall be distributed among his or her children equally.

(5) Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother or sister, the property shall be distributed among the nephews and **nieces** of the intestate equally without representation.

(6) Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother, sister, nephew or **niece**, the property shall be distributed among the next of kin of equal degree of consanguinity to the intestate equally without representation.

(7) Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother, sister, nephew, **niece** or next of kin, the property becomes the property of the Crown, and the *Escheats Act* applies.

(8) For the purposes of subsection (6), degrees of kindred shall be computed by counting upward from the deceased to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

(9) For the purposes of this section, descendants and relatives of the deceased conceived before and born alive after the death of the deceased shall inherit as if they had been born in the lifetime of the deceased and had survived him or her. R.S.O. 1980, c. 488, s. 47.