Montana Law Review

Volume 28
Issue 1 *Fall 1966*

Article 8

7-1-1966

Intestate Succession: Stepchild May Inherit under a Statute Providing That There Is No Distinction between Kindred of the Whole and Half Blood (In re Estate of Humphrey, D. D.C., 1966)

Joseph T. Swindlehurst
University of Montana School of Law

capable of "brutalizing the temper of society." However a standard couched in terms of brutality appears to be a poor one. In most instances its application would depend on the conduct initiated by the subject rather than the police. Protection would be afforded primarily to those who resisted. A better standard would appear to be based on a balancing of the interests involved. Society's reason for the search should be balanced against the potential invasion of privacy and other risks to the individual searched.[41] Such criteria should be in addition to, and not a substitution for, traditional Fourth Amendment standards.

It is recognized that any such expansion of personal rights probably would involve the freeing of some obviously guilty individuals. However, the standard thus laid down would provide criteria regulating police conduct toward the innocent as well as the guilty. It is important that the criminal element of society be controlled, but in the words of F. B. I. Director J. Edgar Hoover:

> Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.[42]

JAMES POORE.

INTESTATE SUCCESSION: STEPCHILD MAY INHERIT UNDER A STATUTE PROVIDING THAT THERE IS NO DISTINCTION BETWEEN KINDRED OF THE WHOLE AND HALF BLOOD.—William F. Humphrey died intestate, leaving as survivors his two brothers, several children of deceased brothers, and a stepdaughter who was the natural daughter by a former marriage of his deceased wife. When a nephew was appointed administrator of the estate, the stepdaughter filed a cross-petition to revoke the letters of administration and establish herself as administratrix. On motion to dismiss the cross-petition, *held,* denied. Under a statute eliminating the common law distinction between kindred of the whole and half blood, a stepchild may inherit from a stepparent who dies intestate. *In re Estate of Humphrey,* 254 F. Supp. 33 (D. D. C. 1966).[1]

[41]Recently the Supreme Court applied a similar test in Griswold v. Connecticut, 381 U.S. 479 (1965). There the Court found the possibility that the law would allow police to search the marital bedroom for signs of the use of contraceptives to be repulsive to our notions of privacy, and hence, held the Connecticut contraceptive law unconstitutional. Perhaps the drug laws should be examined with similar considerations in mind by both the Court and the Congress.

[42]Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI,* 37 IOWA L. REV. 175, 177 (1952).

[1]A "stepchild" is the son or daughter of one's wife by a former husband, or of one's husband by a former wife. *In re* Estate of Smith, 49 Wash.2d 229, 299 P.2d 550, 63 A.L.R.2d 299 (1956). "Half blood" is a term denoting the degree of relationship which exists between those who have the same father or the same mother, but not both parents in common. BLACK, LAW DICTIONARY (4th ed. 1951).

At common law only persons related by whole blood to the decedent could be heirs to real property,[2] and stepchildren were thus excluded. Succession to personal property was governed by the English Statute of Distribution of 1670,[3] and stepchildren could not inherit under this statute since they were not related to the intestate by blood.[4]

In the United States, the common law rule remains intact,[5] except for some few instances of statutory modification.[6] The majority of states have statutes providing that half blood and whole blood kindred inherit equally.[7] However, they have interpreted these statutes as referring only to persons who are related to the intestate by blood.[8]

A recent illustration of this view is *In re Estate of Smith*.[9] In that case, deceased was survived by two stepchildren and a daughter of his natural son. He left a will in which he referred to the stepchildren as his "children." The bulk of his property was to pass to his wife under a residuary clause of the will, but she predeceased him, thus succession to the residuary property was determined by the law of descent. The court held that the stepchildren would not share in the residue; that it would go to the granddaughter. The court interpreted the words of the half blood statute[10] "kindred of the half blood" as referring to kindred of the intestate and therefore having no application to stepchildren.

[2] 2 BLACKSTONE, COMMENTARIES *199.

[3] 22 & 23 Car. 2, c. 10.

[4] 11 HALSBURY, LAWS OF ENGLAND, § 41 (1910). Decisions interpreting the statute held that there was no distinction between kindred of the half and whole blood, but the reasoning underlying these decisions made it clear that they had no application to the question of inheritance by stepchildren. The statute provided for distribution to "kindred of the intestate who are in equal degree" and the courts interpreted this to mean that half brothers of the decedent could inherit with whole brothers since they were all kindred of the intestate of equal degree. It was clear that these decisions were talking about the relation of the kindred to the intestate and not the relation of the kindred to each other. See Smith v. Tracy, 1 Mod. 209, 86 Eng. Rep. 833 (K.B. 1673); Brown v. Farndell, Carth. 51, 90 Eng. Rep. 634 (K.B. 1689); Watts v. Crooke, Show.P.C. 108, 1 Eng. Rep. 74 (1690).

