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KINSHIP HEARINGS IN THE SURROGATE'S COURT

The need for a kinship hearing can arise in a variety of circumstances, among them: a) competing claimants are seeking an appointment as Administrator pursuant to SCPA §1001; b) a determination is sought as to who is entitled to a share as distributee under EPTL §4-1.1(1); c) the Public Administrator is petitioning to settle his account. Most kinship hearings occur in the last context. Who may come forward to object to the account? Who will, ultimately, benefit from the decedent's estate? A party in interest, a "distributee" in an intestacy proceeding, is entitled to come forward and dispute the accounting and/or make a claim for his or her share of the estate.

Where the Public Administrator has been appointed to administer the estate, potential claimants should be vigilant in making known their presence to the Court early in the proceeding. Early intervention may prevent the deposit of funds with the Commissioner of Finance for later distribution, or with the New York State Comptroller as abandoned property. If no claimant appears or can prove his entitlement, the Public Administrator may move to deposit the funds with the Commissioner of Finance of the City of New York pursuant to §207.25 of the Uniform Rules of the Surrogate's Court, which requires that proof to establish kinship must be completed by a claimant within one year of filing

objections to the accounting. If estate funds have been paid to the State Comptroller as abandoned property, an application for payment to a claimant should be made pursuant to SCPA §2225 as an independent proceeding.

Typically, the Court appoints the Public Administrator where the decedent dies without immediate next of kin or where those in the nearest degree of kinship are first cousins. The Public Administrator will file his Affidavit of Due Diligence and cite those persons he identifies as alleged distributees as he petitions for the judicial settlement of his account. [1] The account may already have been settled and an application may then be made by distributees who were not made party to the accounting proceeding to reopen the decree. [2]

On occasion, the first steps to determine kinship may already have been taken. In Estate of Richard Kuberka, 22 Misc.3d 1104(A), 880 N.Y.S.2d 225 (Sur. Ct. N.Y. Cty. 2008) the decedent's neighbors had contacted the Public Administrator to tell him what they knew about the decedent's family. Claimants to kinship may be in possession of personal documents, birth- and death certificates, marriage certificate, copies of obituaries, letters between relatives, a family bible. Of course, in the age of the internet, claimants can obtain much information by diligently searching numerous, even free, internet sources. [3] If the family tree appears to be difficult to complete with suspected, but absent, branches, it may be good strategy for the claimants to engage a genealogist. As he is experienced in conducting an orderly search, his efforts may be invaluable.

Once optimal information has been gathered, it must be presented at a kinship hearing. The Public Administrator will have served counsel for the claimants with a Notice fixing the time for the hearing; requiring disclosure of the documents to be produced and

the witnesses to testify. The Court, generally by a Court Attorney/Referee, may schedule a pre-heirship hearing conference, where the parameters of the hearing and the evidence to be presented are discussed.

Since the claimants in many kinship hearings are cousins, a brief review of their rights under the intestacy statute is imperative. EPTL § 4-1.1 (a)(6) provides: "[if a decedent is survived by]:

> "One or more grandparents or the issue of grandparents... and no spouse, issue, parent or issue of parents, one-half [of the estate] shall be distributed to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to surviving maternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation.... For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents."

The inevitable question that arises is, what if presumptive claimants on one side are first cousins, and those on the other side are first cousins once removed (children of first cousins, is the estate still divided into two shares, one for the maternal side and one for the paternal side? The Appellate Division, 2d Department answered that question in the negative in Matter of Shumavon, 260 A.D.2d 140 (2d Dept. 1999), citing Matter of Briggs, 167 Misc.2d 972 (Sur. Ct. Westchester Cty. 1996.) There the Court found that the decedent's paternal first cousins were entitled to the whole of the estate and maternal first cousins once removed were not distributees. If there are no first cousins alive, first cousins once removed may, nevertheless, be distributees pursuant to EPTL § 4-1.1(1)(7). This points up the need, notwithstanding the division into paternal- and maternal shares of the estate, to thoroughly investigate both sides of the family tree and for counsel to advise the

presumptive claimants properly as to their possible rights.

Burden of Proof

Claimants have the burden of proving kinship in kinship proceedings. [4] They must establish that they are the decedent's distributees by a preponderance of the evidence. [5]

The Uniform Rules for Surrogate's Court, 22 NYCRR §207.16 et seq. require that the claimants must meet certain proof requirements:

> "If the petitioner alleges that the decedent was survived by no distributee or only one distributee, or where the relationship of distributees to the decedent is grandparents, aunts, uncles, first cousins or first cousins once removed, proof must be submitted to establish (1) how each such distributee is related to the decedent and (2) that no other person of the same or nearer degree of relationship survived the decedent...."

