Kinship Proceedings

Proving the Family Tree

By David N. Adler

Kinship remains a subject of keen interest to our society. A recent bestseller, *In Praise of Nepotism*,[1] analyzes the historical, sociological and political aspects of kinship networks. Thousands of families have traced their genealogical roots to locate family origins. State-of-the-art medical technology and genetic engineering may be on the verge of altering our traditional understanding of next of kin. When legal issues arise, kinship proceedings provide the formal mechanism to determine blood relatives and establish proof of heirship.

In cases that require intestate administration, the accounting proceeding is the stage at which all activities and issues must be finally resolved. As part of the accounting, the fiduciary must make a final determination of whom the decedent's heirs are so that assets can be distributed and the fiduciary can be discharged.[2]

In many estates, the heirs have either been known to the fiduciary or have been established through affidavits at early stages of the administration. When some questions of lineage do remain, the fiduciary has usually done preliminary research and made reference to "alleged heirs" or to heirs who may exist but are "unknown."

Typically, "alleged heirs" often consist of cousins who have come forward with a claim, but the validity of their status is not clear and questions remain about whether there may be other heirs with equal or superior claims. (See sidebar on page 44 for a description of the statutory standards.) The relative remoteness of their lineage, coupled with their potential right to inherit, requires a formal kinship proceeding to confirm their status.

At this point, counsel representing "alleged heirs" objects to the fiduciary's proposed accounting, asserting that the "alleged heirs" are, in fact, the heirs and are entitled to inherit their appropriate percentages of the estate.[3] The interested parties are any alleged claimants (heirs), other claimants, the fiduciary, and the attorney general of New York State because the state maintains an interest in the outcome of this proceeding.[4] If heirship is ultimately unproved or partially proved, a certain fraction of the estate may pass to New York State.[5]

As a matter of course, the court appoints a guardian *ad litem* to represent the interests of any potential unknown heirs.[6] In many kinship matters, the fiduciary is often the counsel to the public administrator, either because no one else has taken the initiative to resolve the estate, or the heirs involved are sufficiently distant.[7] As part of his or her relief, the claimant requests a kinship hearing to determine the identity of the distributees.

The burden of proof is at all times on the claimant, or alleged heir. The standard of proof is a preponderance of the evidence. This standard is based upon a degree of probability and has been defined as "persuading the triers of fact that the existence of the fact is more probable than its non existence."[8] Ultimately, a claimant must demonstrate that he or she was either the closest blood relative to the decedent, or among a class of equally close blood relatives as defined in the parameters of Estate, Powrers and Trusts Law 4-1.1 (EPTL).[9]

Discovery

Once issue has been joined, the matter is traditionally referred to a referee who conducts a hearing and reports to the surrogate's court.[10] The referee is normally a member of the Law Department, and is required to conduct the proceeding in the same manner as a court trying an issue

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without a jury.[11] Initially, the referee may set up a pretrial conference, grant time for discovery, if necessary, and set a date for a hearing.[12] The date set for a hearing is crucial, because all proof must be completed by the claimant within one year of that date, or objections will be dismissed.[13] Often, kinship proceedings take more than one day and may run over many months. Still, that hearing date starts the running of the one-year statute of limitations.

The Civil Practice Law and Rules apply as they would in any civil trial.[14] The discovery devices are also fully available, yet, practically speaking, are extremely limited. This is not a traditional hearing or trial. Often, all other interested parties have absolutely no knowledge regarding any aspects of a claimant's lineage. Thus, discovery here is often not focused on the adversary but consists of a thorough investigation of family information and relationships from a variety of sources. The admissibility of this evidence is discussed below, but the key element is that the focus should be on searching both for individuals who know the claimant's family history, and for various documents reflecting that history.

Where to Look

The personal effects of the decedent are usually an excellent starting point. Normally, these are in the possession of the fiduciary, often the public administrator. Once the authority of counsel to represent a claimant is established, these effects must be made available for review. They may consist of letters, photographs, address books, personal notes, vital statistics records, or other important memoranda. Counsel's own investigation is often more effective. The search for those with knowledge of the family may include relatives, neighbors, clergy, business associates, friends, or employees. Not every individual is expected to have a full and thorough knowledge of the entire family, maternal and paternal sides. Yet, to the extent that isolated areas of knowledge can be acquired from sufficient people, an entire family portrait may be pieced together.

