When is a Child Left Behind? Intestacy Distribution and Inheritance Fights

By Vesselin Mitev

Father dies in custody and leaves behind a small child. Father and mother were never married but lived off and on together. The father never left a will. A wrongful death action is commenced by the father's estate, with the mother of the child acting as administrator — so far, so good.

Under New York law, if a person leaves behind a child (and is not married), the estate goes to the child in its entirety, see EPTL Section 4-1.1(a)(3): "Issue and no spouse, the whole to the issue, by representation."

In direct and (possibly) immediate conflict is the next section, which provides that if someone has no children and no spouse, their parent(s), if alive, get the whole kit and caboodle:

"(4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents." (id).

What happens, then, when it turns out that either a) the decedent's surviving parent did not know about the infant child (and statutory sole distributee); or b) the decedent's surviving parent raises some sort of issue about whether or not the child was indeed the child of the decedent (aside from the obviously uncomfortable holiday dinners)?

The interplay between three completely different laws yields the answer.

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If the father signed a paternity acknowledgment, in a form as promulgated under section 4135-B of the Public Health Law, which provides that "immediately" either before or after the "in-hospital birth "of a child to an unmarried woman" an acknowledgment of paternity must be filled out by the father and the mother, witnessed by two persons not related to the parties, and filed with the registrar along with the birth certificate, then the inquiry is all but foreclosed, since for all intents and purposes, a valid paternity acknowledgment presumptively (and conclusively) establishes paternity.

Notably, the acknowledgment of paternity has the same force as a court order of filiation (see sub. 1 (a)(iii)). From the moment it is signed, a 60-day window to rescind the acknowledgment by either of the signatories opens (and closes, unless before the 60-day window, a court proceeding is initialized to determine paternity), under the public policy that it is best for children not to be further de-legitimized and or stigmatized by a parent withdrawing their previous acknowledgment that they were indeed their child's father.

Upon the expiration of the 60 days, only a challenge for "fraud, duress, or material mistake of fact" may be brought, with the onerous burden of proving same on the signatory bringing such a challenge.

Family Court Act Section 522 further narrows the scope of who may bring a proceeding to "establish paternity" (not challenge paternity): the mother, a person alleging to be the father, the child, the child's guardian, or a public welfare official, if the mother or the child is likely to become a public charge. Of course, if a duly filed acknowledgment of paternity exists, there would be no need to resort to the mental gymnastics needed to invoke FCA 522.

By reference back to PHL Section 4135-b, FCA Section 516-a (a) cogently provides that an acknowledgment executed pursuant to PHL Section 4135-b "shall establish the paternity of … a child." Social Services Law Section 111-k is also invoked, which again references the PHL requirements or, simply a "written statement, witnessed by two people not related to the signator(ies)" as a sufficient acknowledgment of paternity.

The EPTL circles back around and provides that a:

> "…non-marital child is the legitimate child of his mother so that he and his issue inherit from his father and his paternal kindred if: (A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and father of the child have executed an acknowledgment of paternity pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the

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registrar of the district in which the birth certificate has been filed…" EPTL Section 4-1.2(a)(2)(A).

So, no matter how much anyone doubts, or questions, or queries whether or not a child is the child of their father for inheritance purposes, if there is a duly executed and filed acknowledgment of paternity, the matter is resolved. No genetic marker test or DNA test can be ordered and the acknowledgment (if 60 days have passed since it was signed) is, for all intents and purposes, embedded and dispositive.

The statutory framework (and relevant case law) also yields the unmistakable conclusion that the legislature drafted the applicable laws as narrowly as possible, to foreclose potential inquiries and challenges into whether or not a child is presumptively their parent's, even in bitter estate litigation contests. Further evidence of this is the presumption in New York law that a father who holds himself out to be the father of a child is the father for support purposes, even if he is found later to be not so biologically.

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