

## CASE NOTES

### PER STIRPES PRINCIPLE VERSUS THE PER CAPITA PRINCIPLE IN INTESTATE SUCCESSION: A BRIEF OVERVIEW

Case Note on the Case of in Re Estate Late Bellinah  
Mhlanga  
HH 816-17 HC 4168/17 DR 143/13

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#### 1. INTRODUCTION

One area of law which has been a source of serious conflict particularly within families is the law of succession. Prior to delving deeper into the topic it is imperative that as a starting point the term 'succession' be defined. In defining the term 'succession,' Moses Bello J.P. a member of the Nigerian judiciary had this to say;

The Oxford Advanced Learner's Dictionary,<sup>2</sup> defines succession in the context of this topic to mean the act of taking over an official position or title. According to Kerry R., succession is concerned with the transfer or devolution of property on death.<sup>3</sup> Succession therefore can be loosely defined to mean inheritance, the right to inherit, the order in which inheritance is bequeathed and the condition precedent under which one can succeed another. The law of succession therefore is all about the transfer or devolution of property on the death of an owner to another, his heir.<sup>4</sup> The law is the rule by which such devolution occurs.<sup>5</sup>

Subsumed under the law of succession are two principles that have clearly dominated the manner in which estates have been administered across the majority of jurisdictions in the region and abroad whether

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<sup>2</sup> 8th Edition, 2015

<sup>3</sup> Kerridge R. Parry & Kerry: The Law of Succession, 12th Ed (London, Sweet & Maxwell 2009) Pg.1

<sup>4</sup> Ibid

<sup>5</sup> M. Bello JP, Principles and Practice of Succession under Customary Law, 2015, p.1

under general law, common or customary law. These are *per stirpes* and *per capita* principles of succession. What is most peculiar about the *per stirpes* principle is that it is applicable under both testate<sup>6</sup> and intestate<sup>7</sup> succession whether under general or customary law. Due to Zimbabwe's dualist legal system, intestate succession occurs under both general and customary law. In this case note the focus is on the implications of the two principles under intestate succession under general law. Taking particular note of this all encompassing element of the *per stirpes* principle, Mwayera J in the *In Re Estate Late Bellinah Mhlanga* case made the following comments;

Although the Human and Herold cases supra referred to testate succession the principle of *per stirpes* inheritance is equally applicable in an intestate estate...From the foregoing discussion it has been established that the *per stirpes* principle is part of the common law of Zimbabwe and is applicable under general law. It is also applicable under customary law with equal force.<sup>8</sup>

Intestate succession occurs in three situations namely (a) if a person upon death does not leave behind a valid will; (b) if the beneficiary appointed in a will predeceases the testator and the latter does not substitute the predeceased heir with another prior to his/her own subsequent death, then that part of the will, will be dealt with under the law of intestate succession; and (c) where a beneficiary or heir appointed in a will cannot or declines to take up the appointment, that portion of his/her inheritance will automatically fall under intestate succession. Under Roman Dutch common law, it is also possible to have an estate that falls under both testate and intestate succession. This happens where a person dies partly testate and partly intestate.

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<sup>6</sup> Testate succession happens where a deceased person (testator) leaves behind a valid will stipulating how his/her estate will be distributed in strict accordance with their wishes as contained in their will. A testator can then indicate within the will whether after their death they wish their estate to be distributed in accordance with *per capita* or *per stirpes* succession.

<sup>7</sup> If a person dies without having written a will or if the will is declared invalid, the estate will be distributed on the basis of intestacy i.e. a state of having no valid will. The intestate law of succession refers to the distribution of assets in a deceased's estate whereby the deceased would have died without leaving any valid will. It will be the duty of the executor dative in consultation with the Master of the High Court to decide on the most suitable type of intestate succession under the prevailing circumstances.

<sup>8</sup> At page 6 of the unreported High Court judgment (both pdf and word versions)

## 2. BACKGROUND ISSUES

Time and again a key question has arisen among estates administrators vis-à-vis what the two principles of per stirpes and per capita succession entail in intestate succession and the key difference between them. Another question which has been raised regards which of the two principles offers a fairer framework under which a deceased's estate is distributed to his/her descendants, heirs or beneficiaries? The *per stirpes* principle came under spotlight in Zimbabwe in the High Court case of Estate Late Bellinah Mhlanga,<sup>9</sup> a matter placed before Mwayera J whereby the court's opinion was sought on the meaning and application of the *per stirpes* principle. Two contentious issues were placed for determination namely (i) whether or not the *per stirpes* principle applies under general law in intestate succession in Zimbabwe and under common law in the absence of a specific legal provision in statutory law and (ii) the legal interpretation of the *per stirpes* principle under general law and as set out under customary law in Section 68F of the Administration of Estates Act [Chapter 6:01]. Further to the two issues determined under the *per stirpes* principle in the Estate Late Bellinah Mhlanga case (supra), this case note seeks to make a brief comparative analysis of *per stirpes* and *per capita* principles prior to making a case justifying the decision taken by the executor in this case to opt for the *per stirpes* principle as being more appropriate under the circumstances; which decision was supported by the court as presided over by Mwayera J.