The search for documentary evidence is equally important. Documents can establish tangible proof of the existence and identification of decedent's blood relatives, thereby providing the necessary link in the genealogical chain to the claimant. This evidence includes vital statistics records (birth, death, and marriage), census records, cemetery (burial) records, naturalization and immigration records, court records (surrogate, matrimonial, adoption), church records, Holocaust records, and military records. The nature of records essential to an individual case varies, but it is only limited by one's imagination.

Many records can be obtained by a letter that requests such records, describes the reasons for the request, accompanied by payment of the appropriate fee. If records are not forthcoming or sealed, a court order may be issued and will often produce the records. It may be advisable to retain a certified genealogist to assist counsel in the search. A genealogist is acutely aware of the necessary steps in establishing heirship, may have more ready access to sources of information that are difficult to reach, and can ordinarily complete a search within a set time frame. Upon all evidence, both oral and documentary, constituting proof of kinship being marshaled, the hearing can proceed.

Manner of Proof – Testimonial Evidence

The admissibility of oral testimony offered as proof of any aspect of family relationship is subject to two severe limitations. The first, generally referred to as the Dead Man's Statute, is codified at CPLR 4519. It provides that a party or person interested in an event is incompetent to testify concerning any personal transaction or communication with the decedent.[15] A kinship hearing is clearly within the parameter of events covered by the statute;[16] the claimants or individuals seeking to inherit are clearly interested in the event because they stand to gain or lose by operation of the judgment.[17]

Unfortunately for the claimant, the concept of transaction or communication is broadly defined. It applies to a wide range of behavior involving the claimant and the decedent, including all forms of conduct and language. It embraces every "variety of affairs which can form the subject of negotiations, interviews, or actions between two persons."[18] Thus, the claimant cannot testify to *any* conversation or correspondence between the decedent and himself.

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Individuals not interested in the event (those who do not stand to inherit) are not barred from testifying. For example, a claimant's spouse or friends, if present at a certain conversation between the claimant and the decedent, can provide admissible testimony about their personal knowledge of an event. If the decedent constantly referred to the claimant as his or her "favorite cousin" or "sole surviving cousin," the claimant cannot testify but friends or a spouse would be able to substantiate that statement.

Exception to Hearsay Rule

The second limitation concerns the concept of hearsay. Hearsay consists generally of statements made out of court that are offered for the truth of their contents.[19] Much information pertaining to one's family history may

be received this way as a function of word of mouth. Hearsay evidence is traditionally excluded unless the particular hearsay falls within one of the exceptions to the general rule of exclusion. Fortunately, one exception to the hearsay rule concerns declarations of pedigree or family descent.[20]

The conditions of admission for pedigree declarations consist in the fact that the original declarant is dead, was related by blood or marriage to the family of whom he or she spoke, and made these pedigree declarations before this kinship proceeding arose.[21] These declarations may be written as well as oral. A proper foundation must be laid to incorporate all of these criteria before testimony is received.[22] In the simple case, the submission of a death certificate, birth certificate or marriage certificate should suffice. Here, a witness could testify about family infor-

Statutory Foundation for Kinship Proceedings

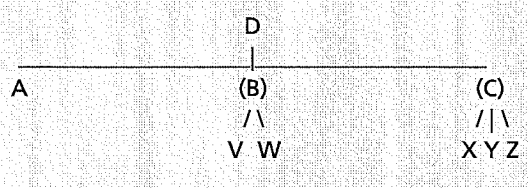
The framework for analyzing kinship issues is provided by the Estates, Powers and Trusts Law, specifically EPTL 4-1.1, which identifies the priorities among claimants who seek to inherit from an estate and specifies formal rules for the inheritance process.

