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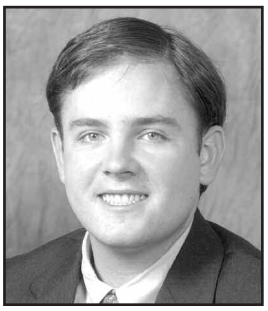
Inheritance Rights

'After-Born' vs. 'After-Known' Children



Robert M. Harper

By Robert M. Harper

Under New York law, a child who is born or adopted after a parent executes a will may inherit from the parent in certain circumstances, even when the parent dies, testate, and the parent's will makes no provision for the child. In *Matter of Gilmore,* the Appellate Division, Second Department, recently addressed whether a child who is born prior to the execution of his or her parent's will, but is not known to the parent until after the execution of that instrument, may inherit from the parent's estate. This article discusses the Second Department's decision in *Gilmore* and the issues attendant thereto.

EPTL 5-3.2

While New York law does not obligate a parent to leave any part of his or her estate to his or her children, the Legislature has enacted EPTL 5-3.2 in order to address situations in which an "after-born child", i.e., a child born after a parent executes a will or in gestation at the time of the parent's death and born thereafter, is inadvertently left out as a beneficiary of the parent's testamentary instrument. Under EPTL 5-3.2, whenever a "testator has a child born after the execution of a last will, and dies leaving the after-born child unprovided for by any settlement, and neither provided for nor in any way mentioned in the will, [the] child shall succeed to a portion of the testator's estate as herein provided."

EPTL 5-3.2 provides that when a provision is made in a testator's will for one or more of the testator's children, the testator's after-born child shall be entitled to a share of the testator's estate, subject to the following: (1) "[t]he portion of the testator's estate in which the after-born child may share is limited to the disposition made to [the testator's] children under the will;" (2) the portion of the testator's estate in which an after-born child has an interest shall be distributed as if the testator had included all of his or her after-born children as beneficiaries under the will; (3) if it appears that the testator's will limits the bequests there under to his or her children who are living at the time of the will's execution, the testator's after-born child shall succeed to the portion of the testator's estate as would have passed to the after-born child had the testator died intestate; and (4) the after-born child's interest in the testator's estate shall be of the same character as the interest that the testator conferred upon his or her children under the will. Otherwise, when the testator's will makes no provision for the testator's children, a testator's after-born child shall not be entitled to any portion of the estate.

Adopted Children

In addition to an after-born child, New York law protects against the inadvertent exclusion of a testator's adopted child as a beneficiary under a will executed prior to the child's adoption. The genesis of this protection is the Second Department's time-tested decision in *Bourne v. Dorney.*

In *Bourne,* which was decided in 1918 and affirmed by the Court of Appeals in 1919, the Appellate Division recognized a child adopted by a testator after the execution of his will as an after-born child under the predecessor to EPTL 5-3.2. The resulting rationale has been that a child adopted by a testator is considered to be "born" to the testator at the time of his or her adoption.

Since the adopted child is not deemed to be "born" to the testator until the adoption is complete, it matters not that the adopted child was, in fact, "born" in the biological sense before the testator's will was executed. What matters is that the testator's adoption of a child occurred after the testator executed his or her will.

Matter of Walsh

In *Matter of Walsh,* the Surrogate's Court, Nassau County, addressed an issue of first impression, namely, whether the petitioner, who alleged that she was the decedent's non-marital child and that the decedent knew of her before executing his last will, was entitled to inherit as an after-born child under EPTL 5-3.2. The petitioner was born in 1964, and the decedent's will in question was executed in 1984. Following the decedent's death in 1995, the petitioner sought a declaration that she was the decedent's after-born child.

In ruling against the petitioner, the Surrogate's Court explained: "even assuming that Petitioner [was] in fact the non-marital [child] of decedent, petitioner cannot, as a matter of law, establish herself as an after born child under EPTL Sec. 5-3.2". The court reasoned that the petitioner was born before the 1984 will's execution and that the decedent knew of the petitioner at the time that he executed the will, thus, precluding the petitioner from being recognized as an after-born child under EPTL 5-3.2.

In dicta, however, the court further opined: "had petitioner been born after the execution of [the decedent's] 1984 will, or perhaps even if [the decedent] was unaware of petitioner's existence until after the execution of the will, she may have had a valid claim under [EPTL 5-3.2 and 4-1.2]." Perhaps, not surprisingly, the dicta in *Walsh* gave rise to another issue of first impression in this state that the Second Department recently addressed in Matter of Gilmore.

Matter of Gilmore

In *Gilmore,* the decedent executed his last will and testament, which benefited only one of his eleven children, in 1996. Ten years later, the decedent underwent DNA testing, which established that he was the father of two non-marital children, the petitioners. The decedent apparently acknowledged the petitioners as his children, but did not revise his will before dying in 2007.

Following the commencement of a proceeding to have the decedent's will admitted to probate, the petitioners filed a petition with the Surrogate's Court, Nassau County, in which they sought to fashion themselves as "after-known children" and to be treated in the same manner as adopted children under a case law-created exception to EPTL 5-3.2. Citing Walsh, Bourne, and the legislative history to EPTL 5-3.2, the petitioners argued that public policy militates against precluding "biological children discovered after the execution of a will from sharing in the decedent's estate while also allowing children adopted after the execution of a will to share in the decedent's estate."

Neither the Surrogate's Court, nor the Appellate Division was persuaded by the petitioners' position. In ruling against the petitioners, the Appellate Division explained that the petitioners could not be considered after-born children within the plain meaning of EPTL 5-3.2, as they were not "born after the execution of [the decedent's] last will;" that there was no indication of a contrary intention on the Legislature's part in the statute's history; and that the exception for which the petitioners advocated "would promote uncertainty in identifying persons interested in an estate and finality in its distribution, which are critical to the public interest in the orderly administration of estates."

While acknowledging the petitioners' "sympathetic" position, the Second Department also explained that there are significant differences between adopted children and "after-known" children. First, an adopted child is not "born" to the testator until the adoption is complete, while a testator's natural child is his or hers at the child's birth, whether known or not. Second, in adopting a child, a testator takes the affirmative step of incurring legal obligations that arise from the adoption, whereas a testator's natural child's birth and the testator's subsequent discovery of that child do not necessarily involve an affirmative act on the testator's part. Third, when a testator engages in sexual conduct that lends itself to reproduction before executing a will and yet makes no provision for unknown children, the testator's actions may evidence an intention not to provide for unknown children. As such, the Appellate Division concluded that it would be imprudent to treat the petitioners, the decedent's after-known children, in the same manner as adopted children for the purposes of EPTL 5-3.2.

Accordingly, the Second Department ruled against the petitioners, holding that children born prior to a testator's execution of a will, but discovered thereafter, are not entitled to be treated in the same manner as after-born or adopted children under EPTL 5-3.2.

The lesson to take away from *Gilmore* is that a decedent's after-known children are not entitled to the same treatment under EPTL 5-3.2 as the decedent's after-born or adopted children. The only way to remedy this dichotomy may be by legislative action.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in estate and trust-related litigation. He is Co-Chair of the Bar Association's Member Benefits Committee and Vice-Chair of the New York State Bar Association's Trust and Estates Law Section's Government Relations and Legislation Committee.