## 3. PER STIRPES SUCCESSION

Intestate succession can either be per capita or per stirpes. Per stirpes is a Latin expression meaning "by the roots. The word stirps refers to the singular while in plural form reference is made to a number of stirps or stirpes. A stirpis has also been defined as;

...a child of the deceased, or a predeceased child who left behind living descendants. A deceased person therefore has as many stirpes as he left living children or predeceased children with living descendants.<sup>10</sup>

A stirps is a line of descendants of common ancestry who form the roots. It includes every descendant of the deceased who survives the

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<sup>9</sup> HH 816-17

<sup>10</sup> W. Abrie et al, Deceased Estates, 5th ed, ProPlus Publishers: Lynnwood Ridge, 2003

deceased or a predeceased descendant of the deceased who leaves behind living descendants. Succession *per stirpes* means inheriting from an ancestor “by representation” or “by class.” Where beneficiaries are to share in a distribution “*per stirpes*” the living members within the generation closest in relationship to the deceased ancestor whose estate is being distributed receive an equal share. Since all children of a deceased person form a stirps; they all inherit an equal share of the deceased’s estate. However in cases where one child predeceases the parent and leaves behind children, upon the death of the grandparent, the predeceased child’s children jointly or severally share the share due to their parent in equal shares. This is what is referred to as succession “*by representation*” to what their deceased parent would have been entitled to. According to W.D. Rollison;<sup>11</sup>

Inheritance *per stirpes* signifies that the particular descendants (remote heirs) inherit such portion (share or interest) only as their immediate ancestor would have inherited if he had survived the death of the intestate. Thus, if the intestate has left a son, and the children of a deceased son, as his only lineal descendants and as the only relatives who are entitled to inherit his property, one-half of his property would be inherited by his surviving son and the other half by the children of the deceased son. The children of the deceased son, that is, the grandchildren of the intestate, inherit the same portion that their father (the son of the intestate) would have inherited if he had survived the death of the intestate...(which they share equally among themselves)

In the above quote reference is made only to sons, clearly reflecting the status of the law of succession at the time W.D. Rollison authored his article. This was a time (1935-6) when issues to do with the human right to equality and non-discrimination had not taken root and intestate succession was marked by the primogeniture rule of succession which preferred sons to daughters. If the above quote had been written recently, the words ‘son or daughter’ would have been used as was the case with the children born of Bellina Mhlanga in the Estate Late Bellina Mhlanga case who were equally entitled to succeed their deceased parent’s estate regardless of sex. Below is an illustration of intestate succession *per stirpes*;

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<sup>11</sup> See W.D. Rollison, Principles of the Law of Succession to Intestate Property (continued) in Notre Dame Law Review, Volume 11 Issue 2 Article 2, 1936, 136 - 137. Available at: <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4119&context=ndlr> Accessed 09/08/2018