The statute effectively describes how to build a "family tree," providing schemata for the proximity of family ties and identifying the "distributees" who qualify as heirs of the decedent.[1]

Spouses and children have the highest priority. The spouse receives the first $50,000 and half the balance of the net estate after deducting traditional debts, taxes and expenses.[2] Issue of the decedent receive the other half. "Issue," by definition, are descendants from a common ancestor.[3] They are often the decedent's children. If there are no issue, the spouse receives everything. If there is no spouse, the issue inherit everything.[4]

If no spouse and no issue survive, the priority for inheritance consists of, in descending order, parents, siblings/nieces/nephews, grandparents, uncles/aunts/first cousins, and first cousins once-removed.[5]

If issue inherit, they generally take "by representation," which essentially means an equal distribution at each generational level.[6] Suppose that the decedent, D, is survived by one child A; V and W, who are children of predeceased child B; and X, Y, and Z who are children of predeceased child C. A chart for this scenario would look like this:



There are three lines of inheritance. If all children (A, B, C) survive the testator, each is entitled to one-third of the net estate. At A's generational level, only A survives, so A takes his one-third share. The next complete surviving generational level is that of the testator's grandchildren, V, W, X, Y, and Z. The remaining two-thirds is divided equally among each member of that level, so that V, W, X, Y and Z each take two-thirds divided by five units or two-fifteenths of the net estate each.

A decedent's relatives of the half blood are treated as if they were relatives of the whole blood.[7] Thus, siblings who share just one parent may inherit as if they were full siblings.

If grandparents or their issue (uncles/aunts of the decedent) are the only survivors, the maternal and paternal sides are divided in half with respective issue sharing only their respective half. In the absence of issue on one side, the other side's issue could share in the whole. These rules of intestate succession provide the numerical guidelines for distribution of the decedent's property, and they further place a legislative imprimatur on the priority of the familial relationships.

1. EPTL 1-2.5, 2-1.1.
2. EPTL 4-1.1(a)(1).
3. EPTL 1-2.10.
4. EPTL 4-1.1(a)(2), (3).
5. EPTL 4-1.1(a)(4), (5), (6), (7).
6. EPTL 1-2.16.
7. EPTL 4-1.1(b).

mation that he or she received from a predeceased relative of the family.

Finally, any individuals, interested or not, may testify regarding their own heirship status.[23] For example, if asked to identify one's parents, siblings, grandparents, uncles, aunts, etc., one may testify as to their *own* personal knowledge of family relationships. Yet, for the claimant, such testimony stops at identifying any relationship with the decedent. Any third party not interested in the event has extremely wide latitude with respect to testimony, including transactions or communications with the decedent, or declarations of pedigree overheard from predeceased individuals. This underscores the importance of an investigation to locate a variety of disinterested individuals who can freely and openly provide links in the family chain.

Manner of Proof – Documentary Evidence

The admissibility of documentary evidence offered to establish any facet of heirship is geared to its authenticity. There is a preference for original documents. The Best Evidence Rule is reflective of historical case law that whenever parties seek to prove the contents of a writing, they must produce the original or satisfactorily account for its absence.[24] In the absence of original documents, the problem of reliability becomes an issue.

Public documents may be received into evidence if they are properly authenticated.[25] It is acknowledged that originals of public documents are extremely impractical to procure and that copies validated by the appropriate custodian or authorized agent are the equivalent of the originals. CPLR 4540 sets out the applicable methods of authentication of copies, certified, exemplified and sworn.[26] Birth, death, marriage, court, voter registration, naturalization and military records are of this type.

A range of documents may be best described as semi-public. They are not official public documents but are issued by institutions and have a mechanism by which an authorized agent can certify them. These include church, cemetery and baptismal records. Census records may be admitted on judicial notice.