As the claimant must prove his case, he will present all witnesses together with documentary evidence and counsel for the other parties, such as the Public Administrator and the Guardian Ad Litem appointed by the Court to represent the interests of unknowns may cross examine the witnesses or question a particular piece of documentary proof. Such proof will consist of certified copies of birth and death certificates; marriage certificates; copies of census reports; obituaries, baptismal certificates, passports and the like. Certified copies of birth and death certificates are prima facie evidence of the facts therein stated in all courts and proceedings. [6] Documents issued by a foreign country require certification and authentication pursuant to CPLR §4542. When in doubt, consider approaching all counsel and inquiring whether counsel can stipulate to the document's authenticity. [7] To aid the Court and counsel, prior to the hearing, all documentary proof

should have been numbered consecutively and submitted, together with the Genealogist Report or outline of the evidence, family tree, and list of witnesses.

Counsel should thoroughly vet the documentary proof, lest it be deemed "woefully inadequate," as found by the Court in In re Judicial Settlement of the Account of Acea M. Mosey, 22 Misc.3d 1104(A), (Sur. Ct. Erie Cty., 2008) where claimant's only documentary proof of the number of children born to grandparents consisted of an obituary which identified eight children. "No primary documents, no estate proceedings, no census records, no ship logs, no immigration record, no foreign documents" supported the proof of kinship in this immigrant family. In that case, the Court, with patience and precision, left an instructive opinion on how a claimant must meet his burden. "In all cases involving pedigree and the distribution of intestate property, it is first necessary to establish the identity of the common ancestor and from that point to construct the true family tree, to which all claimants must attach themselves to be successful," citing Matter of Whalen, 146 Misc. 176 (Sur. Ct. N.Y. Cty., 1932). Census records are not always reliable, as "boarders" may have been cited as a member of the household by the occupant of a dwelling responding to the census taker. In Estate of Minnie Pagliuca, NYLJ 9/9/08, p. 34, Col. 6 (Sur. Ct., Bronx Cty.), the report of a person named "John" in the census records of decedent's parents' household was attributable to error, as no birth or death records for such an individual could be located.

Copies of probate and administration proceedings, showing family descent, and distributees of a particular decedent, may be introduced. In Matter of Geraldine Perry, 2009 WL 7113054 (Sur. Ct., Erie Cty, 2009 (unreported decision), a title abstractor testified he had located eight estate files. Counsel may seek to have such records certified

if originating from another Court, or, if from the same Court, the Court may take judicial notice of such proceedings.

Counsel for the claimant should have prepared a family tree, noting all names by which a particular relation is known. "Hedwig," may also be known as "Jadwiga" in other documents. [8] As cited in In re Judicial Settlement of the Account of Mosey, [9] supra, "When persons of the nearest degree of relationship establish [their] standing, those more remote are excluded." [10] One who seeks to establish an interest in decedent's estate as a collateral relative must show that all lines of descent which would precede his or her claim as distributee are exhausted. [11] In short, upon proof that no heirs other than those before the Court exist, the class of heirs may be closed. [12]

Oral Testimony

Oral testimony will make up a significant portion of the evidence. Pedigree declarations by members of their families are admissible as an exception to the hearsay rule. Under Aalholm v. People, 211 N.Y. 406 (1914), declarations by deceased persons may be received in pedigree cases. To be admissible, 1) the declarant must be dead; 2) the statement must have been made *ante litem motam*, that is, at the time when the declarant had no motive to distort the truth and 3) the declarant must be related by blood or affinity to the family concerning which he speaks. The Court, in Estate of Berlin, 91 Misc.2d 666, (Sur. Ct. Bronx Cty., 1977), addressed the application of the Dead Man statute, CPLR 4519, and its possible application to the pedigree hearsay exception to "interested" claimants, noting this issue to be a "source of some confusion." The Court found that examination of the reasons for the existence of the kinship exception to the

hearsay rule suggests that an interpretation of CPLR 4519 which would extend its preclusionary aspect to conversations relative to pedigree between an objectant [to an accounting, e.g. or any other claimant] and the decedent's estate would be a limitation upon the pedigree exception that is not supported by reason. The Court opined that "The rules of evidence are designed to promote truth and justice."

