

Michigan Law Review

Volume 48 | Issue 3

1950

WILLS-CONSTRUCTION-MEANING OF THE PHRASE "NEAREST OF KIN"

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Recommended Citation

Daniel A. Isaacson, *WILLS-CONSTRUCTION-MEANING OF THE PHRASE "NEAREST OF KIN"*, 48 MICH. L. REV. 383 ().

Available at: <https://repository.law.umich.edu/mlr/vol48/iss3/22>

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WILLS—CONSTRUCTION—MEANING OF THE PHRASE “NEAREST OF KIN”—Testator died in 1931, leaving his estate in trust for the life use and benefit of his wife. The will further provided, *inter alia*, that “Upon the death of my wife, I order and direct my said executor to pay and distribute the one-half of all my said estate unto my *nearest of kin* in equal shares and to pay and distribute the other half of all my said estate unto the *nearest of kin* of my wife in equal shares.” Testator’s wife died in April, 1947. The testamentary trustee filed a petition for construction of the will to determine to whom and in what proportions the residue of the estate was distributable. *Held*, the words “nearest of kin” meant “next of kin” and called for distribution in accordance with the statute of descent and distribution. *In re Burke’s Will*, 298 N.Y. 450, 84 N.E. (2d) 631 (1949).

It is generally agreed that the phrases “next of kin” and “nearest of kin” are used synonymously,¹ but the courts are divided when confronted with the more basic question as to what relatives make up the class so designated. The underlying principle in any will construction problem is that, while the testator’s intent, express or implied, is to control, rules of construction will be applied in the absence of reasonably clear manifestations of such intent.² Many of the states, and the English courts, are committed to the theory that use of the phrase “next of kin” brings into play the law of consanguinity.³ In order to ascertain those within the class, resort is had to the strict civil law method of determining degrees of kinship, without regard to any representation.⁴ The reason given for the stand is that, since the primary, technical, legal meaning of “next of kin” is the closest blood relatives,⁵ it will be presumed that the testator so intended. To infer such an intent is highly conjectural, if not altogether fictitious. Other courts have taken the better considered position that the application of such a phrase must bring about an apportionment according to the statutes of descent and distribution.⁶ They hold that whatever was at one time the primary mean-

¹ *Swasey v. Jaques*, 144 Mass. 135, 10 N.E. 758 (1887); *Godfrey v. Epple*, 100 Ohio 447, 126 N.E. 886 (1919); *St. Louis Union Trust Co. v. Kaltenbach*, 353 Mo. 1114, 186 S.W. (2d) 578 (1945); *Kimrough v. Dickenson*, 251 Ala. 677, 24 S. (2d) 578 (1946).

² THOMPSON, WILLS, 3d ed., §§210-214 (1947); 2 PAGE, WILLS, 3d ed., §916 (1941).

³ *Swasey v. Jaques*, *supra*, note 1; *Clark v. Mack*, 161 Mich. 545, 126 N.W. 632 (1910); *Hammond v. Myers*, 292 Ill. 270, 126 N.E. 537 (1920); *Lowrimore v. First Savings & Trust Co. of Tampa*, 102 Fla. 740, 140 S. 887 (1931); *Wilmington Trust Co. v. Morris*, (Del. Ch. 1947) 54 A. (2d) 851.

⁴ *Leonard v. Haworth*, 171 Mass. 496, 51 N.E. 7 (1898); *Kimrough v. Dickenson*, *supra*, note 1; 2 SCHOULER, WILLS, EXECUTORS, AND ADMINISTRATORS, 6th ed., §987 (1923).

⁵ 46 C.J., Next, §4, p. 473 (1928).

⁶ *Godfrey v. Epple*, *supra*, note 1; *Close v. Benham*, 97 Conn. 102, 115 A. 626 (1921); *New York Life Ins. & Trust Co. v. Winthrop*, 237 N.Y. 93, 142 N.E. 431 (1923); *Coss v. Goebel*, 210 Minn. 32, 297 N.W. 114 (1941); *Francisco v. Citizens Trust Co.*, 133 N.J. Eq. 28, 29 A. (2d) 884 (1943). New York, in addition, has a statute to this effect. N.Y. Consol. Laws (McKinney, 1949) c. XIII (Decedent Estate Law) §47-c.

ing of "next of kin," popular usage today connotes the class designated by the modern laws of intestate succession.⁷ Indeed, if these statutes are considered as approximating most closely, from centuries of experience, what would have been the intent of the intestate if he had left a will,⁸ then they should be followed here, where the best explanation is that the testator had no specific intent other than that the law distribute his property in a fair manner.⁹ An additional argument is that there is a presumption against inheritance, and a construction is to be favored which most closely corresponds to the statutory scheme of succession.¹⁰ With regard to the use of the words "equal shares," there is adequate support for the proposition that per stirpes distribution, under the statutes, is not excluded, since those words merely call for equality among stocks.¹¹

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⁷ "In common speech and general understanding, next of kin would include the children of a deceased child and the wife and husband." *Close v. Benham*, supra, note 6. See also *Godfrey v. Epple*, supra, note 1.

⁸ "... these rules almost invariably take cognizance of the natural law of consanguinity, or of blood, and the natural affection of a person toward those nearest him in relationship." 26 C.J.S., *Descent and Distribution*, §2, p. 997 (1941).

⁹ "The rule thus emerges that in the absence of clear tokens of a contrary intention, the statute is to be taken as the standard of division. . . . The acceptance of this formula supplies a test of simple application. The testator is still free, if he pleases, to direct division upon other lines. Often it will happen that he has no intention one way or another. At such times, a division according to the statute is more likely to correspond with what he would have wished if the subject were one that he had thought about at all." *New York Life Ins. & Trust Co. v. Winthrop*, supra, note 6.

¹⁰ THOMPSON, WILLS, 3d ed., §222 (1947); *Godfrey v. Epple*, supra, note 1.

¹¹ While such expressions of equality import a per capita division, it is agreed the inference is weak. Yet when these phrases modify a gift to persons who are designated by the per stirpes succession laws, courts are not harmonious as to the method of determining the size of the shares. Though probably the majority maintain that the words of equal division place all the heirs in one class, others contend that the statute is to be the guide, both as to those who take and the amount. Cases collected in 16 A.L.R. 15 (1922); supplemented in 31 A.L.R. 799 (1924), 78 A.L.R. 1385 (1932), and 126 A.L.R. 157 (1940). 3 PAGE, WILLS, 3d ed., §§1074, 1080 (1941).