

New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 239—NO. 56

MONDAY, MARCH 24, 2008

ALM

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

A Grand First Quarter to 2008

The opening days of 2008 have experienced an array of significant issues affecting Surrogate's Court practice. With opinions addressing the construction of wills, the rights of same-sex couples, the inheritance rights of adopted children, and proof of paternity, the year 2008 promises important developments in the field of trusts and estates.

Request to Reform Will

• **Denied Request to Reform Will Results in Intestacy.** Before the court in *In re Estate of Sheehan* was an application by the executor for reformation of the decedent's will in order to add a residuary clause, which allegedly had been omitted as the result of a clerical error.

In addressing the relief requested, the court said that while its powers to construe and reform a will were broad, they nevertheless were circumscribed by the traditional rule which prohibits reformation of an unambiguous will, even in instances of mistake, such as the omission of a dispositive provision. The court noted that there was no explicit statutory mechanism for the correction of an error in a will by the insertion of additional language based upon an allegation of testamentary intent not expressed in conformity with the Statute of Wills.

Moreover, the court found that while there have been limited exceptions crafted by courts in order to avoid a perceived injustice when a mistake is made, it held that the petitioner had failed to produce extrinsic evidence demonstrating the actual intent of the testator in regard to the disposition of his residuary estate so as to warrant this result. Indeed, the court concluded that other than the bare allegation by the petitioner that the omission of the residuary clause was a "clerical error," there was nothing in the record concerning the testator's overall estate plan, and his alleged desire that the residue of his estate pass to a revocable inter vivos trust.

Accordingly, while recognizing that the absence of a residuary clause would result in intestacy, the court held that, under the circumstances presented, it was constrained to deny the relief

Ilene Sherwyn Cooper is a partner with the Uniondale firm of Farrell Fritz. In addition, she is a member of the House of Delegates of the New York State Bar Association's Committee on Estates and Trusts Administration.



requested by the petitioner.

In re Estate of Sheehan, NYLJ, Jan. 16, 2008, p. 37 (Sur. Ct. Suffolk County) (Surrogate John M. Czygier Jr.).

Same-Sex Partners

• **Entitled to Health Benefits.** The Appellate Division, Fourth Department, recently recognized a same-sex marriage legally entered in Canada for purposes of allowing health benefits to a lesbian couple.

In *Martinez v. Monroe*, the court was confronted with an action brought by a community college employee seeking, inter alia, a declaration that the defendants' failure to recognize her valid foreign same-sex marriage for spousal health care benefits violated her rights under the Equal Protection Clause and the Executive Law. The Supreme Court granted the defendants' motion for summary judgment declaring that employee's marriage was not entitled to recognition in New York, and the employee appealed. The Appellate Division reversed, finding that while a same-sex marriage cannot be legally contracted in New York, the law does not prohibit recognizing a same-sex marriage validly contracted in another jurisdiction.

The court held that while New York will generally recognize a validly contracted foreign marriage, it will not do so where such marriage is contrary to the express provisions of a statute or the prohibitions of natural law, i.e., a marriage involving incest or polygamy, or offensive to the public sense of morality. The court noted that in spite of these exceptions, New York has recognized

marriages between an uncle and a niece by the half blood, common-law marriages valid under the laws of sister states, and a Canadian marriage between minors.

Assessed within this context, the court concluded that recognition of a same-sex marriage in New York was not precluded by either the "positive law" of New York or "natural law." The court rejected the defendants' argument that the decision by the Court of Appeals in *Hernandez v. Robles*, 7 NY3d 338, required a finding that the same-sex marriage at issue was contrary to public policy, and held that the opinion, instead, stood for the proposition that the New York State Constitution does not compel recognition of same-sex marriages solemnized in New York. The court also noted that the Court of Appeals had indicated that the Legislature may enact legislation recognizing same-sex marriages, thereby suggesting that such marriages were not contrary to the public policy of New York. Further, the court found it significant that New York had not chosen to enact legislation pursuant to the federal Defense of Marriage Act denying full faith and credit to same-sex marriages validly solemnized in another state.

