Wyoming Law Journal

Volume 11 | Number 2 Article 15

December 2019

Probable Interpretation of Wyoming Rules of Descent

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To date, no court has interpreted the meaning of this phrase in the Act,[18] but it would seem proper that oil and gas operation should come within the Act. The Senate Report 404, referred to above, recognizes that it is inequitable not to compensate the stockraiser for damages to the surface,[19] and it should make no difference whether the damage is caused by strip or open pit mining methods, or oil and gas operations. It was noted in discussion of the *Kieffer* case[20] that oil and gas operations may necessitate the use of the entire surface estate in order to remove the oil and gas, thus nullifying any use of the surface by its owner. Under either type of mining operation the result to the stockraiser is comparatively the same; reduction in the number of stock that can be fed and a decrease in the value of the surface estate.

In the situation here under consideration, four points are stressed in conclusion:

1. Only when the acts of an oil and gas lessee are not reasonably incident to the oil and gas operations, can the stockraiser receive any compensation for damage to the surface estate used for grazing purposes.

2. Provisions under statutes existing prior to the Act of 1949 provide recovery for damage to crops and improvements, which has been interpreted to exclude damage to grass.

3. Whether the Act of 1949 will protect the stockraiser from damage to the land for grazing purposes by oil and gas operations, remains an undecided question.

4. The stockraiser should be compensated for damage caused to his surface estate by oil and gas operations. This problem needs more legislative attention and the court's understanding.

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PROBABLE INTERPRETATION OF WYOMING RULES OF DESCENT

Subsections 1, 2 and 3 of Section 6-2501, Wyoming Compiled Statutes, 1945,[1] which govern intestate succession of both real and personal prop-

18. The Wyoming Supreme Court in the *Holbrook* case, note 6 supra, could properly have made an interpretation, but the report contains no mention of the Act.
19. A portion of the report, note 17 supra, reads as follows:
". . . , the number of head of stock an entryman can raise on his homestead is limited to some extent for both the present and future by the activities of the holder of the mineral rights on the land.
It is to correct such an anomalous and inequitable situation and to place surface entrymen on all mineral lands on an equal basis as to compensation for damages to the surface that the committee has adopted this amendment."
20. See note 7 supra.

1. Wyo. Comp. Stat. § 6-2501 (1945). . . . Except in cases above numerated, the estate of any intestate shall descend and be distributed as follows:
1. To his children surviving, and the descendants of his children who are

erty in the event that an intestate dies without a surviving spouse are not as free from ambiguity as appears from a first reading. The phrases ". . . descendants, collectively, taking the share which their parents would have taken if living . . ." and ". . . descendants taking collectively the share of their immediate ancestors . . ." indicate a distribution by representation, that is, the descendants of the deceased heir take the same share or right in the estate of another person that their parents would have taken if living,[2] as distinguished from taking "per capita," or where each descendant takes a share of the inheritance in his own right as next of kin to the intestate.[3] No problem arises if any member of the particular class named in each of these subsections[4] survives the intestate. The estate would be divided into shares, the number of shares being determined by the number of members of the class surviving, plus the number of members of the class who have died leaving descendants, the descendants of each deceased member taking that member's share by representation and the living members taking directly.[5] An ambiguity arises, however, in a situation, where, under any one of the three subsections, all of the members of the particular class named have predeceased the intestate, leaving descendants surviving them. The problem then is one of determining which generation will form the stocks of distribution.

There are two interpretations open: First, that the property is to be divided among the stocks which consist of the heirs of the generation nearest to the intestate whether or not any member of such generation survives the intestate; or second, that the stocks among which the property is to be divided are the heirs of the generation which is nearest to the intestate and of which any member is living at his death.[6]

Varying results will be reached in the distribution of the estate, depending upon which generation is selected by the court as determining the stocks. For example, X has two children, A and B, who predecease him, A leaving two children and B leaving three children, all of the grandchildren surviving X, who dies intestate. If the generation of X's children is selected as determining the stocks, A's children will split one share, each

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dead, (the descendants, collectively, taking the share which their parents would have taken if living);

2. If there be no children, nor their descendants, then to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead, (the descendants, collectively, taking the share which their parents would have taken if living), in equal parts;

3. If there be no children nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers and sisters, nor husband nor wife, living, then to the grandfather, grandmother, uncles, aunts and their descendants, (the descendants taking collectively, the share of their immediate ancestors) in equal parts.

