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Application of Surrogate's Court Rules In Wrongful Death Actions

By **Bruce M. DiCicco**

This article focuses on the rules of estate administration in the Surrogate's Courts that are applicable in situations that are fairly common for New York City personal injury lawyers. It can be described as follows: Your client is the unmarried mother of several minor children, all born in New York City. The father of the children (the Decedent) tragically has been killed in an automobile accident in New York City. The Decedent never established his paternity of his children in family court but lived with the mother continuously for the entire lives of his children. The Decedent is originally from somewhere in Central America, perhaps Mexico, and crossed into the United States somewhere near San Diego or El Paso. He worked successfully for cash as a day laborer and never filed income tax returns. He, together with the earnings of the mother who cleans houses also for cash, provided for the family in a fairly meager manner. New York being a sanctuary city, there was no need to obtain any governmental approval or interaction beyond the voluntary application by the mother of the children for public assistance, which she receives. Little is known about the family relationships of Decedent beyond his children and their mother, perhaps due to the firm reticence of the mother to talk about immigration status. The Decedent never created a will or any other legal documents to transmit his "estate", which amounts to cash and little else of monetary value. Each birth certificate of the minor children lists the Decedent as "Father". The automobile accident involved a taxi cab whose maximum liability coverage is $75,000.

The mother hires personal injury attorneys (PI Lawyer) in order to bring on the lawsuit against the cab company. The wrongful death case seems strong because the Decedent was struck while a pedestrian in a cross walk with a green light in his favor. The insurance company has already signaled that an offer of the policy is likely. The recovery would go to the heirs of the Decedent or as New York describes them, the "distributees". EPTL §4-1.1. In this case, since the mother is not a spouse of the decedent, the closest living distributees are the minor children of the Decedent. PI Lawyer first discovers that an Administrator of the estate of the Decedent is required to bring on the wrongful death lawsuit, which must be brought within two years of the date of death. EPTL §5-4.1 provides in part:

> "The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such action must be commenced within two years after the decedent's death ..."

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The next thing PI Lawyer learns is that there is a statute governing eligibility to receive the appointment as the Administrator (also known as a "personal representative"). The statute, SCPA §707, simply excludes persons who are ineligible who are infants, incompetents and non-domiciliary aliens. SCPA §1001 then sets forth the priority for the issuance of Letters of Administration, or "Letters". The priority is (1) surviving spouse, then (2) children, (3) grandchildren, (4) either parent, (5) brothers or sisters, (6) other distributees. In our hypothetical, the priority unfortunately for PI Lawyer falls to the minor children. The statute then goes on to provide that where all the distributees are infants, the Surrogate's Court may grant Letters to "a fiduciary, committee or conservator of the infant distributee." SCPA §103(21) includes guardians as "fiduciaries". This brings PI Lawyer to the next step, which is to have the mother appointed as the guardian of her minor children so that she can then become the Administrator of their estates and prosecute the wrongful death action on behalf of her minor children.

SCPA Article 17 provides for the appointment of persons to act as person and property guardians of infants. In this case, PI Lawyer only requires the appointment for the purposes of the wrongful death action so property guardianship will be requested by petition in Surrogate's Court. In a well-intended effort to exclude the appointment of persons who have abused children, an investigation is routinely made by the court personnel to the Statewide Central Register of Child Abuse and Maltreatment pursuant to the rules of Child Protective Services as pre-requisite to the appointment of a guardian. The fingerprints of the proposed guardian and all adults residing in home of the minors is also required to be accomplished by the court. Original birth certificates for the non-marital children are required to be attached to the petition for guardianship of the minor children as well. Due to the large volume of cases in the metropolitan counties of New York, three to four months for the Central Register report and the fingerprinting to be accomplished is not unusual in the experience of this author, and COVID has slowed » Page 8

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Rules

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that time down significantly. With Letters of Guardianship eventually in hand, we return to the appointment of the administrator of the estate and this is where things get interesting.

One of the long-valued roles of the Surrogate's Court in administration and probate matters is to provide assurance to the public that their estate matters will be properly carried out and that dispositive instruments are validly executed. The Surrogate's Court, therefore, exercises oversight at various stages of proceedings for the appointment of personal representatives such as Administrators and Executors (see, e.g., *Birnbaum v. Birnbaum*, 73 N.Y.2d 461 (1989) and *Meinhard v. Salmon*, 249 NY 458 (1928)), unlike inter vivos trusts (revocable living trusts) whose trustees and successor trustees, if acting prudently and in the best interests of the beneficiaries, require no court supervision at all.

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EPTL §4-1.2 also specifically governs inheritance by non-marital children. With respect to the *father* of non-marital children, the law sets forth the way kinship must be proved to the court prior to the appointment of the administrator of an estate. There are three alternative ways.

