Fall/Winter 2016
The Newsletter of the NYSBA Committee on Courts of Appellate Jurisdiction

LEAVEWORTHY

Pro Bono Appeal: Navigating Inconsistencies in Posthumous DNA Testing Statutes

By Edward J. Markarian and Robert M. Harper

Family Court Act § 519 and Estates Powers and Trusts Law ("EPTL") § 4-1.2 both address a child's right to prove paternity after the putative father's death. However, DNA testing may be considered under Family Court Act § 519 only if "a genetic marker or DNA test had been administered to the putative father prior to his death." In contrast, EPTL § 4-1.2, as amended in 2010, states that "paternity [may be] established by clear and convincing evidence, which may include…evidence derived from a genetic marker test." EPTL § 4-1.2 does not require that genetic testing be performed while the father was alive. These inconsistent statutes came to our attention after we accepted assignment of an appeal through the New York State Bar Association Pro Bono Appeals Program (see www.nysba.org/probonoappeals).

EDWARD J. MARKARIAN

We were aware that post-death DNA testing was authorized under the 2010 amendment of EPTL § 4-1.2, which settled the conflict among the Appellate Divisions that existed prior to the amendment (see *Matter of Janus*, 157 Misc 2d 999, aff'd 210 AD2d 101 [1st Dept] [precluding DNA test]; *Matter of Morningstar*, 17 AD3d 1060 [4th Dept] [allowing DNA test]; *Matter of Poldrugovaz*, 50 AD3d 117 [2d Dept] [allowing test]). However, we were surprised to learn that a corresponding amendment to Family Court Act § 519 had not been made. Our appeal would have been governed by the less-favorable Family Court Act.

We were prepared to argue at the Appellate Division that Family Court Act § 519 should be interpreted according to decisions allowing post-death DNA testing under EPTL § 4-1.2 even before the 2010 amendment of that provision. However, this argument would have asked the Appellate Division to overlook § 519's express language stating that DNA testing had to be performed prior to the father's death. We therefore filed for extensions of time to perfect the appeal, while at the same time commencing new proceedings in Surrogate's Court seeking a determination under the more favorable provisions of EPTL § 4-1.2. Because the Family Court proceeding had been dismissed without prejudice, this second bite at the apple was possible.

Correctly applying EPTL § 4-1.2, the Surrogate's Court Judge ordered DNA testing (rendering our Family Court appeal moot). The putative father's genetic material was readily available because trial counsel in the Family Court proceeding had diligently secured court orders preserving genetic samples. The DNA testing proved paternity. Thereafter, the Social Security Administration made a substantial award of survivor benefits to the decedent's child. Surrogate's Court heirship proceedings are not private. To shield the personal information of the child in this case, we are not mentioning the venue of the proceedings. However, because the Family Court and Surrogate's Court judge was the same person, we wish to publicly applaud his open-mindedness in reaching different conclusions when addressing the same issue under different statutes. Ultimately, we hope that the inconsistent statutes will be harmonized.

ROBERT M. HARPER

Edward J. Markarian is a partner at Magavern Magavern Grimm LLP in Buffalo, New York. Robert M. Harper is an associate at FarrellFritz PC in Uniondale, New York.