2. 5 Thompson, Real Property § 2425 (perm. ed. 1940).
3. 5 Thompson, Real Property § 2426 (perm. ed. 1940).
4. Wyo. Comp. Stat. § 6-2501 (1945), Subsection 1: children; Subsection 2: father, mother, brothers and sisters; Subsection 3: grandfather, grandmother, uncles and aunts.
5. Winsett v. Winsett, 203 Ala. 373, 83 So. 117 (1919); Johnson v. Bodine, 108 Ia. 594, 79 N.W. 348 (1899); see Ketchum v. Corse, 65 Conn. 85, 31 Atl. 486, 488 (1894).
6. Page, Descent Per Stirpes and Per Capita, 1946 Wis. L.R. 3, 5.

getting one-fourth of the estate and B's children will divide the other share, each taking one-sixth of the estate. If, however, the generation of the grandchildren is selected as determining the stocks by which representation will be traced, each grandchild would receive an equal share, or one-fifth of the estate.

As to both lineal and collateral descent, the majority of jurisdictions in the United States have selected the generation nearest in degree of relationship to the intestate of which a member is living as that generation from which the stocks will be selected.[7] This result seems to have been reached by a construction of statutes the ultimate intent of which required an equal distribution to the members of the class nearest in degree of relationship to the intestate of which there are members surviving.[8] An example of a statute achieving this result is that construed in *In re Martin's Estate,*[9] where three grandchildren were left surviving the intestate, two being sons of a deceased son, the other a daughter of another deceased son. The rights of the grandchildren were held to depend on the construction of a statutory provision which reads as follows: "In equal shares to the children of said deceased person or the legal representatives of deceased children." It was held that the grandchildren surviving the intestate should take equally and not by representation or per stirpes. Another example of a statute reaching this result is that construed by an Arkansas court.[10] The relevant statutory provision provided the estate should be distributed ". . . in the following manner: First, to children, or their descendants, in equal parts; second, if there be no children, then to the father, then to the mother, then to the brothers and sisters, *or* their descendants, in equal parts." The court held that thirty-five nephews and nieces standing in equal degree and nearest to the intestate took per capita, equal shares, and allowed four grand-nephews and nieces to take the share that a deceased niece would have taken if living.

Generally this result is also achieved if the governing provision of the statute is that the property shall go to the "next of kin" or the "next of kin in equal degree." Thus a California court[11] decreed a per capita distribution to only the nephews and nieces where the decedent was survived by no issue, spouse, parent, sister, or brother, but by nephews and nieces and children of dead nieces and nephews. The governing provision in this situation was that "the estate must go to the next of kin in equal degree," and there being no further provision for representation by the children of deceased nephews and nieces.

Although the courts have been far from unanimous in their decisions on the question, contrary conclusions have been reached in the construction of statutory provisions quite similar to Wyoming's. In these constructions

7. Atkinson, Wills 65 and 67 (2nd ed. 1953); 26 C.J.S. 1030 and 1031; 16 Am. Jur. 811.
8. IV Vernier, American Family Laws 114 (1936).
9. In re Martin's Estate, 96 Vt. 455, 120 Atl. 862 (1923).
10. Garrett v. Bean, 51 Ark. 52, 9 S.W. 435 (1888).
11. Re Nigro's Estate, 172 Cal. 474; 156 Pac. 1019 (1916).

the courts seem to have given primary consideration to provisions providing for representation. The result has been to interpret such provisions as requiring the selection of the generation originally nearest the intestate regardless of whether or not a member of such generation is living as the generation from which the stocks will be determined.

Various examples of such construction can be given. One such is that of the North Carolina court in *Crump v. Faucett*.[12] Here the intestate died possessed of real and personal estate, leaving three grandchildren by a son, and five grandchildren by a daughter, both of his children predeceasing him. The court stated that the question of whether the grandchildren inherited per stirpes or per capita depended on the construction of the following provision: "The lineal descendants of any person deceased shall represent their ancestor and stand in the same place as the person himself would have done had he been living." It was held that the grandchildren represent their ancestors and take the estate per stirpes and not per capita, with the result that the son's children each took one-sixth and the daughter's children each took one-tenth of the estate. Another example is the construction of a provision covering lineal descent by the California court in *Maud v. Catherwood*.[13] A trust indenture provided that trust property was to be distributed to the heirs at law of the settlor upon the decease of the last survivor of the beneficiaries. Four grandchildren and two great-grandchildren were the qualified heirs at the time of distribution. The California statute provided for a per stirpes distribution if the descendants were of unequal degree of relationship. The relevant portion was ". . . if all the descendants are in the same degree, they share equally, otherwise they take by right of representation." The court held that to "take by right of representation" required the selection of the settlor's children as the generation which determined the stocks. Accordingly the estate was divided into four parts, that being the number of deceased children who had surviving descendants. The interest of each grandchild and great-grandchild was then determined by representation.

