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A Cautionary Tale for Step-Parents and Step-Children

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Case Commented On: *Peters Estate (Re)*, [2015 ABQB 168 CanLII](#)

People have many different ways of defining “family” and what being part of a family means to them. The idea that “a family is what you make it” or “families are who you love” is true enough when it comes to inheritance if you make a will. But the assumption that each of us can define family for ourselves is not true if we die without a will. If we die intestate (i.e., without a will), then the law will define our family for us — and the law’s categories are not flexible ones. They are not even twenty-first century categories. While the percentage of Canadian families who correspond to the nuclear-family model has declined, the laws of intestate succession still depend on that model. As a result, for those who die without a will, there is the possibility that the people they considered family will not inherit from them. The *Peters Estate* case is a cautionary tale about the need for wills or adoption in a modern world where “family” is a constantly changing concept.

The Decision

The family at the centre of the *Peters Estate* case was that of Ileen Peters. She died intestate in 2013. Her husband, Lester Peters, had predeceased her in 2009, after a 43 year marriage. Ileen and Lester had one biological child together, a son. Lester Peters also had four daughters and those daughters were Ileen Peters’ step-daughters.

Ileen Peters’ son was appointed to administer her estate. One of her step-daughters applied to the court for directions, seeking to have the estate divided equally among the five children/step-children.

The only issue was whether the four step-daughters were also beneficiaries of Ileen Peters’ estate, along with her son. Because she died intestate, the answer is found in the *Wills and Succession Act*, [SA 2010, c W-12.2](#). That Act, which came into effect on February 1, 2012, is the latest provincial effort to try to ensure the fair distribution of the estates of people who die without a will. The relevant sections of the Act are sections 65(a) and 66(1)(a) (emphasis added):

65 If an individual dies leaving no surviving spouse or adult interdependent partner, the intestate estate shall be distributed

(a) to the descendants of the intestate in accordance with section 66 ...

66(1) When a distribution is to be made under this Part to the descendants of any individual, the intestate estate or the portion of it being distributed shall be divided into as many shares as there are

(a) children of that individual who survived the intestate

Given the wording of these sections, the only question before Justice Rodney A Jerke was: “Who are the descendants of Ileen Peters?” (at para 8). The term “descendants” is defined in section 1(1)(e) of the Act as follows:

“descendants” means all lineal descendants of an individual through all generations;

And according to Justice Jerke and the 7th edition of *Black’s Law Dictionary*, “lineal descendants” means “a blood relative in the direct line of descent — children, grandchildren, and great-grandchildren are lineal descendants” (at para 10).

Given these definition, Justice Jerke’s conclusion followed quickly and easily:

Ms. Peters’ four step-daughters are not her blood relatives, so they are not her lineal descendants. [Her son] is her only lineal descendant. Accordingly he is her sole beneficiary (at para 11).

Justice Jerke went on to note that the facts presented a very sympathetic case for the step-daughters (at para 12). He mentioned that the marriage between their father, Lester Peters, and Ileen Peters had lasted 43 years; that Lester Peters was the father of all five children; that Lester and Ileen Peters were in bankruptcy at the time of the father’s death; and that all five children gave up any claim in their father’s estate in favour of Ileen Peters. He noted that Ileen Peters treated her step-daughters in every way as her daughters (at para 16). None of those facts mattered, or, to use Justice Jerke’s words, “this evidence is not relevant to a determination of who are Ms. Peters’ descendants” (at para 13). The facts were not relevant because the Act sets out a definition of “descendants” and the step-daughters did not fit within that definition.

Commentary

Justice Jerke spelled out all of the elements of a classic “cautionary tale” when he concluded as follows (at para 20):

This case is an example of the personal difficulties and harm to relationships which can occur when individuals do not have a will. The distribution of this modest estate has become an instrument with the potential to create, enhance or perpetuate ill will amongst five family members at a time when they should instead be benefiting from good memories of their mother and father.

In that conclusion, readers are warned of the moral danger of not making a will. The story of Ileen Peters, a person who disregarded this danger and died without a will, was told. The story ended with her step-daughters, who she had treated in every way as her daughters, suffering the unpleasant fate of disinheritance.

However, in addition to functioning as a lesson on why the parents of so-called “blended families” must make wills, the *Peters Estate* case also illustrates how antiquated the intestate succession provisions of the 2012 *Wills and Succession Act* are when it comes to step-children (or at least those step-children who are adults and able to earn a livelihood.)

Sections 65 and 66 of the *Wills and Succession Act* are supposed to approximate what a parent without a surviving spouse would have done if they had made a will. Every Canadian jurisdiction has a law similar to the provisions in Alberta’s *Wills and Succession Act* for inheriting when there is no will. See, for example, sections 1(1) and 23 of British Columbia’s *Wills, Estates and Succession Act*, [SBC 2009, c 13](#) where “descendant” is defined to mean “all lineal descendants through all generations” and section 1(1) and 47 of Ontario’s *Succession Law Reform Act*, [RSO 1990, c S.26](#) where “issue” is defined as “a descendant conceived before and born alive after the person’s death.”