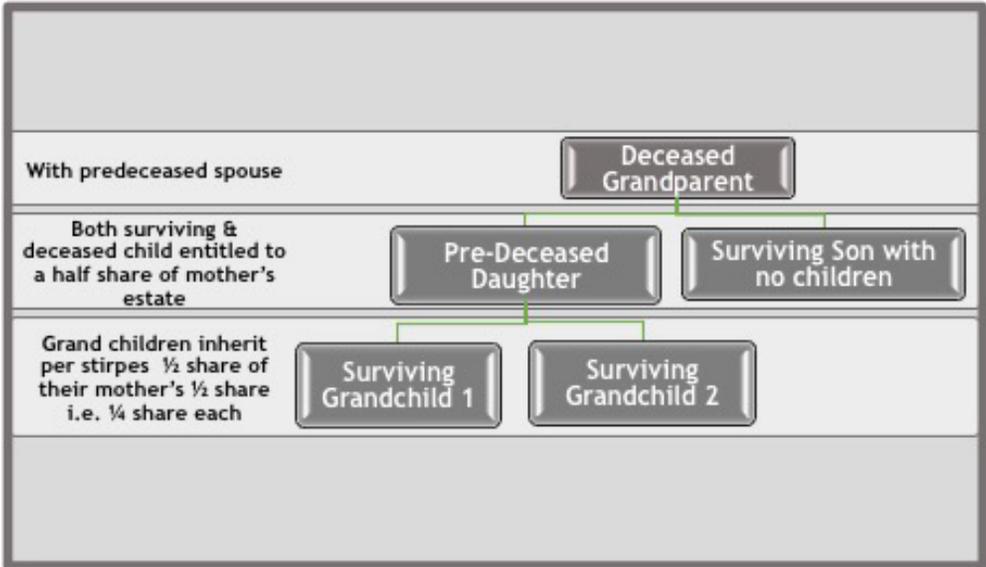


Figure 1: Illustration of intestate succession per stirpes

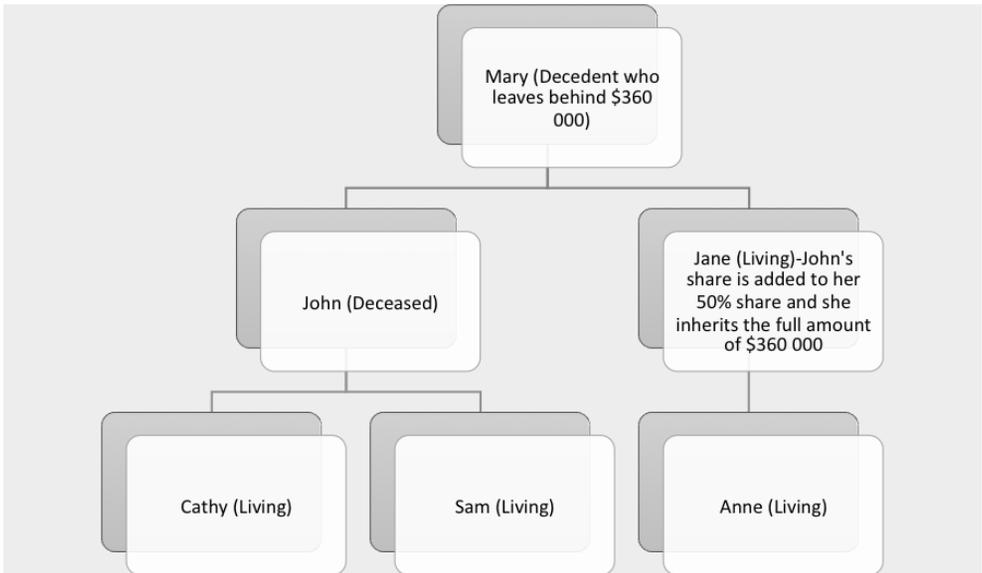


Figure 2: Illustrating Per Capita Intestate Succession

4. INTESTATE SUCCESSION PER CAPITA

Per Capita is a Latin maxim meaning, "by the head" or "headcount." Hence per capita succession involves taking "by total headcount" all surviving heirs or beneficiaries across different generations or "by a

total number of living individuals” within a particular generation. The succession can cover all living beneficiaries who are related to the decedent through blood ties (**consanguineal**), marriage ties (affinal), and adoption (fictive). The phrase kinship system refers to all of the **relationships** based on blood, marriage, and adoption that intertwines individuals in sets of rights and obligations. In practice this means that if the beneficiaries to an estate are to share in a distribution “per capita,” then all of the living members of the identified group or generation will receive an equal share. However, if a member of the identified group predeceases the decedent, then a share won’t be created for the predeceased member and all of the shares of the other members will be increased accordingly after they equally share the predeceased member’s share.

#### **5. A COMPARATIVE ANALYSIS OF PER STIRPES AND PER CAPITA PRINCIPLES**

As indicated earlier succession per stirpes refers to ‘allocation by class’ or ‘by representation.’ In any distribution per stirpes, all the living members within the class of beneficiaries who are closest in relationship to the decedent will receive an equal share. However in the event that one of these beneficiaries closest in relationship to the decedent has predeceased the benefactor but is survived by any descendants, then that deceased beneficiary’s descendants will take “by representation” what their deceased parent would have taken. On the other hand distributing an estate in a manner in which it is shared per capita involves ‘taking a total headcount’ or ‘the total number of living individuals’ within an identified group or generation who are entitled to inherit. These will share equally what is there. However in the event that a member of this identified group is deceased, then unlike in succession per stirpes a share won’t be created for the deceased member. Rather, that which would have been given to the deceased had they been alive is added to the total sum to be shared by the living beneficiaries resulting in an increase in the individual shares of those living beneficiaries.

