HEALTH SERVICES ACT 1991, SECTION 62

Submission to Queensland Health and Others
MP 18

Queensland Law Reform Commission
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Please note, in addition to the Hon M J Foley MLA the then Attorney-General, this submission was sent to:

. Mr John Leahy, Parliamentary Counsel

. Dr Ian Siggins, Health Rights Commissioner

. Dr Robert Stable, Director General, Queensland Health

9 February 1996

The Hon M J Foley MLA
Minister for Justice and Attorney-General
Minister for Industrial Relations and
Minister for the Arts of Qld
Floor 18/ State Law Building
BRISBANE QLD 4000

Dear Minister

***HEALTH SERVICES ACT 1991*, SECTION 62**

A member of the public (the respondent) recently contacted the Commission in relation to one aspect of section 62 (Confidentiality) of the *Health Services Act 1991* which he believed could result in an injustice - a view shard by the Commission.

The respondent had sought information from Queensland Health about the treatment his wife had received prior to her death. Apparently the respondent was refused this information on the basis of section 62 of the *Health Services Act 1991*. That section basically prevents the disclosure by health service personnel of information about a patient's condition. One exception to this requirement relates to health services provided to a patient who has subsequently died. Section 62(2)(b) provides:

> (2) Subsection (1) does not apply -
>
> ...
>
> (b) to the giving of information with the prior consent of the person to whom it relates or, **if that person has died, with the consent of the senior available next of kin of that person.** [emphasis added]

The respondent claims that he was denied information relating to his wife's treatment because the respondent was not, in the terms of that provision, the woman's "next of kin". The term "next of kin" is not defined by the *Health*

Services's Act 1991 and is not defined in Queensland legislation of general application such as the *Acts Interpretation Act 1954*. The common law is relied upon for a definition. The phrase "next of kin" has traditionally been regarded by the Courts as referring to blood relatives only - and therefore would not include spouses. (See, for example, Strouds Judicial Dictionary, an extract of which is attached).

Where it is intended that legislative provisions apply to spouses as well as to next of kin, it is not unusual for that intention to be spelt out. For example, in the *Succession Act 1981* (Qld) separate reference is made to the entitlement of spouses and to the entitlement of next of kin in the intestacy provisions (section 35 and Schedule 2).

It is likely that most members of the public would consider "next of kin" in the context of section 62 of the *Health Services Act 1991* to include the patient's spouse or in any event would consider it unjust for legislation to deny such information to the surviving spouse. It is likely to be considered even more unjust if a request by a surviving spouse is denied during the surviving spouse's period of bereavement, as apparently happened in the respondent's case.

A further exception to the duty of confidentiality imposed on health service personnel is in section 62(2)(c)(ii) of the *Health Services Act 1991* which enables the provision of information about a person who is a patient or who is receiving health services from a public health service to "the next of kin or a near relative" of the patient. There is some judicial authority for the assertion that the term "near relative" is also restricted to blood relatives and would therefore exclude a spouse. Again, it is unlikely that most members of the public would expect the spouse of a patient to be denied such information and it would appear to be an unjust effect of the legislation if that were the case.

The Commission does not have a current reference from the Attorney General which would enable it to investigate this matter in any great detail. However, it would appear that section 62 of the *Health Services Act 1991* could operate in an unjust manner and contrary to the expectations of the general community. Your consideration of this matter would be greatly appreciated.

Yours faithfully

The Hon Justice G N Williams
Chairperson

(2) Under a bequest of personalty to testator's "next heir-at-law," the heir, and not the next of kin, is the person entitled (*Southgate* v. *Clinch*, 27 L.J. Ch. 651).

(3) And so in a devise, "next heir" may mean a person, and not the heir general (*Baker* v. *Wall*, 1 Raym. 185, cited 3 Jarm. (8th ed.) 1557). And such a phrase would be one of purchase and not of limitation (*Re Parry*, 31 Ch. D. 130).

(4) "Next heir male": see *Dormer* v. *Phillips*, 24 L.J. Ch. 168. Cp. MALE.

See HEIRS.

