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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.

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 multi-million 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 LeRoy, 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.

In a 2005 decision, Monroe County Surrogate's Court Judge Edmund A. Calvaruso agreed, denying McNabb's claim.

But the Appellate Division, Fourth Department recently disagreed, awarding McNabb a one-third share (she has two half-sisters) of the trusts, Matter of the Accounting by Fleet Bank, 831 NYS3d 609 (2007).

The court looked at the law in effect at the time the trusts were established, which included non-marital children in the potential class of heirs. (Although at the time, Boylan explained, New York allowed non-marital 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 non-marital 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 Fourteenth 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 PLLC, who represented the trustees, did not respond to a request for comment.