In summary therefore, the difference between the per stirpes and per capita principles lies in the fact that while inheriting per stirpes would entail equal sharing of the inheritance among all of the decedent’s descendants (living and deceased) within the first line of generation; per capita succession only occurs among living descendants and other beneficiaries who may not be a decedent’s direct descendants but affinal and/or consanguineal kin within that particular generation closest in line to the decedent.

Take for example a decedent called George who had three children Mary, Jane and George Junior. Mary predeceased George but left behind 3 children Amy, Sarah and Tom. Jane is also deceased but is survived by two children Jack and Jill. George Junior is still living and has one child Joel. The decedent George left behind \$630 000 cash. If that amount would be shared per stirpes, George Junior would get one-third of the \$630 000 which would amount to \$210 000. Mary's \$210 000 entitlement would be shared equally among her 3 living children, each getting \$70 000. This is inheritance per stirpes by representation. George's son, Joel will not get anything since his father George Junior is still alive. Jack and Jill who are born of Jane will share their late mother's share of \$210 000, each getting \$105 000 as they are representing their mother in the inheritance.

The same example will be used with the \$630 000 shared using the per capita principle. Since Mary and Jane are deceased, their shares are added onto George Junior's share and he inherits the full amount of \$630 000 as he is the only living beneficiary within that first generation after George Senior. Mary and Jane's children do not inherit anything as there is no representation under the per capita principle in intestate succession. For argument sake if George Junior and Mary are both living with Jane predeceasing George Senior, then Jane's share of \$210 000 will be shared equally between Mary and George Junior each getting a total share of \$315 000. As indicated earlier, despite a deceased heir having living descendants, they will not inherit by representation as is the case with per stirpes because the per capita principle focuses on living beneficiaries within a particular generation closest in line to the decedent. In some cases however the per capita principle as used in testate succession has included all living heirs across several generations who have to equally share the inheritance despite one heir being the decedent's child while another is a grandchild, great grandchild or nephew. In the case on hand, this would mean all the seven living heirs namely George Junior, his son Joel, Mary's three children Amy, Sarah and Tom as well as Jane's two children, Jack and Jill would equally share the \$630 000, each getting \$90 000 if indicated as such in a will. Most people have tended to prefer using the per stirpes principle rather than per capita as the former caters for all beneficiaries, both living and deceased (if only through their descendants by representation).

## 6. IMPACT OF THE USE OF REPRESENTATION IN THE SUCCESSION PER CAPITA PRINCIPLE

It is important to note that within some jurisdictions, for example the American legal system, the distinguishing line between succession per stirpes and that which is per capita has increasingly become blurred with the modification of the per capita principle. There has been modification of the succession per capita principle to come up with the per capita at each generation and the per capita with representation principles which seem to echo the per stirpes principles.<sup>12</sup> Strictly applied per capita succession ensures that if any of the decedent's beneficiaries predecease the decedent, their share will not transfer to their descendants but will transfer to and is shared equally among the remaining surviving beneficiaries.

Using succession 'per capita at each generation' approach ensures that heirs of the same generation will each receive the same amount. The inheritance is divided into equal shares for the generation closest to the deceased with surviving heirs. These shares are equal in number to the number of original members either surviving or with surviving descendants. Each surviving heir of that generation gets a share. The remainder is then equally divided among the next-generation descendants of the deceased in the same manner. On the other hand, succession per capita by representation is such that, the predeceased beneficiaries' shares at the same generation are divided equally between all their children. In other words the surviving descendants of predeceased beneficiaries of the same generation get to equally share what their predeceased ancestors would have inherited in equal shares. It would seem like the key aspect of succession per capita is collation<sup>13</sup> at each and every generational level of succession.

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<sup>12</sup> The per stirpes principle is now referred to as the old English approach within the American legal system.

<sup>13</sup> Succession law is underpinned by the Common Law requirement for collation. Under collation it is a requirement that all descendants of a decedent inherit equal portions and where one child has benefitted more through some loan or other benefit received from the decedent during their lifetime, the child who unfairly benefitted should pay back the advanced money so as to ensure all the children benefit equally from the decedent's estate. These descendants include children born out of wedlock and adopted children, who have all the rights of flesh and blood.