Thus, the court held that the employee's same-sex marriage, valid in Canada, was entitled to recognition in New York in the absence of express legislation to the contrary, and that the defendants' refusal to recognize such marriage was in violation of the Executive Law. In light of its determination, the court did not address the employee's contention regarding the Equal Protection Clause.

Martinez v. Monroe, 2008 WL 275138 (4th Dept. 2008).

Author's Note: It is significant that approximately one month before the decision was rendered in *Martinez*, the Third Department rendered its opinion in *Langan v. State Farm Fire & Casualty*, 849 NYS2d 105 (3d Dept. 2007), holding that a domestic partner was not entitled to death benefits under the Workers' Compensation Law as a surviving spouse, despite having entered a valid civil union with the decedent in Vermont.

In reaching this result, the court determined that the doctrine of comity did not require New York to recognize the claimant as the decedent's surviving spouse for death benefit purposes. According to the court, comity was not a mandate to adhere to another state's laws but, rather, an expression of one state's voluntary choice to defer to another state's

policy. Moreover, the court said that a decision to accord recognition to a civil union as a matter of comity does not require New York to confer upon the parties to that civil union all the legal incidents of that status recognized in the foreign jurisdiction that created the relationship.

Based upon the foregoing, the court further held that the deprivation of death benefits to the surviving party to a civil union does not violate the Equal Protection Clause of the U.S. Constitution. The court reasoned, in part, that the Workers' Compensation Law was enacted to encourage and protect the traditional family unit, and that while arguably a same-sex couple may be equally as capable of creating a family unit, the determination by the Court of Appeals in *Hernandez v. Robles*, 7 NY3d 338, established that the Legislature's decision to limit marriage to opposite-sex couples was rationally related to a legitimate state interest and withstands rational basis scrutiny.

Adopted Child

• **Child Adopted by Paternal Aunt Entitled to Inherit From Mother's Estate.** In a contested administration proceeding, the issue before the court was whether the decedent's natural child could inherit from the decedent's estate, despite the fact that the child had been adopted by her paternal aunt and her aunt's husband one year after birth. The child, daughter of the decedent, maintained that her right to inherit from her natural mother had not been severed by the intrafamily adoption.

In finding for the daughter, the court relied upon the provisions of DRL §117(1)(e) and concluded that where the other requirements of the statute were satisfied, an adoptee may inherit from his or her birth mother and father so long as the adoptive parent was a descendant of the adoptee's natural grandparents on either the maternal or paternal side.

The court rejected arguments by the decedent's sister that the statute required the adoptive parent to have descended from the same grandparents as the decedent in order for the adopted child to inherit from a deceased natural parent. The court found that both the rules of statutory construction and the Recommendations of the Law Revision Commission contained support for the proposition that the statute was not intended to be so limited in its scope, but rather was designed to permit an adopted child to inherit from either natural parent under the circumstances set forth regardless of whether the adoptive parent was a descendant of a maternal or paternal grandparent.

The court further relied, for its result, upon the legislative history of the statute, and policy considerations that supported the inheritance rights of adopted children from either natural parent in cases of intrafamily adoptions. The court reasoned that unlike instances when a child is adopted out, when a child is adopted by a close family member there is a likelihood of contact between the child and his or her biological parents, and thus the concerns for severing family ties are not implicated. The court determined that under such circumstances the birth parents would

likely want their child to receive the inheritance due pursuant to the laws of intestacy.

In re Estate of Johnson, NYLJ, Jan. 25, 2008, p. 25 (Surr. Ct., Kings County) (Surrogate Margarita López Torres).

DNA, Proof of Paternity

• **Admissibility of DNA Test Results and Proof of Paternity Addressed by Second Department.** In *Matter of Poldrugovaz*, the Appellate Division, Second Department, had occasion to examine the issue of the standard of proof to be applied in a pretrial request by a putative child of the decedent for posthumous genetic marker testing pursuant to the provisions of EPTL §4-1.2(a)(2)(C).

The record revealed that a petition for letters of administration was filed by an alleged nonmarital child of the decedent. The decedent was never married and had no other children.

