

NOVA SCOTIA COURT OF APPEAL

Citation: *Mitchell Estate v. Mitchell Estate*, 2004 NSCA 149

Date: 20041210

Docket: CA 212254

Registry: Halifax

Between:

Nancy Smithers, Heather Leet, Richard Mitchell,
Greg Mitchell, Jason Quigley, Brandon Quigley and
Laurie Harrietha

Appellants

v.

Thomas E. Pekar, Executor of the Estate of Jane Mitchell,
deceased

Respondent

Judge: The Honourable Justice David R. Chipman

Appeal Heard: December 1, 2004

Subject: *Wills and Estates - gift to one of a group who predeceased the testator leaving issue - whether gift lapsed or fell into residue*

Summary: The testator left certain property to be sold with the proceeds to be divided among his five children, naming them. There was no provision to cover the event of one of the children predeceasing the testator. The will contained a residuary clause in favour of the testator's grandchildren, the residue to be divided equally among them. One of the testator's children predeceased him leaving issue and a will naming her husband as executor and sole residuary beneficiary. On an application to the judge in Chambers, the judge found that the gift to the deceased daughter did not lapse on her death, but by operation of s. 31 of the **Wills Act**, R.S.N.S. 1989, c. 505 passed to her estate as if her death had happened immediately after that of the testator. The surviving children of the testator and children of the deceased daughter appealed to the Court of Appeal.

- Issues:**
1. Whether the gift to the five named children of the testator was a class gift showing a contrary intention within the meaning of s. 31 of the **Wills Act** so as to displace the presumption arising thereunder?
 2. Whether, having regard to the circumstances surrounding the making of the will by the testator, a contrary intention within the meaning of s. 31 was indicated?
 3. Whether the Chambers judge correctly interpreted s. 31 of the **Wills Act**?

Result: The Nova Scotia Court of Appeal dismissed the appeal. The Court found that the Chambers judge was correct in his interpretation of the testator's will and in his determination of the relevant principles of law. The Court held that the gift to the five named children was not a class gift, and that the testator did not otherwise show a contrary intention sufficient to displace the effect of s. 31 of the **Wills Act**. The Court reviewed the surrounding circumstances at and before the making of the will and found nothing in them sufficient to overcome the intention of the testator as manifested by the clear wording used in the will. The Court further held that the Chambers judge was correct in his interpretation of s. 31 of the **Act** which had the effect of providing for a fictional survival of the deceased legatee until immediately after the death of the testator and not for devolution to the issue of the deceased legatee notwithstanding that the leaving of issue was a precondition to the operation of s. 31 of the **Act**. The appeal was dismissed with costs.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 11 pages.