## **7. EXAMPLE SHOWING THE INTER-LINKAGES BETWEEN THE PER STIRPES AND PER CAPITA PRINCIPLES OF SUCCESSION AS DRAWN FROM REPRESENTATION**

Representation is the principle of law by which the children or their descendants of an heir to an estate, who dies intestate have a collective interest in the ancestor's intestate share of the inheritance. This could either be through representation in per stirpes succession or per capita succession by representation. Taking for example a decedent Sam who was a widower at the time of death but who during his lifetime was married under general law and had two daughters Ann and Alice. He dies intestate leaving an estate worth \$400 000 after the deduction of all duties, debts and other charges. Ann was never married and has no children. Alice who predeceased her father Sam left behind two sons Hillary and David whereby David also died a few days before the death of Sam, his grandfather. David leaves behind two children Peter and Pam. In sharing the \$400 000, Ann and the late Alice are entitled to \$200 000 each because the degree of their blood relationship to the deceased Sam is equal and so they share per capita or in equal parts what Sam their late father has left behind. However since Alice is no longer there to take up her share, her children Hillary and David are expected to succeed per stirpes to their late mother's \$200 000 share in equal shares of \$100 000 each. While Hillary takes his per capita share of \$100 000, David being deceased cannot take up his own per capita share. Being survived by Peter and Pam David's per capita share is inherited by the two in equal shares of \$50 000 each.

In the ultimate, Ann's per capita share of \$200 000 from her late father Sam's estate remains unaffected; Hillary and David having an equal degree of relationship to Ann's sister, the late Alice, were entitled to \$100 000 per capita of Alice's share but jointly inherited \$200 000 per stirpes from Sam their grandfather. Peter and Pam also took per capita shares of what their late father David was entitled to per stirpes, hence the two inherited a share of their great grandfather Sam's estate per stirpes. The degrees of consanguinity among Ann, Hillary, Peter and Pam are unequal since Ann is the late Sam's child while Hillary is his grandchild and Peter and Pam are his great grandchildren hence they cannot have per capita shares. From Sam's estate, Ann gets 50%, Hillary, 25% while Peter and Pam share the remaining 25% i.e. 12.5% each. Although they all inherit per stirpes from the late Alice's share Hillary, Peter and Pam have unequal degrees of relationship to her whereby Hillary is one generation removed from Alice while Peter and Pam are two generations removed. Inheriting

per stirpes, they cannot have equal or per capita shares across different generations. However strictly speaking all living descendants inheriting per capita should have equal shares despite having unequal degrees of relationship to the deceased ancestor. To cure the injustice of having all beneficiaries sharing an inheritance equally despite different degrees of consanguinity towards the decedent, the practice has been to allow per capita sharing among beneficiaries within the same generation or who are equally removed from the benefactor, for example grandchildren born of the decedent's several children.<sup>14</sup>

#### **8. BRIEF FACTS OF THE CASE IN RE ESTATE LATE BELLINAH MHLANGA HH 816-17 HC 4168/17/ DR 143/13**

This matter was brought before Mwayera J in chambers for the determination of a question of law arising in terms of section 113 of the Administration of Estate Act [Chapter 6:01]. Having had a difference of opinion on how the estate was to be administered, the Master of the High Court and the executrix dative in Re Estate Late Bellinah Mhlanga (supra). The key issues for determination by the honourable judge by way of judicial opinion were;

- a) Whether or not the *per stirpes* principle applies under general law in intestate succession in Zimbabwe and under common law in the absence of a specific legal provision in statutory law.
- b) What is the legal interpretation of the *per stirpes* principle both under general law and as set out under customary law in the Administration of Estates Act Section 68F.

In *casu*, Bellinah Mhlanga, a widow (hereinafter called the decedent) died intestate on the 28th day of January 2010, in Harare as per the death certificate. The decedent during her lifetime had been married under the Marriages Act [Chapter 5:11] to one Amon Mhlanga who had predeceased her. All in all, the decedent had had six children Busisiwe, Lovemore, Dakarayi, Cynthia, Luwis and Eric of which Tapuwa

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<sup>14</sup> However this also depends on the number of surviving children in each family whose parent would have predeceased the grandparent with the estate being shared among descendants because if one deceased son had 2 children while another had 4 children, those grandchildren from the two families will have different allocations since in one family more children share the same pie e.g. each family shares \$60 000 each from the \$120 000 estate. Despite belonging to the same generation, in one family a grandchild will get \$30 000 while in the other each will get \$15 000.

Caroline Mhlanga had predeceased her mother. However, Tapuwa Caroline was survived by three children namely Tafadzwa, Nyasha and Tatenda Chidiyiwa who in other words were the decedent's grandchildren. On 30 January 2013, the estate was duly registered by Cynthia Mhlanga a daughter of the decedent, through completion of a death notice. Having been married under the Marriages Act [*Chapter 5:11*], general law applied to the administration of the decedent's estate. The decedent was the registered owner of property, a house in the Glen View high density suburb of Harare.