However, the weight of the evidence is obviously affected where interested parties avail themselves of the pedigree exception by delivering self serving hearsay. For that reason, "Such testimony may only be a part of the cameo that constitutes a family tree, not all of it." [13] As a good friend or neighbor may be related to the declarant by "affinity," there is no reason to limit hearsay testimony to family members. In fact, such a witness may be ideal to "open" the oral testimony and thus support the testimony to be provided by an interested claimant.

Presumptions

A number of presumptions are helpful. A person who would have been in excess of 100 years old on the date of decedent's death is presumed to have predeceased her. [14] Pursuant to McKinney's EPTL §2-1.7, a presumption of death is applicable if a family member has not been heard from for three years and no reasonable explanation for the person's absence can be articulated. This is generally done at a hearing utilized to obtain Letters of Administration in the absentee's estate. The presumption is codified in McKinney's SCPA §2225, permitting the Court not only to make a finding that the absentee is deceased, but that he predeceased the decedent without issue, other than the issue stated in the record. [15] In fact, as pointed out in Warren's Heaton on Surrogates' Courts, a determination that a person predeceased without issue pursuant to SCPA

§2225, does not constitute a finding that the absentee is dead, as would be the case in a determination pursuant to EPTL §2-1.7, rather, it involves a "presumptive legal fiction" for the limited purpose of facilitating distribution of an estate. [16]

Persons are presumed to be born legitimate, the offspring of a valid marriage. [17]

Documents older than thirty years or more in the possession of the natural custodian may be presumed to be authentic. [18]

Oral testimony, documentary evidence, and all applicable presumptions must work together to persuade the Court. ".... In cases of this kind the pieces of evidence fit together in a perfect picture, like a mosaic, when status is established. On the other hand, where correlation or co-ordination of the pieces is absent, the fictitious nature of the claim is revealed." [19]

The Conclusion of the Hearing

The Referee must issue a report stating Findings of Fact and Conclusions of Law within thirty days of the kinship hearing. The parties may waive the filing of the Referee's report and stipulate to the Court's determination of all kinship issues upon the transcript of the hearing testimony and evidence. [20]

Kinship hearings are challenging at times because of the sheer volume of the documents produced in the course of a search. It is a good idea to study the family tree and remember its branches as counsel may refer the court to documents other than a challenged or missing one to support one's case.*

* Thanks to my collegaues, Paul Forster, Esq. and Arthur Decker, Esq. for helpful hints.

1. See, e.g. Estate of Olive Mason, NYLJ 8/6/2008 p. 36, col. 5 (Sur. Ct., Suffolk Cty.)
2. In Re Hayden's Estate, 176 Misc. 1078, (Sur. Ct., N.Y. Cty., 1941).
3. See,e.g. Ancestry.com; Familysearch.org; Pipl.org; Mormon Database.
4. Matter of Morris, 277 A.D. 211 (3rd Dept. 1950).
5. Matter of Whelan, 93 A.D.2d 891, (2nd Dept. 1983).
6. McKinney's Public Health Law §4103; CPLR §4520.
7. In re Estate of Shapiro, NYLJ 10/28/2010, p 32 col. 3 (Sur. Ct., Kings Cty).
8. In re Judicial Settlement of the Account of Acea M. Mosey, 22 Misc.3d 1104(A), 880 N.Y.S.2d 225 (Table) (Sur. Ct., Erie Cty., 2008), supra
9. Ibid
10. Matter of Henesey, 3 Misc.2d 660, aff'd 3 AD 2d 384, App Den. 3AD 2d 1004 (1st Dept. 1957).
11. Matter of Dinzey, NYLJ, 6/9/2003, p. 33, col 4 (Sur. Ct., Kings Cty).
12. Matter of Alao, NYLJ 3/19/02, p. 18 col 6 (Sur. Ct., Kings Cty).
13. Estate of Berlin, 91 Misc.2d 666, (Sur. Ct., Bronx Cty. 1977), supra
14. Young v. Shulenberg, 165 NY 385 (1900).
15. McKinney's SCPA §2225(a)
16. Warren's Heaton on Surrogates' Courts, §74.17(1).
17. In re Findlay, 253 N.Y. 1, (1930).
18. In re Brittain's Will 54 Misc.2d 965 (Sur. Ct., Queens Cty. 1967).
19. In Re Hayden's Estate, 176 Misc. 1078 (Sur. Ct., N.Y. Cty. 1941), supra; Matter of Wendel, 146 Misc. 260 (Sur. Ct., N.Y. Cty. 1933).
20. McKinney's SCPA §506 (6)©)