New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 263—NO. 40
MONDAY, MARCH 2, 2020

TRUSTS AND ESTATES LAW

Expert Analysis

Implications of DNA Registries For Trust and Estate Practitioners

By **Raymond Radigan**

And **Jennifer F. Hillman**

Chances are you or a family member has undergone a genetic data analysis through one of the many DNA analysis services. Reports estimate that more than 26 million people have shared their DNA with one of the four leading ancestry and health databases. The results can be interesting and informative, but there are some far-reaching implications.

Perhaps you have heard the stories—or know someone personally—who found an unknown sibling or learned their parents are not their biological parents. DNA analysis services have been used to assist law enforcement with criminal cases. There is also the issue of what happens to that genetic material after you die.

This article focuses on issues that trust and estate attorneys may encounter in their practices.

Is That My Sibling?

When filing probate or administration proceedings, petitioners are required to list the persons interested in a proceeding. Even when a will disposes of estate assets to specific individuals, a decedent's distributees—individuals who would take under intestacy pursuant to EPTL 4-1.1—must be cited in the probate proceeding. If there is a dispute over someone's status, that person must still be cited as an alleged distributee.

New technology and the availability of DNA analysis services has created new wrinkles in this area. Individuals may learn of siblings or half-siblings that were previously unknown.

For example, if X claims they are a child of the decedent (even if the family disputes that claim) an estate attorney should include X as an "alleged child" on the probate petition. The individual claiming status has the burden of proof which may be litigated in a separate status or kinship hearing.

If X is not included in the probate petition and they are not cited, the court never obtained jurisdiction over X. The eventual probate decree is open to challenge and could be vacated for this reason. See, e.g., *In re Gentile*, 2002 N.Y. Slip Op. 40026(U) (Nassau Co. Surr. Ct.) (non-marital child sought to vacate a probate decree because he had not been cited in the probate proceeding as a distributee-child of the decedent).

New technology and the availability of DNA analysis services has created new wrinkles in this area. Individuals may learn of siblings or half-siblings that were previously unknown. However, on a foundational level these issues are no different than those previously encountered when an individual claimed they were a distributee or a non-marital children of a decedent.

C. RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the advisory committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.* JENNIFER F. HILLMAN *is a partner at the firm, where her practice focuses on trust and estate litigation.*

Focusing specifically on non-marital children, Domestic Relations Law §24 states that a child born to a married couple is presumed to be a child of the couple. For individuals who died after 2010, the current version of EPTL 4-1.2(a)(2)(C) states that a non-marital child is the legitimate child of their father so that they can inherit from the father (and thus is a distributee) if paternity has been established by clear and convincing evidence. This may include, but is not limited to: (1) evidence derived from a genetic marker test, or (2) evidence that the father openly and notoriously acknowledged the child as his own.

Pursuant to Family Court Act §418(a) and CPLR §4518(d), if a genetic marker or DNA test indicates at least a 95 percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and, if unrebutted, shall establish the paternity of and liability for the support of a child pursuant to the Family Court Act.

Importantly, there is no time limitation for the establishment of paternity. If a non-marital child discovers belatedly that their father has died, they can seek an accounting of the estate if the statute of limitations has not run—and the statute of limitations only starts to run when the fiduciary openly repudiates his or her fiduciary obligations. For example, in *Matter of Barabash*, 31 N.Y.2d 76 (1972), *the* decedent's children (who were in the Soviet Union, did not know of their father's death, and were not cited in the administration proceeding) were entitled to an estate accounting 20 years after their father's death because the administrator had not repudiated his fiduciary duties.

Of course, the probability of paternity or other familial relationship through these registries may not meet the 95 percent requirement. However, if an individual is aware of a potential non-marital child through DNA analysis, they should disclose that individual as an alleged distributee, unless they are aware that the individual was adopted. (Adopted individuals are not distributees of their adopted out families.)

I'm a Long-Lost Relative, Can I Inherit?

Every day there are individuals who pass away with no known distributees and no will. In these cases, the Public Administrator of the county where the decedent resided may be appointed administrator of the estate. The Public Administrator is tasked with administering the estate, paying bills and taxes, and attempting to locate individuals who may be entitled to inherit from the estate. If the distributees cannot be located, the estate assets are deposited with the New York State Comptroller or the Commissioner of Finance of the city of New York.

Individuals who assert that they are relatives (or perhaps learn they may be relatives) can petition to withdraw the funds by proving their status. See Surrogate's Court Procedure Act §2222. The claimants have the burden of proving kinship and must establish that they are the decedent's closest blood relatives as defined in EPTL 4-1.1 by making an evidentiary showing (1) how they are related to the decedent, and (2) that no other persons of the same or a nearer degree of relationship survived the decedent. Other proof requirements exist in the Uniform Rules for Surrogate's Court at 22 NYCRR §207.16.

Was I Adopted?

An individual may also learn through a DNA registry that their parents are not their biological parents. If they were adopted, a newly enacted New York State law may assist them in learning the identity of their biological parents.

Enacted on Jan. 15, 2020, Public Health Law §4138-e establishes the right of adoptees to receive a certified copy of their birth certificate upon reaching the age of 18 by applying to their local or state health department. This is a significant change from the longstanding public policy of New York State to seal adoption records and only grant access to original birth certificates of adopted children in rare instances.

With the increasing popularity of DNA registry services, trust and estate practitioners should be aware of the potential implications and be guided accordingly.