In completing form M.H.C. 12 showing that one of the children of the deceased namely Tapuwa Caroline Mhlanga had predeceased the decedent, the duly appointed executrix dative of the estate, Sylvia Chirawu (as she then was)<sup>15</sup> amended the account accordingly to award the share of Tapuwa Caroline Mhlanga to her three surviving children on the basis of the *per stirpes* principle. It is on the basis of this award in terms of the *per stirpes* principle that a difference of opinion arose between the executrix dative and the Master of the High Court, the latter having directed that Tapuwa Caroline was not supposed to inherit since she had predeceased her mother. The Master was of the view that the *per stirpes* principle did not apply, hence Tapuwa Caroline's children were not entitled to inherit from their grandmother's estate by representation of their late mother. It would be my assumption that the Master was in favour of a strictly applied *per capita* succession approach which would cater only for the living children of the late Bellinah Mhlanga. The executrix dative on the other hand maintained that the children ought to inherit by representation of their mother through the succession *per stirpes* approach. It is due to the difference of opinion that the matter was brought before a judge of the High Court in Chambers.

## 9. BASIS FOR DECISION

The court after determining that the resolution of the matter hinged on the nature of law applicable in the deceased estate in question as well as the interpretation of the *per stirpes* principle proceeded to interpret the law of succession in accordance with the facts that were placed before it as summarized below;

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<sup>15</sup> She is now a judge of the High Court of Zimbabwe

### **a) Supremacy of the Constitution**

As a starting point the court considered the supremacy of the Constitution of Zimbabwe Amendment (No 20) Act 2013 (hereinafter referred to as the Constitution) over all matters (law, practice, custom or conduct) and all persons, natural, juristic or otherwise in terms of section 2. Accordingly the administration of an estate was supposed to be in line with the constitution to the extent that an entitled beneficiary ought to be recognised and not discriminated against. It was considered as mandatory that emphasis should be on equality before the law especially where the entitlement was anchored on law.

### **b) Continued applicability of Common Law**

In its determination, the court indicated that common law was still applicable in Zimbabwe and the statutory provisions that had been enacted did not oust common law but rather complemented each other. Closely looking at how the estate of one who dies intestate leaving no surviving spouse was disposed of under the Deceased Estate's Succession Act [*Chapter 6:02*], the court indicated that resort has to be made to common law. In *casu* general law automatically applied to the estate since the decedent had been married under a civil marriage. However, despite having no surviving husband, the decedent was survived by children and descendants and hence common law in conjunction with general law had to be resorted to in the administration of her intestate estate. In its delineation of the common law position in Zimbabwe, the court made reference to the decision taken in the case of *Nzara and others v Kashumba NO and Others*<sup>16</sup> where it was held that by virtue of s 192 of the Constitution, Roman Dutch law remains also the common law of Zimbabwe. The applicable law as currently obtaining made provision for the *per stirpes* principle under general law; intestate succession based on common law, and also testate succession.

In its interpretation of the law vis-à-vis succession to deceased estates, the court averred that the *per stirpes* principle was clearly set out under both general and customary law in Zimbabwe. The customary law position of the *per stirpes* principle was said to be well captured in the Administration of Estates Act [*Chapter 6:01*] part 111A with particular reference to section 68 F.

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<sup>16</sup> HH 151-16

It was also pointed out that despite the *per stirpes* principle applying to both testate and intestate estates under both customary and general law, this did not distort its general meaning since the common law of Zimbabwe was the one giving it meaning. The court proceeded to find the principle's definition as outlined within the *Advanced Oxford Learners Dictionary*<sup>17</sup> and that proffered by the court in *Rotmanskey and Another v Heiss*.<sup>18</sup> In that case, the court of appeal 1898 at p 634 described the terms *stirpes* and *per stirpes* as follows;

*Stirpes* is root of inheritance, it designates the ancestor from whom the heir derives title and it necessarily presupposes the death of the ancestor. When issue are said to take *per stirpes*, it is meant that the descendants of a deceased person take the property to which he was entitled or would have been entitled if living.