So who counts as “children” or “lineal descendants” or “issue” for the purpose of inheriting from a parent without a will? A biological child, or “blood relative”, is included, as the definitions cited in the *Peters Estate* case make clear. An adopted child is also included because the legislation that governs adoptions says he or she is included: *Child, Youth and Family Enhancement Act*, [RSA 2000, c C-12](#), s 72 and *Adult Adoption Act*, [RSA 2000, c A-4](#), s 9. A step-child — a person defined by Statistics Canada as “a child in a couple family who is the biological or adopted child of only one married spouse or common-law partner in the couple, and whose birth or adoption preceded the current relationship” ([Portrait of Families and Living Arrangements in Canada](#), fn 16) — is excluded.

There are at least two problems with the exclusion of step-children.

First, a large number of individuals may be affected. The number of blended families and hence the number of step-children is generally accepted to be growing in Canada. The 2011 Canadian census counted step-families for the first time and found that 12.6% of couples with children living at home are step-families. They also found that while 12.5% of opposite-sex couples with children were step-families, close to half (49.7%) of same-sex couples with children were step-families: [Portrait of Families and Living Arrangements in Canada](#). These numbers omit, of course, adult step-children not living with their step-parent, but they do give some indication of the potential size of the problem. They also suggest an adverse impact based on sexual orientation.

Building on that suggestion of an adverse impact leads to the second and more substantive problem. The intestate succession provisions in the *Wills and Succession Act* use formal adoption, as that practice exists within a Eurocentric nuclear family model, to define what qualifies as a parent-child relationship worthy of including in intestacy laws. The Act ignores the practice of informal adoption as it exists within extended family models which are more prevalent in some ethnic and Aboriginal communities in Canada. (See Michael J Higdon, “When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine” (2008) 43 Wake Forest L Rev 223, available at [SSRN](#), discussing the impact on African American and Hispanic communities in the United States).

Neither of these problems appears to have been considered in the drafting of the 2012 *Wills and Succession Act*, which was the result of a major law reform project undertaken by Alberta Justice. Part of their law reform process included public and technical consultations on questions about the transfer of property on death: see [Alberta Justice Succession Law Reform Stakeholder](#)

[Consultation: Summary of Input](#), October 2009. However, the question of who to include in the definition of children was not one of the questions put to those consulted. The definition of children who inherit on intestacy is unchanged in its effect from the legislation which preceded the current act. Section 1(b) of the *Intestate Succession Act*, [RSA 2000, c I-10](#) defined “issue” to include “all lineal descendants of the ancestor.”

By failing to recognize blended families as a significant and legitimate segment of Canadian society in intestate succession laws, legislation such as Alberta’s *Wills and Succession Act* arguably demeans blended families. It has been argued that the failure to account for blended family members not only authorizes inequitable estate distributions but also affects social perceptions of the legitimacy and status of blended families. Scholars of intestacy law have also argued that provisions excluding step-children may affect relations between stepfamily members, lessening their degree of commitment and exacerbating adjustment difficulties for family members. See Jennifer Seidman, “Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession” (2004) 75 U Colo L Rev 211 at 226; Cristy G. Lomenzo, “A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than the Surviving Spouse” (1995) 46 Hastings LJ 941 at 947; Mary Louise Fellows et al., “Committed Partners and Inheritance: An Empirical Study” (1998) 16 Law & Inequality 1 at 3; E. Gary Spitko, “The Expressive Function of Succession Law and the Merits of Nonmarital Inclusion” (1999) 41 Ariz L Rev 1063 at 1066. See more generally Frances H. Foster, “The Family Paradigm of Inheritance Law” (2001) 80 NC L Rev 199 and Susan N. Gary, “Adapting Intestacy Laws to Changing Families” (2000) 18 Law & Inequality 1.

It might be argued that it is too difficult to include step-children, or at least those step-children who should be presumed to be included in a step-parent’s donative intent. When the Alberta Law Reform Institute issued Report No. 78 in June 1999 on the [Reform of the Intestate Succession Act](#), they considered the question of whether a step-child should be able to inherit if a step-parent died intestate (at 137):

In some families, the only father or mother the children have known is the step-parent because, for whatever reason, there is no contact with one of the biological parents. In these situations, it may seem logical for the stepchild to inherit from the step-parent. Although these situations do arise, the relationships between step-parents and stepchildren vary too much to support a generalization that the majority of step-parents would want their stepchildren to share in their estate. We, therefore, make no recommendation for change on this issue. Stepchildren will not share in the estate of an intestate step-parent.

However, a categorical approach is not necessary. The inclusion of step-children can be made dependant on the circumstances of the relationship.

The *Uniform Probate Code* in the United States (sections 2-115, 2-116, and 2-117) offers one example of a relationship-focused type of approach. It uses the concept of “functioned as a parent of the child.” That phrase means “behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent,

including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household." See National Conference of Commissioners on Uniform State Laws, [Amendments to the Uniform Probate Code, 2008](#) at pages 27-29.

However, unless and until the current intestate succession provisions of the *Wills and Succession Act* are changed (or successfully challenged for adverse impact discrimination), step-children must count on their step-parents to do one of two things: either formally adopt them or include them in a valid will. Merely leaving everything to your "children" in a store-bought or downloaded form is not enough; one vague word can destroy a family. But both formal adoption and valid wills require a significant commitment of time and money and are out therefore out of the reach of some families.

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