

PROBATE LAW: Where nieces and nephews of an intestate inherit from
DESCENT AND him they will take in their own right per capita in
DISTRIBUTION: accordance with Section 474.020, RSMo Cum. Supp. 1955.



January 29, 1957

Honorable Henry H. McNabb, Jr.
Prosecuting Attorney
Butler, Missouri

Dear Mr. McNabb:

This office has received a request for an opinion from you which, in part, reads:

"An intestate had two brothers, both of whom, together with their spouses, predeceased the intestate. One brother left two children surviving him and the other left three children surviving. Do these neices and nephews take in equal parts or per stirpes?"

Section 474.020, Laws Mo. Cum. Supp. 1955, is as follows:

"When several lineal descendents, all of equal degree of consanguinity to the intestate, or his father, mother, brothers and sisters, or his grandfathers, grandmothers, uncles and aunts, or any ancestor living and their children, come into partition, they shall take per capita, that is, by persons; where a part of them are dead, and part living, and the issue of those dead have a right to partition, such issue shall take per stirpes; that is, the share of the deceased parent."

It is noted that the above quoted section differs only slightly to the section contained in RSMo 1949, as Section 468.030. The difference is that the new section says "or his grandfathers, grandmothers," the former section was "or his grandfather, grandmother." It can be seen that this difference does not affect the question here posed. It is thought best to here quote from the case of Aull v. Day, 133 Mo. 337, at l.c. 344, 345:

Honorable Henry H. McNabb, Jr.

"Under this section the nephews and nieces of the ancestor, Mrs. Pomeroy, took their interest in her estate per capita, and the greatnephews and nieces took per stirpes. This construction was given to the statute in Copenhaver v. Copenhaver, 78 Mo. 58, in which the court says: 'While this section is somewhat confused by the multiplication of words, we think it is quite evident that it conveys the idea that when several lineal descendants all of equal degree of consanguinity to the intestate come into partition, as in this case, with others of a more remote degree, that the former take per capita and the latter per stirpes. So that in the case before us, as made by the agreed statement, the result would be, that the nephews and nieces would take in their own right, per capita, and the grand-nephews and grandnieces would take by representation, or per stirpes.'" "

This, we feel, definitely shows that the nieces and nephews will take per capita rather than per stirpes.

CONCLUSION

Therefore, it is the opinion of this office that where nieces and nephews of an intestate inherit from him they will take in their own right per capita in accordance with Section 474.020, RSMo Cum. Supp. 1955.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Paris.

Yours very truly,

JWF:mw

John M. Dalton
Attorney General