Private documents contain a greater possibility of inaccuracy because there is no formal mechanism for authentication in place.[27] These documents often consist of material found among the decedent's personal effects such as letters, telephone books, holiday cards, and personal notes. These documents may be admitted into evidence in the following ways: the means of authenticating private documents consist of the testimony of a witness who saw that person write or sign the document; as an admission made by an adversary; by circumstantial evidence; or by proof of handwriting.[28] For handwriting proof, a lay witness may be used.[29] Photographs may also be authenticated by the testimony of a witness familiar with the subject portrayed.[30]

Finally, the ancient document rule operates as a presumption of authenticity and greatly aids in the admission of older documents in kinship proceedings.[31] The rule states that when the writing is 30 or more years old, is in the possession of the natural custodian, and is free from indications of fraud or invalidity, it proves itself.[32] Essentially, the document is self-authenticating. A natural custodian in this type of proceeding could be any range of institutions or agencies, including the decedent, if documents of this type were found among the personal effects in the decedent's household. Physical review of the document for tampering or damage is a condition precedent to its admission.

Foreign documents also require authentication in accordance with CPLR 4542. One primary feature of this statute consists in the affixation of an "apostille," which is a certification of validity practiced in a variety of European countries and approved in U.S. courts.[33]

Closing the Class

Despite extensive discovery and marshaling of evidence, certain aspects of the family tree may remain open. An alleged distributee may be missing (whereabouts unknown) or it may not be sufficiently proved that the heirs before the court are in fact the *only* heirs. This situation occurs commonly in dealing with Holocaust survivors or severely fragmented families. Years ago, this often created an insurmountable problem to establishing the right to inherit the entire estate: a fraction of said estate pertaining to the "open," not sufficiently proven, side of the family might have been payable to New York State under the theory of escheat.

Fortunately, the legislature chose to rectify this situation in SCPA 2225. This section creates a presumption that "the distributees before the court are the only distributees" (the only ones entitled to inherit) if certain conditions are met.[34] The conditions are two-pronged and they specifically pertain to the time elapsing from the decedent's death, coupled with an appropriate search for existing heirs.

Part (a) of SCPA 2225, in dealing with a single alleged heir, requires that at least three years must elapse from the death of the decedent along with a diligent search having been conducted to discover the status of the missing heir.[35] If no evidence has been found, that individual may be presumed dead. Here, presumption of death is defined as one predeceasing the decedent without issue.[36]

Part (b) of SCPA 2225 pertains to a determination that no other distributees, other than those already before the court, exist. This also involves the three-year time period elapsing from the date of death of the decedent, but requires a more exhaustive diligent search, using all available sources.[37] Because this section provides a broader-based exclusion of any and all heirs not before the court, it requires a higher degree of proof.

The sources composing the diligent search consist of all aspects of attempts to locate, including the discovery devices referred to above. An abbreviated definition of due diligence is contained in the Uniform Rules.[38] Although specifically applicable to probate in that context, it encompasses the most basic elements of a diligent search including interviewing friends, relatives and neighbors, inspecting personal effects, and reviewing motor vehicle, post office and voter registration records. The use of the Internet as an inventory of last names and addresses is also noted and continues to expand as a research option. The degree of diligence required is often analyzed in relation to the size of the estate.[39] Generally, the greater the value of the estate, the more comprehensive the diligence required by the court in efforts to locate the missing or alleged heirs and satisfy the statutes. Finally, the use of a genealogist as an expert in matters of kinship is often indispensable to completing a truly diligent search. The genealogist may marshal all forms of evidence and provide opinion testimony regarding heirship status.[40]

The preparation of a detailed family tree is essential to success in the world of kinship.

In conjunction with SCPA 2225, EPTL 2-1.7 also creates a presumption of death if after three years of continuous *unexplained* absence, a diligent search fails to locate a particular individual. The individual is presumed to have died three years after the unexplained absence, or less than three years if it can be established that the individual was exposed to a specific peril.[41] Other presumptions may also aid in the proof of aspects of family status: every person is presumed legitimate or born in wedlock;[42] a marriage ceremony is presumed to have been legally performed;[43] a male under the age of 14 and a female under the age of 12 are presumed not capable of having children;[44] a person who would have been more than 100 years old at the time of the decedent's death is presumed to have predeceased the decedent.[45]

These statutes provide a means to prove a negative – the non-existence of other distributees. They are useful tools for reaching a final resolution and determination of heirs. The three-year statutory period from death should always be kept in mind before initiating proceedings so that its application is not limited. Upon proof that no heirs exist other than those before the court and in the record, the class of heirs may be closed.