In the matter on hand, the court stated that the *per stirpes* principle encapsulated inheritance by representation by the deceased person's descendants. As such it became crucial to conceptualize what descendants were so as to fully appreciate the inheritance by representation principle of *per stirpes*. The court cited M.J. De Waal and M.C. Schoeman-Malan<sup>19</sup> who state that, "*a person's blood relations can be divided into three categories - a person's descendants are those who descend directly from him for example, his children, grandchildren and great grandchildren.*" Further to that the court in identifying a deceased person's heirs made reference to the case of *Dera v Chimari*<sup>20</sup> where it was stated clearly that in dealing with the principle of vesting, heirs are determined once and for all at the time of death. Hence in inheritance *per stirpes* the right of representation is determined by what was prevailing at the date of death of the deceased. The principle of vesting was deemed relevant in so far as it determined who predeceased the deceased and whether they left any descendants who could inherit by representation. It became common cause therefore that Tapuwa Caroline's children should also inherit *per stirpes* because the fact that Tapuwa Caroline had predeceased her mother did not alienate her children's rights as

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<sup>17</sup> The dictionary defines the *per stirpes* principle as referring to the acquisition of inheritance by a deceased person's descendants in equal share.

<sup>18</sup> 89 Md 633 MD

<sup>19</sup> M.J. De Waal and M.C. Schoeman-Malan, *The Law of Succession*, (Juta and Company Limited), 2013 (reprinted edition) at p. 16

<sup>20</sup> HH 177-13

descendants who qualified as beneficiaries of their Grandmother Bellinah Mhlanga's estate.

In its own words the court stated;

The definition of *per stirpes* certainly includes surviving children and descendants of predeceased children. It is succession by representation which in simple terms entails inheritance on the basis of blood relationship with a predeceased heir of the deceased, whose place the descendant fills. What occurs in *per stirpes* principle is that a descendant of the predeceased heir moves up into the place of the predeceased heir. The grandchildren are entitled to inherit by representation as they move into their parent's place. In the case of *Herold v Vissen and Ors* 1937 LPD 67 at 74 the court affirmed the principle set out in *Human v Human Executors* 1893 SC 172 wherein it was stated that only grandchildren from children who predeceased the testator must be included on the grandchildren to benefit under the estate. It was further made clear that grandchildren whose parent predeceased the grandparent were entitled to inherit and succeed by representation (success by representation) which is an acknowledgement of the *per stirpes* principle. There is no legal bar to the application of the *per stirpes* principle in the current estate of Bellinah Mhlanga...The death of their mother does not take away their blood line and descendant rights to inherit. As clearly discussed *per stirpes* principle is not anchored by predeceasing the deceased but rather blood relationship of children and descendants. Even if there is no Will and last Testament the right to inherit by representation is based on the blood relationship line.<sup>21</sup>

***c) The role played by administrative rules of procedure in confirming inheritance per stirpes under the common law applicable in Zimbabwe***

In coming up with a decision in the matter on hand, the court also brought under scrutiny Form M.H.C. 12 filled in by an executor or executrix as required by the Master's office prior to the office authorising the final distribution of an Estate. The scrutiny concerned Form M.H.C.'s import and purpose in the administration of deceased's estates. It became apparent that to complete this form, detailed information was required with regards to the following issues;

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<sup>21</sup> At pages 6 and 7 of the unreported judgment, (pdf and word versions)

- Identification of deceased's relatives, their names and degree or nature of relationship.
- Address of each surviving relative and date of death of each deceased relative.
- Surviving spouse-date and place of marriage.
- Children of the deceased and dates of birth giving names of those who may be dead, dates of their deaths and names of their children. If the predecessor's children had no issue, this fact must be stated
- Father and mother of the deceased (need not be answered if the deceased left children)
- Brothers and sisters of the deceased stating whether full or half blood and their address and date of birth in case of half brothers and half sisters name of step parent should be stated only those brothers and sisters whether of full or half blood who survived the deceased are to be given in this answer. (Need not be answered if both parents survived the deceased or if the deceased left children.
- Names of brother or sister, stating whether full or half blood who may be dead giving their dates of death and names, addresses and dated of birth of their children. If predeceased brothers and sisters had no issue, this fact must be stated (need not be answered if both parents survived the deceased or if the deceased left children).

Emanating from the detailed M.H.C 12 form, the court questioned the logic behind asking for the name of a child who predeceased the deceased parent; whether they had their own children; if so their names and details; if in the ultimate such grandchildren would not be eligible to inherit by virtue of their parent having predeceased the grandparent. Form M.H.C. 12 was ruled to be in conformity with the common law as imported from the Cape of Good Hope which in turn confirmed the applicability of the *per stirpes* principle in intestate inheritance.