[5] Cases holding that stepchildren do not inherit from intestate stepparents are: Gazley v. Cornwell, 2 Redf.Sur. 139 (N.Y. Surr. Ct. 1874); *In re* Field, 182 App. Div. 226, 169 N.Y. Supp. 677 (1918); Houston v. McKinney, 54 Fla. 600, 45 So. 480 (1907); Center v. Kramer, 112 Ohio St. 269, 147 N.E. 602 (1925); *In re* Wall's Will, 216 N.C. 805, 5 S.E.2d 837 (1939); *In re* Paus' Estate, 324 Ill. App. 58, 57 N.E.2d 212 (1944); Carpenter v. Franklin, 228 Ark. 512, 308 S.W.2d 829 (1958); *In re* Auclair's Estate, 75 Cal. App. 2d 189, 170 P.2d 29 (Dis. Ct. App. 1945); Aubrey v. Folsom, 151 F. Supp. 836 (N.D. Cal. 1957); *In re* Estate of Lima, 225 Cal. App. 2d 396, 37 Cal. Rptr. 404 (Dis. Ct. App. 1964); *In re Estate of Smith, supra* note 1.

[6] *E.g.*, OHIO REV. CODE § 2105.06(I) (Anderson 1953), provides for distribution to stepchildren when there are no next of kin before the property escheats to the state.

[7] See summary of half blood statutes in Annot., 55 A.L.R.2d 648.

[8] Finley v. Abner, 129 F. 734 (8th Cir. 1904); *In re* Long's Estate, 180 Okl. 28, 67 P.2d 41, 110 A.L.R. 1002 (1936); *In re* Pearson's Estate, 110 Cal. 524, 42 Pac. 960 (1895); *In re* McKenna's Estate, 168 Cal. 339, 143 Pac. 605 (1914). See cases *supra* note 5 (either expressly or by implication).

[9] *Supra* note 1.

[10] WASH. REV. CODE ANN. § 11.04.100 (1963):

> The degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half blood shall inherit equally with those of whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, or kindred of such ancestors in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance: *Provided, how-*

The question of whether stepchildren can inherit under the intestacy statute has never arisen in Montana. However, Montana's intestacy statutes were derived from California,[11] and cases construing California statutes should be most persuasive. The law is well settled in California that stepchildren do not inherit under the general intestacy statute,[12] and the statute on half bloods has no application.[13] Further, the California and Montana statutes contain ancestral property provisions stating that half bloods can not inherit property coming to the intestate from one of his ancestors, unless he is of the blood of the ancestor.[14] Even if stepchildren were allowed to inherit under the half blood statute, they still could not inherit ancestral property since they are generally not related to the ancestor by blood.

The decision in the instant case was based on the District of Columbia half blood statute providing that "There is no distinction between the kindred of the whole and the half blood."[15] The court distinguished the instant case from *In re Estate of Smith*,[16] saying that the District of Columbia statute was broader than the Washington statute[17] and should be applied in any case involving the relative rights of persons of the whole or half blood. Since stepchildren could be related by the half blood to natural children, the court said there could be no distinction between them. The court concluded that there was no reason why a different result should be reached if the deceased left only a stepchild and no natural child of his own.

It is submitted that there is no authority for the proposition that stepchildren inherit from intestate stepparents. The court's appplication of the half blood statute where there is no blood relationship is clearly

---

ever, That the words "kindred of such ancestor's blood" and "blood of such ancestors" shall be construed to include any child lawfully adopted by one who is in fact of the blood of such ancestor.

[11]CAL. PROB. CODE §§ 220-231, are the general intestacy sections for California. REVISED CODES OF MONTANA, 1947, § 91-403 is the general intestacy statute for Montana.

CAL. PROB. CODE § 254:
Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance in favor of those who are.

REVISED CODES OF MONTANA, 1947, § 91-411:
Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

[12]*In re Auclair's Estate, supra* note 5; *Aubrey v. Folsom, supra* note 5; *In re Estate of Lima, supra* note 5.

[13]*Ibid.* (by implication). Other cases, in construing the ancestral property provision, make it clear the statute refers to the relation of the kindred to the intestate and not the relation of the kindred to each other. See *In re Pearson's Estate, supra* note 8; *In re McKenna's Estate, supra* note 8.

[14]*Supra* note 11.

[15]D. C. CODE ANN. § 19-315 (1961).

[16]*Supra* note 1.

