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HEADLINE: Excluded heirs in the spotlight

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BODY:

What do Anna Nicole Smith and the Jell-O fortune have in common? An unusual legal entity: excluded heirs.

In her most recent will, Anna Nicole Smith left her estate - including the continuing rights to a legal battle over hundreds of millions of dollars in her late husband's estate - to her only son, specifically excluding any future children. But there's one problem: Smith gave birth to a baby girl, Dannielynn, just months before she and the son who was to inherit it all both died.

And in New York, a woman born out of wedlock and adopted in the 1950s found her birth mother as well as an inheritance when she learned her biological family were heirs to the Jell-O fortune.

What these recent stories demonstrate, said Terry L. Turnipseed, a professor of trusts and estates at Syracuse University, is the importance of reminding clients to update their wills and trust documents.

In the Anna Nicole Smith situation, "she experienced two life-altering events that necessitated a change in her will: her son, her sole heir, died, and she had another daughter," noted Turnipseed. "Either one of those alone required changes in her will. "

A Jell-O fortune

Elizabeth McNabb was born in 1955 and adopted soon after her birth. In the 1980s, she gained access to her original birth certificate, which revealed her mother's name. McNabb contacted her mother, New York resident Barbara Woodward, and began a relationship that lasted until Woodward's death in 2003.

But the legal story had only just begun.

When she found her birth mother, McNabb also discovered that she was related to early investors in Jell-O, the profits of which were placed in two multimillion dollar trusts by her grandmother, Florence S. Woodward.

The first trust, established in 1926, provided Barbara with income during her lifetime and distribution of the principal in equal shares to her "descendants" after her death, explained McNabb's attorney, Paul S. Boylan, a partner at Boylan, Morton & Whiting in Le Roy, N.Y.

In 1963, a second trust was established that gave income to Barbara during her life and was to be split into equal trusts "for each then living child of hers" upon her death, with the principal delivered to their issue upon their deaths.

McNabb sought an equal portion of the trusts as a descendant and living heir upon Barbara's death, but the trustees objected.

They argued that because McNabb was adopted out of the family, she was no longer a "child" or Barbara's "descendant" under New York state law. A surrogate court agreed, denying McNabb's claim.

But a New York appellate court recently disagreed, awarding McNabb a one-third share (she has two half-sisters) of the trusts. (Matter of the Accounting by Fleet Bank, 831 N.Y.S.3d 609 (2007)).

The court looked at the law in effect at the time the trusts were established, which included nonmarital children in the potential class of heirs. (Although at the time, Boylan explained, New York allowed nonmarital children to actually inherit only when the deceased didn't have recognized heirs.)

"[B]ecause the laws of devise and distribution in effect when the trusts herein were executed recognized that nonmarital children were included, at least to some extent, in the class of descendants or children of their parents, [McNabb] is not excluded from the class of Barbara's descendants and children," the court said.

McNabb could inherit despite the presence of recognized heirs (her two half-sisters), Boylan explained, because treating illegitimate children differently than marital children violates the 14th Amendment, since birth status is an immutable characteristic like race or gender. So while the court looked to the law in place at the time to include McNabb as a potential taker, it refused to enforce the letter of the law, which would have violated her constitutional rights, he said.

Further, when the trusts were created, New York law allowed adopted-out children to inherit from both their adoptive and biological families - meaning McNabb was still considered a "descendant. "

The law changed in 1964 - just months after the second trust was established - limiting adopted children to take only from their adoptive parents.

"Our argument was that the adoption statute must be strictly construed and that the court had no authority to retroactively abrogate the vested rights of people who were beneficiaries of trusts before the legislative change," Boylan said.

And the court agreed, noting that a "grantor is presumed to have known the law when she executed the trusts. "

Edward D. Bloom, a partner at Harris Beach in Pittsford, N.Y., who represented the trustees, did not respond to a request for comment.

Who excludes?

While issues surrounding excluded heirs don't arise every day, they aren't unheard of.

Trusts and estates attorney Steve Oshins, a partner at Oshins & Associates in Las Vegas, has encountered wealthy couples with children from former marriages who structure their trusts to exclude future children in order to ensure their older children will inherit.

And some wealthy men may specifically exclude future issue in order to protect their known heirs, Turnipseed said.

"It wouldn't be that uncommon, because a male might not know what children he has, or he might know and want to specifically exclude such children," he explained.

But intentional exclusions in a woman's will don't make sense, he said, "because women know exactly what children they had in a lifetime - there is no need for a statement specifically disinheriting future children. "

Oshins agreed.

The exclusion of future children in Anna Nicole Smith's will "is a drafting error on the part of her attorney," he opined.

He continued, "If a client told me he or she didn't want any future heirs to inherit, I would really fight it. If he absolutely insisted, I would have him sign a separate document to show that I tried to talk him out of it and didn't approve," because the existence of such a clause invites a legal challenge.

Smith's daughter Dannielynn could make a claim that her exclusion was a drafting error, Oshins said, especially if she can establish that her mother would never have intentionally excluded her.

But Dannielynn will inherit one way or another, Turnipseed predicted.

Under the circumstances, most courts would step in and rely upon the "omitted child" doctrine to transfer the estate to Dannielynn, he explained.

When a parent has a will and then has children after the fact, the majority of courts treat the child as if he or she had been born prior to the will and include the child in any estate plans with his or her siblings, Turnipseed said.

Under the terms of Smith's will - which hasn't been filed for probate yet - the entire estate is left in trust to her son Daniel, with lawyer and boyfriend Howard K. Stern as the trustee. If Dannielynn takes as an "omitted child," then she would step into Daniel's shoes and receive the estate in trust, with Stern remaining as trustee, Turnipseed explained.

Alternatively, Turnipseed said the will might not be filed, or might be deemed not to govern the disposition of Smith's estate (because by its very terms it cannot be fulfilled and is subject to challenge by Dannielynn) and then Dannielynn would take outside of the trust.

"[She'll] get the money, but it's a question of whether it will be in trust or just a straight inheritance," he predicted.
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