The Proceeding

The kinship proceeding itself is generally referred to as a hearing, although it contains elements of a trial. It functions as an end in itself, retains the full force of judicial sanction, and may be set up by filing a Note of Issue and Certificate of Readiness in certain counties.

The venue for such a proceeding is normally the surrogate's court in the county of the decedent's domicile.[46] Occasionally, the hearing or any part of it may be conducted outside this venue upon application to the court. The grounds for this removal, referred to as a commission, are covered by CPLR 3108 and are geared to the unavailability of witnesses within New York State. Here, the court travels to the witness if the witness cannot travel to the court. Common reasons justifying unavailability consist of age, infirmity, and political barriers.[47] The coordination and production of witnesses who are often from different parts of the country or the globe should be confirmed as early as possible. Travel factors and living accommodations pending the duration of the hearing should be anticipated before scheduling.

Family Tree

The preparation of a detailed family tree is essential to success in the world of kinship. The family tree consists of an outline from a chronological perspective of all family relationships.[48] It should contain names, name changes, dates of birth, death, marriage, and issue produced per person. The tree proceeds both downward from the oldest common ancestor, laterally incorporating those with equal degrees of lineage. It should provide a clear, unbroken connection from one generation to another and among members of the same generation. It is traditionally offered into evidence at the beginning of the hearing, not for the truth of its contents which remain to be proven, but for identification purposes. It is an invaluable tool in consolidating the objects of a claimant's proof, and thus it should accurately reflect the testimonial and documentary evidence. As a practical matter, all interested parties at the hearing rely on the family tree as a physical guideline to the claims.

The order of testimony may provide distinct advantages in attempting to prove elements of the family tree. The burden of going forward is always on the claimant. Disinterested witnesses are often viewed as possessing the highest degree of credibility, particularly those not married to, or children of, the claimant. Yet, disinterested witnesses may only be able to provide testimony concerning limited aspects of the family. This, when coupled with other factors, can be sufficient and highly influential.

Many practitioners believe it is most beneficial to open with strong disinterested witnesses to confirm various aspects of the family tree. It is always advisable to have the claimant appear and testify. If multiple claimants exist, and are all part of the same nuclear family or on the

same generational level and possess the same knowledge, it may only be necessary to produce one claimant. Although claimants are limited in testifying about their relationship to the decedent, they may testify about their own pedigrees. The genealogist is often used as a clean-up hitter to fill in any holes in the family framework, close the class, if required, and possibly provide a summary and confirmation of prior testimony. The above is merely suggestive; any order that counsel deems most appropriate for proving the case at hand may be used.

As with any hearing or trial, the depth and certainty of knowledge and its lucid presentation are most effective as an offer of proof. In kinship, precise testimony is particularly crucial because the nature of the proceeding incorporates specificity of names and dates, not merely general descriptions.

Documentary evidence may be submitted and offered for proof at various phases of the proceeding, but it is often most advisable to submit all documents at the end of testimony, as exhibits. It is prudent to have all documents numbered and have numbered copies, in addition to a copy of the family tree, distributed to all interested parties at the outset. The court normally requests copies of all documents approximately one to two weeks before the hearing. Only originals or copies with the appropriate authentication will be accepted into evidence after all interested parties have reviewed them and declined to object.

Conclusion

At the completion of all testimony and offers of proof, all parties rest and the referee typically reserves decision. Within 30 days of the hearing, the referee is required to issue a report indicating the findings of fact and conclusions of law.[49] The report specifies the identity and relationship of the decedent's heirs based upon the evidence submitted. Any interested party may then make a motion either confirming or denying, in whole or in part, the findings of the referee. If no motion or objection is made, the report is deemed confirmed. At this point the surrogate reviews the report, and if it is found legally sufficient, the surrogate issues a decree reflecting the report's findings and conclusions.[50]

Finally, funds are distributed to the appropriate individuals in the amounts or percentages dictated in the decree, and in accordance with the rules for intestate succession. The legal determination of the heirs at law of a particular decedent has thus been established and the question of who maintains the right to inherit has been answered. ■