NEXT MALE KIN. See *Re Chapman*, 49 L.T. 673, cited KINDRED.

NEXT OF KIN. (1) "The expressions 'nearest of kin,' 'nearest of blood,' and 'next of kin,' are synonymous" (Seton, 1575, 1576); so of "next of kindred." So, of "next of kin in blood" (*Re Gray* [1896] 2 Ch. 802; but see *Re Fitzgerald*, 50 L.J. Ch. 662, cited IN BLOOD). See further NEAREST; FIRST AND NEAREST; KINDRED.

(2) The primary and proper meaning of "next of kin" is the nearest in proximity of blood (whether of the whole or half blood, and as distinguished from those who would have been entitled under the Statute of Distribution 1670 (c. 101)), living at the death of the person whose next of kin are spoken of (*Elmsley* v. *Young*, 2 My. & K. 780; *Withy* v. *Mangles*, 10 L.J. Ch. 391; *Collingwood* v. *Pace*, 1 Vent. 424; *Brown* v. *Wood*, Aleyn, 36; *Avison* v. *Simpson*, Johns. 43; *Moss* v. *Dunlop*, Johns. 490; *Bullock* v. *Downes*, 9 H.L. Cas. 1; *Re Webber*, 19 L.J. Ch. 445; *Halton* v. *Foster*, 3 Ch. 505; *Heron* v. *Stokes*, 4 Ir. Eq. Rep. 296; *Mortimore* v. *Mortimore*, 4 App. Cas. 449; *Re Rees*, 44 Ch. D. 484; 3 Jarm. (8th ed.) 1596 *et seq*). Cp. RELATIONS; LEGAL REPRESENTATIVES.

(3) Where however there was an express reference to the Statute of Distribution (or where such reference was implied, e.g. where a division was directed, or reference was made to intestacy, *Garrick* v. *Camden*, 14 Ves. 372; *Re Gray*, supra), or the word "heirs" was used as a limitation of personalty and was therefore construed as "next of kin," or the phrase "next of kin" was coloured by association with the word "heirs"—e.g. a gift of realty and personalty to the "heirs or next of kin" of A—in those cases the statutory next of kin were entitled (see *Re Nightingale*, 78 L.J. Ch. 196; see now Administration of Estates Act 1925 (c. 23), ss. 47–50; *Re Sutcliffe* [1929] 1 Ch. 123; *Doody* v. *Higgins*, 25 L.J. Ch. 773; *Re Thompson*, 9 Ch. D. 607, but "as if she had died unmarried" would not import the statute (*Halton* v. *Foster*, supra). Cp. STATUTE OF DISTRIBUTION.

(4) A gift, in a will made before 1926, to such person as would be the testatrix's next of kin had she died intestate is a gift "by reference to the Statute of Distribution" within the meaning of that expression in the Administration of Estates Act 1925 (c. 23), s. 50 (2), and therefore takes effect as a gift to the next of kin so ascertained, *per capita* (*Re Jackson*, *Holliday* v. *Jackson*, 60 T.L.R. 157).

(5) A gift to "next of kin" creates a joint tenancy, PER CAPITA (3 Jarm. (8th ed.) 1596); but where the statutory next of kin take, they take their respective statutory shares as tenants in common PER STIRPES (ibid., but see *Re Gray*, supra; *Re Greenwood*, 31 L.J. Ch. 119, which last case was not followed in *Re Ranking*, L.R. 6 Eq. 601; *Re Rees*, supra).

(6) A husband is obviously not of kin to his wife nor a wife to her husband; and, further, neither would be entitled under a limitation to the statutory "next of kin" of the other (*Garrick* v. *Camden*, supra; *Bailey* v. *Wright*, 18 Ves. 49; *Lee* v. *Lee*, 8 W.R. 443; *Re Parry*, *Leak* v. *Scott*, 32 S.J. 645; *Milne* v. *Gilbert*, 23 L.J. Ch. 828; IN BLOOD). Cp. LEGAL REPRESENTATIVES. See further 3 Jarm. (8th ed.) 1605 *et seq*.