Method 1. A court of competent jurisdiction has, during the lifetime of the father, made an order of filiation or parentage declaring parentage or the parentage of the child has been established through the execution of an acknowledgment of parentage pursuant to §4135(b) of the Public Health Law, which has been filed with the registrar of the district in which the birth certificate has been filed. Method 1 is rarely undertaken by clients such as the one described here. The cost would likely be prohibitive and people rarely think the need would ever arise for such proceedings in court.

Method 2. The father of the child has signed an instrument acknowledging parentage that is acknowledged like a real estate deed before a notary public and filed within 60 days with the register under Social Services Law §372(c), and upon the Department of Social Services sending notice of the acknowledgement to the mother or other legal guardian of the minor non-marital child. Method 2 seems promising according to your client because she informs you that the Decedent signed a Social Services form (designated LDSS-5171) in the hospital at the time of the birth of each of his children so that his name would appear on the baby's birth certificates. Unfortunately, the form does not require, nor is there a space for, a notary public to attest to the signing. This may be an oversight in the development of the form.

Method 3. Parentage has been established by clear and convincing evidence, which may include, but is not limited to: (1) evidence derived from a genetic marker test, or (2) evidence that the parent openly and notoriously acknowledged the child as his or her own. The first prong of this method is proof by a genetic marker test. This is unlikely to be affordable by the mother. Another hurdle is who would have the right to gather DNA from the body? Public Health Law §4201 identifies in descending priority those persons who shall have the right to dispose of the remains of a decedent. There is a body of case law ruling on when an order to make a body available for DNA testing will be granted in order to comply with EPTL 4-1.2. *Matter of Poldrugova*, 50 A.D.3d 117 (2d Dept. 2008); *Bin Sultan Bin Abdul-Aziz Al Saud v. New York and Presbyt. Hosp.*, 2019 N.Y. Misc. LEXIS 4044. Rarely, however, do persons in our factual pattern have the resources to bring on a request for DNA nor would the estate likely want to finance such a request from the relatively meager liability insurance proceeds recovered in the wrongful death action. There is also the practical issue that the insurance proceeds are not available at this stage of proceedings from which to finance the DNA work. The second prong of Method 3 is the last resort of PI Lawyer and it allows evidence that the Decedent "open and notoriously acknowledged the child as his or her own." Wouldn't such evidence be the name of the Decedent on the Birth Certificates in the box designated "Father"? Is that not open and notorious acknowledgment? Administration Department(s) clerks of the Surrogate's Courts in the New York City area do not seem to think so and routinely reject the birth certificate acknowledgement as proof of kinship. Should this be the case? Is the public not using birth certificates for all manner of functions and proofs in society? Affidavits to prove facts in Surrogate's Courts would normally consist of the statements of a witness who knew the subject of the issue which in this case would be the facts that the affiant knew the Decedent and the non-marital children, knew that the father openly claimed them as his own and who have no financial interest in the outcome. The aforesaid memo may, however, purport to require that such an affidavit come only from a person in the next class of distributees *after* the class of persons (the non-marital children in our case) who would take the estate of the *Decedent*. In our case, the possible affiants would be parents of the Decedent or if not found, siblings of the Decedent and so on down the line of the family of the Decedent per EPTL §4-1.1. It also may be demanded by the clerks that the affiant in the next class state that he or she is disclaiming any interest in the estate and that the affiant knows that the effect of the affidavit may decrease his or her distributive share since the affidavit is being used to establish the kinship of distributees (the minor children) who would have a prior right to the estate recovery. So, this means that the sister of the mother who visited the children and family regularly and who has no financial interest whatsoever in the matter could not satisfy the requirement because she is not related by blood to the Decedent, even though nothing exists to doubt her testimony. Even if PI Lawyer somehow managed to find the distributee of the Decedent, imagine the response when he or she calls the relative of Decedent and essentially says, "Hey will you sign a document before a notary public (and if a foreign country—make a trip to the nearest U.S. Embassy) saying you get nothing from the estate of your long lost relative?

We wish to point out that no such requirement as to the source of the proof can be found in EPTL §4-1.2 nor in local court rule 22 NYCRR 207.16. Should the proof from a non-family member of Decedent be rejected if such person has no financial interest in the estate and bases his or her knowledge on solid personal experience and observation? The Uniform Court Rule cited above even states that the due diligence requirement is *not intended* to burden the estate with costly or overly time-consuming searches. Should the size of the estate become relevant in making this determination? Does this seem to indicate that common sense requirements should be applied in establishing kinship of *paternal* non-marital children? Many would argue in the affirmative (and perhaps successfully if resort is made directly to the Surrogate and/or his or her law department) on the basis that the requirement of acceptable proof of kinship being limited to persons from only the *paternal* family of Decedent, is not stated in the governing statute or the court's own rules. Should not an affidavit from any disinterested person having knowledge be sufficient, particularly in relatively small estates where fathers have been listed on birth certificates? The situation described may also call for a revision to Form LDSS-5171 to simply add a notary certificate!