Objections to the petition were filed by the decedent's sole surviving sibling, his brother. The Office of the Medical Examiner had performed an autopsy to determine the cause of the decedent's death, and during the course thereof, extracted certain tissue samples from the decedent's body.

Following the filing of the petition for letters of administration, the petitioner moved to direct the medical examiner to send a portion of the tissue samples to a laboratory for testing so as to provide "clear and convincing evidence" of the decedent's paternity pursuant to the provisions of EPTL §4-1.2(a)(2)(C). In support of her application, the petitioner submitted additional evidence in support of her claim that she was the decedent's child, including photographs evidencing a familial relationship between herself and the deceased, affidavits of acquaintances who attested that the decedent acknowledged that he was the petitioner's father, and her own affidavit indicating that the decedent openly acknowledged that she was his child.

The application was opposed by the decedent's brother.

Relying on the decision by the Fourth Department in *Matter of Morningstar*, 17 AD3d 1060, the Surrogate's Court, Suffolk County, found that the petitioner had provided "some evidence" that the decedent had openly and notoriously acknowledged paternity, and granted the motion.

An appeal was filed by the decedent's brother, who argued that the opinion subsequently rendered by the Second Department in *Matter of Davis*, 27 AD3d 124, required that the petitioner's motion be denied absent clear and convincing proof that the decedent openly and notoriously acknowledged that the petitioner was his child.

In a lengthy decision analyzing the legal and public policy issues surrounding the rights of nonmarital children, the Appellate Division affirmed the order of the Surrogate's Court, holding that to the extent its decision in *Matter of Davis* required a party seeking posthumous genetic marker testing to prove acknowledgment of paternity by clear and convincing evidence, it should no longer be followed since it set too

high of an evidentiary standard. Instead, the court said that a party seeking an order directing posthumous genetic marker testing need only provide some evidence that the decedent openly and notoriously acknowledged the nonmarital child as his own, and establish that genetic marker testing is practicable and reasonable under the totality of the circumstances, to wit, such factors as: (1) whether the evidence presented demonstrates a reasonable possibility that the genetic marker testing will establish a match; (2) the practicability of obtaining the tissue sample for the purpose of the genetic testing; (3) whether there is a need to exhume the body or obtain the sample from a nonparty; (4) whether appropriate safeguards were, or will be, taken to insure the reliability of the genetic material to be tested; and (5) the privacy and religious concerns of the decedent and/or his family members. However, the court cautioned that its holding should not be interpreted as altering the standard of proof required under EPTL §4-1.2(a)(2)(C) to establish paternity; to wit, clear and convincing evidence of paternity together with proof that the decedent openly and notoriously acknowledged the child as his own.

In reaching this result, the court reasoned that the foregoing standard established a proper balance between the state's interest in the prompt administration of estates, respect for the privacy of the decedent and his family members and the rights of a nonmarital child to relevant evidence needed to prove paternity. The court was further motivated by the legal trend in New York and in other states to enhance the ability of nonmarital children to assert their rights of inheritance, the much-criticized restrictions imposed by the provisions of EPTL §4-1.2(a)(2)(D) upon use of DNA test results, the increasing legislative sensitivity to the inheritance rights of nonmarital children, the significant segment of the population affected by paternity and inheritance rights issues, and the usefulness and reliability of DNA testing.

Based upon the foregoing, and a factual review of the record below, the court found that the affidavits submitted by the petitioner provided some evidence that the decedent openly and notoriously acknowledged the petitioner as his child, and that her request for posthumous DNA testing of the tissue samples obtained by the medical examiner was reasonable and practicable under the circumstances. Significantly, the court noted that the tissue samples were readily available for testing, were obtained in the regular course of business of the medical examiner, and exhumation was not required. Accordingly, the court concluded that the Surrogate did not err in granting the relief requested by the petitioner.

In re Poldrugovaz, 2008 N.Y. Slip Op. 01152 (2d Dept. 2008).

Reprinted with permission from the March 24, 2008 edition of The New York Law Journal © 2008 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-545-6111 or visit www.almreprints.com. # 070-03-08-0043