1. Adam Bellow, In Praise of Nepotism (2003).
2. Surrogate's Court Procedure Act 2215(1) (SCPA).
3. Uniform Rules for Surrogate's Court § 207.41.
4. SCPA 316.
5. SCPA 2222(1), (2), (3). In the event that property has already passed to New York State, and heirs are subsequently located, a kinship hearing may be initiated by a petition for withdrawal of funds from the State Comptroller.
6. SCPA 315(2)(a)(iii).
7. SCPA 1001, 1112.
8. *See* Richardson on Evidence § 3-206 (11th ed.); *see also* Uniform Commercial Code § 1-201(8) (UCC).
9. *See* Turano, McKinney's Practice Commentary, EPTL 4-1.1 (2003).
10. SCPA 506(1).
11. SCPA 506(3), (6)(a).
12. SCPA 510.
13. Uniform Rules for Surrogate's Court § 207.25(a).
14. SCPA 506(3).
15. CPLR 4519. For an in-depth analysis, see Professor Radigan, *New Rules on Surrogate's Court Assignments Prompt Review of Issues in Dead Man's Statute*, N.Y. St. B.J. (June 2003).
16. *In re Christie's Estate*, 167 Misc. 484, 4 N.Y.S.2d 484 (1938).
17. *Hobart v. Hobart*, 62 N.Y. 80, 81, 83 (1875).
18. *Holcomb v. Holcomb*, 95 N.Y. 316, 325 (1884).
19. *See* Richardson on Evidence § 8-101 (11th ed.) (hereinafter "Richardson").
20. *See* Richardson § 8-901.
21. *See* Richardson § 8-903; *see also Aalholm v. People*, 211 N.Y. 406, 412, 105 N.E. 647 (1914).
22. *See* Richardson § 8-904; *see also Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901).
23. *See* Richardson § 8-911.
24. *See* Richardson § 10-101; *see also Schozer v. William Penn Life Ins.*, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994).
25. *See* Richardson § 10-108.
26. CPLR 4540; *see* Richardson § 9-202.
27. *See* Richardson § 9-101.
28. *See* Richardson § 9-103.
29. *See* Richardson § 7-318(a)(i), (ii).
30. *See* Richardson § 4-212; *see also Moore v. Leaseway Transp. Co.*, 49 N.Y.2d 720, 426 N.Y.S.2d 259 (1980).
31. *See* Richardson § 3-124; *see also Fairchild v. Union Ferry Co.*, 121 Misc. 513, 518, 201 N.Y.S. 295 (1923) *aff'd*, 212 A.D. 823, 207 N.Y.S. 835, *aff'd*, 240 N.Y. 666, 148 N.E. 750 (1925).
32. *In re Brittain*, 54 Misc. 2d 965, 283 N.Y.S.2d 668 (1967).
33. Weinschenk, *An Update on Kinship Proof in Surrogate's Court*, N.Y.L.J., Oct. 9, 1992, p. 1.
34. *See* Turano, McKinney's Practice Commentary, SCPA 2225 (2002).
35. SCPA 2225(a).
36. *Id.*
37. SCPA 2225(b).
38. Uniform Rules for Surrogate's Court § 207.16(d).
39. *In re Whelan*, 93 A.D.2d 891, 461 N.Y.S.2d 398 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 657, 476 N.Y.S.2d 290 (1984).
40. *See* Richardson § 7-301.
41. EPTL 2-1.7(b).
42. *See* Richardson § 60; *see also In re Matthews' Estate*, 153 N.Y. 443, 47 N.E. 901 (1897).
43. *See* Richardson § 65; *see also Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929).
44. EPTL 9-1.3(e)(1), (2).
45. *Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901).
46. SCPA 205(1).
47. CPLR 3108; *Kelleher v. Mazzaro*, 175 A.D.2d 352, 572 N.Y.S.2d 429 (3d Dep't 1991).
48. Uniform Rules for Surrogate's Court § 207.16(c).
49. SCPA 506(3).
50. SCPA 506(4), (6)(a), 2215(1).