It was emphasised that the mere fact that Tapiwa Caroline Mhlanga had predeceased her mother did not disqualify her children, the grand children of Bellinah Mhlanga, who were rightfully entitled as descendants to inherit under the *per stirpes* principle. The court proceeded to define descendants and the *per stirpes* principle in a manner which confirms the definitions outlined earlier in this article. The court made reference to the definition and illustration of the *per*

stirpes principle given by J. Jamneck and C. Rautenbach (eds), M. Paleker (et al) in their book entitled "The Law of Succession in South Africa"<sup>22</sup> whereby the authors define *stirpes* as a line of descendants of common ancestry, including every descendant of the deceased who survives the deceased or a predeceased descendant of the deceased who leaves living descendants.

#### ***d) Best interests of the child, a key element***

In coming up with a decision in the *in Re Bellinah Mhlanga* case, the court also considered the fact that the interests of minor children were at stake. The court acknowledged its duty to protect the best interests of minor children particularly considering that in the case before it, the rights and interests of the late Tapuwa Caroline's children were clearly sanctioned by the law. The court made reference to Section 81(2) and (3) of the Constitution of Zimbabwe on the rights of children which state;

- (2) A child's best interests are paramount in every matter concerning the child.
- (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

In addition to the court's citation of section 81, it is also important to take note of Section 19(1) of the same Constitution on children which also calls on the Zimbabwean State to adopt policies and measures that ensure that in matters relating to children, the best interests of the children concerned are paramount.

## **10. THE DECISION**

Based on its interpretation of the law of intestate succession particularly concerning the applicability of the *per stirpes* principle for a decedent's descendants born of a predeceased child, the court agreed with the approach taken by the executrix in the case by finding that Tapuwa Caroline Mhlanga's children were legally entitled to inherit *per stirpes* from the Estate of late Bellinah Mhlanga, their grandmother. The court order reads;

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<sup>22</sup> J. Jamneck and C. Rautenbach (eds), M. Paleker, A. van der Linde and M. Wood-Bodley *The Law of Succession in South Africa* (2nd edition), (Oxford Press-Southern Africa) 2012 at p. 13

Accordingly it is ordered that:-

1. The *per stirpes* principle is applicable in all estates regardless of being governed by customary law or general law and or common law.
2. Tapuwa Caroline Mhlanga's children are legally entitled to inherit *per stirpes* from the estate of late Bellinah Mhlanga their grandmother.<sup>23</sup>

## 11. A CONCLUDING ANALYSIS

It is clear from the facts of the case concerning the estate of the late Bellinah Mhlanga that the approach taken by the executrix which was subsequently supported by the High Court was the best under the circumstances. This is because when the *per stirpes* principle of succession was applied, the outcome was just and fair to all the concerned parties because;

- 1) In line with a Constitutional requirement, the best interests of children were fulfilled since Tapuwa Caroline's children's rights and entitlement to inherit *per stirpes* from their deceased grandmother's estate were protected by the High Court;
- 2) The use of the *per stirpes* principle ensures the protection of another key Constitutional provision within section 56 of the Constitution namely 'equality and non-discrimination.' Most interesting is the fact that the *per stirpes* principle of succession guarantees equality of a deceased parent's children (both living and dead). There is no discrimination against those children who would have predeceased their parents particularly where they are survived by their own children. It is my own interpretation that the equality and non-discrimination principle is applicable to both the living and the dead children a deceased parent whose estate should be distributed equally among them particularly where the deceased children leave their own issue behind who in turn take up the latter's share by representation.

On the other hand, assuming that the court had agreed with the approach suggested by the Master and the decedent's estate had been distributed in accordance with strict *per capita* succession, the share due to the late Tapuwa Caroline Mhlanga (equivalent to one-sixth of the value of the estate) would have been shared equally among her

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<sup>23</sup> At page 7 of the unreported High Court judgment (word and pdf versions)

surviving siblings thereby increasing their individual shares substantially to one-fifth for each.<sup>24</sup>

The use of the per stirpes principle of succession enabled Tapuwa Caroline's three children to inherit per stirpes from their late grandmother's estate with each getting per capita (in equal parts) a one-eighteenth share. For argument's sake, if the house was valued at \$54 000, each child's share would be worth \$3 000, while their late mother's siblings would each have a share worth \$9 000. This would meet the justice of the case rather than having each living sibling getting \$10 800 and Tapuwa Caroline's children getting nothing at all. In conclusion it is respectfully argued that application of the per capita principle of succession would have made sense if Tapuwa Caroline Mhlanga had died leaving no surviving children.

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<sup>24</sup> The surviving siblings of Tapuwa Caroline Mhlanga would have ended up having a one-fifth share each leaving Tapuwa's three minor children with nothing, a great injustice indeed.