

EASTERN CARIBBEAN SUPREME COURT

**COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE
HCV2010/0102**

BETWEEN:

Richard David [as Personal Representative of Angelina Madonna Mitchel] And Geraldine David Vital [as Personal Representative of Angelina Madonna Mitchel] And	1st Claimant 2nd Claimant
Joseph Peters	Defendant

Before:

The Hon Justice Brian Cottle

Appearances:

Ms. Rose-Anne Charles for the Claimants
Mrs. Gina Dyer-Munro for the Defendant

2012: August 15th

JUDGMENT

[1] **Cottle J:** Nicholas Mitchel and Angelina Mitchel were married for 50 years. The union was terminated by the death of Mr. Mitchel. As so often happens, Mrs. Mitchel died shortly afterwards. They had no children.

- [2] At his death Mr. Mitchel was the registered proprietor of a parcel of land in Roseau recorded in the Book of Titles X1 folio 81. He left no will. His widow did not apply for Letters of Administration. At his death Mr. Mitchel had no surviving parents, grandparents, siblings, uncles or aunts.
- [3] Mrs. Angelina Mitchel died leaving a will. In it she bequeathed the property of her late husband to the Claimants. She did so apparently in the belief that the property had passed to her upon the intestacy of her late husband.
- [4] The defendant is the son of Mr. Mitchel's sister of the whole blood. He is one of the 10 surviving children of the sister of Mr. Mitchel. He has occupied the property formerly owned by Mr. Mitchel. He and his siblings resist the efforts of the claimants to get possession. They do so on the basis that the interest of Mr. Mitchel would go to Mrs. Mitchel for life and thereafter to his siblings. They claim to stand in the shoes of their mother who would have been entitled had she survived Mr. Mitchel.
- [5] As the above facts were not in dispute the parties agreed that this matter falls to be determined as a strict question of law. The issue which confronts this court is whether upon an intestacy where the deceased left a surviving spouse but no issue, his siblings having also predeceased him, any interest which would have fallen to these siblings had they survived, can now be taken by their issue.
- [6] The claimants say the siblings having predeceased the deceased in this case, all the remaining interest goes to the surviving spouse. The defendant is of a different view.

The Law

- [7] The Intestates Act, Chap. 9:03 of the 1990 Revised Laws of Dominica is the applicable statute. Section 4 provides for the devolution of property upon intestacy. Section 4 (1) e

provides:

- (e) if the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate and in the following order and manner, namely –
 - (i) first, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trust, then
 - (ii) secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts, then
 - (iii) thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class, then
 - (iv) fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under
 - (v) fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts, then
 - (vi) sixthly, for the surviving husband or wife of the intestate absolutely;

- [8] Mrs. Munro for the defendant submits that under section 4 (1) (e) (i), subject to the life interest of the surviving spouse, the property would have passed to the siblings of the deceased. There were two such siblings, one of whom was the mother of the defendant. These siblings having died, Mrs. Munro urges the court to interpret “brothers and sisters” to mean brothers and sisters or their issue, where those brothers and sisters are dead.

- [9] She submits that a court should arrive at this interpretation by considering section 5 (1) (c) of the Intestates Estates Act. That section reads:

“where the property held on the statutory trusts for issue is divisible into shares, then any money or property which by way of advancement or on the marriage of a child of the intestate has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenant to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child would have taken if living at the death of the intestate, and shall be brought into account at a valuation (the value to be reckoned as at the death of the intestate) in accordance with the requirements of the personal representative.”

From this, argues Mrs. Munro, one sees that the issue of a class are entitled to represent deceased members of that class and to take in their place upon an intestacy.

- [10] Having carefully considered this section, I find myself unable to agree that it has any such impact. The section deals with the treatment to be accorded to property advanced to an issue which the issue would have been entitled upon an intestacy.
- [11] Mrs. Munro further points to the learning found at paragraph 12.39 of Mellow: The Law of Succession “The Statutory trusts for brothers and sisters and uncles and aunts are the same as trusts for issue. Thus deceased members of the class may be represented by their issue and entitlement is dependent upon attaining the age of 18 or marrying under that age but the hotchpot rule is inapplicable”.
- [12] The learned authors are commenting on section 47 (i) (ii) of the 1925 UK Administration of Estates Act which is in pari materia with our section 5 (1) (c) reproduced above. As indicated I do not believe it applies to the present case.
- [13] Mrs. Munro also points to the UK Non Contentious Probate Rules which apply to Dominica because of the reception provision in Section 11 of the Eastern Caribbean Supreme Court Dominica Act Chap 4:02 of the Revised Law of Dominica. Rule 21 of the NCPR reads

“Where a gift to any person fails by reason of Section 15 of the Wills Act 1837, such person shall not have any right to a grant as a beneficiary named in the will, without prejudice to his right to a grant in any other capacity.”

- [14] The difficulty with this line of argument is the failure to appreciate that Section 11 of the Eastern Caribbean Supreme Court (Dominica) Act requires the court to exercise jurisdiction in accordance with any other law in operation in Dominica first. It is only when no such law exists that we turn to the UK law and practice. In the UK legislation which is the 1925 Administration of Estates Act as amended by the 1952 Intestates Estates Act the residuary estate of a person dying intestate leaving a spouse is held in trust for the surviving spouse absolutely if the intestate leaves no issue and no parent or brother or sister of the whole blood, or issue of a brother or sister of the whole blood.
- [15] In other words the UK statute expressly includes the issue of a brother or sister as a member of the class of persons entitled upon an intestacy. That addition is conspicuously absent from the local legislation. In fact the local act goes further to remove any doubt. It restricts the entitlement upon intestacy to siblings “living at the death of the intestate.”
- [16] To my mind this expressly excludes any interest for siblings not alive at the date of the death of the intestate. Applying my understanding of the legislation to the present facts I conclude that the defendants have no interest in the property of their deceased uncle upon his intestacy. It follows that there will be judgment for the claimant for possession of the property in issue and an injunction is granted restraining the defendant from entering or remaining on the property.
- [17] Having regard to the manner in which this litigation was conducted I make no order for mesne profits. I will also depart from the prescribed costs regime and order that the defendants pay the claimant costs in the sum of \$3,000.00

Brian Cottle

High Court Judge