[17]*Supra* note 10.

out of line with the historical interpretation of such statutes. The court emphasized that the statute is phrased in "broad, sweeping terms and contains no limitations,"[18] but the opposite result has been reached under statutes that are almost identical.[19] Moreover, it is difficult to see any appreciable difference between the District of Columbia statute and statutes providing that "kindred of the half blood inherit equally with those of the whole blood in the same degree . . ."[20] It is true that these statutes have ancestral property provisions limiting such property to persons who are of the blood of the ancestor,[21] but there is no reason why such provisions would change the basic meaning of the statute.

Since persons frequently die intestate their property should be distributed according to some scheme or plan that can be consistently applied. This is accomplished by intestacy statutes which attempt to distribute property in an equitable manner. Blood relation has been a fundamental part of these statutes.[22] Human experience has shown that a high degree of affection generally exists between blood relatives, and generally an intestate would prefer that a blood relative receive his property.

On the other hand, the amount of affection found between persons related only by affinity is far less predictable. While there may be a great deal of love between stepparents and their stepchildren, there is often complete indifference. In a case where the stepchild was loved and raised by the stepparent, a decision like that in the instant case would be reasonable. Conversely, it might be unreasonable if the stepchild had been little more than a stranger to the decedent. Rather than allowing stepchildren to inherit in all events, as the instant case does, it would be preferable to give them limited rights of inheritance based on the special circumstances of each case. This may result in increased litigation, but the court or legislature should be able to establish workable guidelines.

Before determining that stepchildren should inherit in a given circumstance, a number of factors should be considered. For example, to determine what the decedent would have desired had he made a will, it would be necessary to look at such facts as the age of the stepchildren and whether they were raised in the stepparent's home. It might be significant to determine if the decedent could have easily adopted them, or why he failed to make a will.

[18]Instant case at 34.

[19]*Finley v. Abner, supra* note 8, interpreting KAN. GEN. STAT. 1889, ch. 33 § 29. Children of the half blood shall inherit equally with children of the whole blood. *In re Paus' Estate, supra* note 5. ILLINOIS LAWS 1939, § 11 p. 4. In no case is there any distinction between kindred of the whole and the half blood.

[20]This is the form of the Montana, California and Washington statutes. *Supra* notes 10 and 11.

[21]*Supra* notes 10 and 11.

[22]*In re* Bradley's Estate, 185 Wis. 393, 201 N.W. 973, 38 A.L.R. 1 (1925); *rev'd on other grounds, In re* Nelson's Estate, 266 Wis. 617, 64 N.W.2d 406 (1954).

A determination of the fairness of any distribution is likely to be influenced by the needs of the stepchildren. For instance, they may have been dependent on the stepparent because of age or physical disability. Thus, it might seem unfair to evict a minor stepchild from decedent's family home in favor of a distant relative who has no need for it himself. Also, the death of the stepparent may place heavy burdens on a stepchild who is left with a moral obligation to wind up the decedent's affairs.

Another consideration would be the nature of the property to be distributed. If decedent's property was largely obtained from the stepchild's natural parent, it would seem manifestly unfair to exclude the stepchild. The same would be true of property developed or acquired through a joint family effort in which the stepchild participated. However, giving stepchildren a share in the family heirlooms or other sentimental property might lead to additional difficulties in an area already a frequent source of family argument.

The instant case was clearly erroneous in its legal analysis. Further, if the case is understood to stand for the proposition that stepchildren inherit as natural children, it is unacceptable as a general rule of law. However, if the decision had been based on a rule taking into consideration the special circumstances of each case, the result would be quite acceptable, since the decedent had no natural children and he raised the stepdaughter as if she were his own.

JOSEPH T. SWINDLEHURST.

NEW TRIAL: USE OF AFFIDAVITS FROM JURORS TO IMPEACH THE VERDICT. —After a verdict for defendant in an auto negligence case, counsel for plaintiff submitted affidavits from jurors showing that the foreman had made an independent investigation of the accident scene. *Held:* Affidavits of jurors that bring to the court's attention facts of irregularity and misconduct are competent to sustain a motion for a new trial. *Goff v. Kinzle,* 417 P.2d 105 (Mont. 1966).

An English jury sitting in 1785 tossed a coin to determine a verdict. Chief Justice Lord Mansfield used the occasion to expand the doctrine of *nemo turpitudinem suam allegans audietur*[1] by declaring that the verdict could not be disturbed solely on the basis of affidavits from jurors. Instead, to show jury misconduct "the Court must derive their knowledge from some person having seen the [misconduct] through a window, or by some such means."[2]

The Mansfield Rule was carried over to the United States and ap-

[1]No man alleging his own infamy will be heard. Also expressed as *allegans suam turpitudinum non est audiendus;* one who alleges his own infamy is not to be heard.

[2]Vaise v. Delaval, 1 T.R. 11 (K.B. 1785).