The same conclusions have been reached in the construction of statutory provisions governing collateral descent. Various examples can be recited (all of them being in a situation where no one nearer in degree than nephews and nieces survived the intestate). A Maryland court[14] has construed a provision reading "every brother and sister of the intestate shall be entitled to an equal share, and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister" as requiring a per stirpes and not a per capita distribution. A per stirpes distribution (regarding real property) was held to be intended by the following North Carolina provision: "If any brother or sister of the intestate shall have died in the lifetime of the intestate leaving issue, such

12. Crump v. Faucett, 70 N.C. 345 (1874).
13. Maud v. Catherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945), noted, 33 Cal. L.R. 324.
14. McComas v. Amos, 29 Md. 120 (1868).

issue shall represent the deceased parent, and stand in the same place he or she would have done if living, ..."[15] By a subsequent decision this construction was regarded as having been sanctioned by the legislature since the provision was re-enacted in identical terms.[16] A later decision approved both holdings.[17] Other jurisdictions have reached the same conclusion in construing similar statutes.[18]

Emphasis has been placed on a provision for representation in a similar manner where the only qualified heirs are descendants of uncles and aunts. Under a Pennsyvlania statute which provided that "the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters, and the children of uncles and aunts, by representation, such descendants taking equally among them such share as their parents would have taken if living" the court held that a per stirpes distribution was required to the descendants in unequal numbers of various deceased uncles and aunts.[19] Though the general rule in Pennsylvania at the time provided for a per capita distribution among kindred of equal degree, it was decided that the quoted provision overrode the general rule, even though the claimants were all equally related to the decedent.

As previously indicated, all courts have not taken the view that a provision for representation requires the selection of the generation originally nearest the intestate as that generation from which the stocks will be determined. Some courts have selected the nearest generation to the intestate of which there is a member surviving and have given effect to the provision for representation only where the qualified heirs are of unequal degree. In this situation these courts hold that the heirs who are members of the class nearest in degree take equal shares, while those further removed take by representation. These decisions are either indicated by the pertinent statute[20] or are decided on the basis of what the court felt must have been the intent of the legislature.[21]

Though there is no certainty as to which way a Wyoming court would hold, there is a likelihood that the generation originally nearest to the intestate, regardless of whether a member of such survives the intestate, would be selected as that generation which would determine the stocks. Presuming that the rules for descent and distribution were intended to codify what would probably have been the intent of the intestate as to

15. Clement v. Cauble, 55 N.C. (2 Jones Eq) 82 (1854).
16. Haynes v. Johnson, 58 N.C. (5 Jones Eq) 124 (1859).
17. Cromartie v. Kemp, 66 N.C. 382 (1872).
18. E.g., Appeal of Messler, 97 N.J. Eq 271, 127 Atl. 85 (1924).
19. Haye's Appeal, 89 Pa. 256 (1879).
20. Broward v. Broward, 96 Fla. 131, 117 So. 691 (1928), where the statute construed provided in effect that qualified heirs in the same and nearest degree take per capita from the intestate, while those further removed take per stirpes. Provisions to the same effect are construed in In re Crommette's Estate, 8 N.Y. Supp.2d 288, 169 Misc. 521 (1938); In re Lieberman's Estate, 16 N.Y. Supp.2d 1008, 172 Misc. 1085 (1939).
21. Houston v. Davidson, 45 Ga. 574 (1872); Balch v. Stone, 149 Mass. 39, 20 N.E. 322 (1889).

the distribution of his property, this probable construction is not consonant with reason and natural justice. It is to be seriously doubted that the intestate would have intended to favor the descendants of a particular son, brother or uncle, merely because that particular person happened to have fewer descendants than another in the same class. Such is the effect of this construction.

Remedial legislation would be desirable. The plan proposed by the Model Probate Code[22] in its provisions covering intestate succession would reach a more justifiable result. It provides in essence that the shares of others than the surviving spouse will be equal if all claimants are in equal degree of relationship to the intestate, while the distribution is per stirpes (by representation) if the claimants are in unequal degrees. The code explicitly states what is to be meant by representation:

> " 'Representation' refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this division shall continue until each portion falls to a living person. All distributees except those in the nearest degree are said to take by representation."

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WAGE EXEMPTION IN WYOMING

Wyoming, through statutory enactment, has provided partial exemption of the judgment debtor's wages from garnishment.[1] The purpose, as expressed by the Wyoming Supreme Court, is to save debtors and their families from want by reason of misfortune or improvidence.[2] Yet, by the provisions of Wyoming's garnishment-in-aid-of-execution statutes,[3] this purpose may be defeated in many instances. Apparently, the debtor may be deprived of his entire wage without any opportunity for the assertion of his exemption. Garnishment-in-aid-of-execution in Wyoming requires only notice to the garnishee, with no requirement as to notice to the judg-

22. Problems in Probate Law Including a Model Probate Code, § 22 (1946).

1. Wyo. Comp. Stat. § 3-4713 (1945).
2. Lafferty v. Sistalla, 11 Wyo. 360, 72 Pac. 192 (1903).
3. Wyo. Comp. Stat. §§ 3-4801 through 4812; §§ 3-4705 through 4712 (1945); the problem is substantially the same in the Justice of Peace Courts, see Wyo. Comp. Stat. § 14-905 (1945).