

Proving the Family Tree: Navigating A Kinship Proceeding in Surrogate's Court

When a decedent dies without a will and leaves only remote heirs behind, a kinship proceeding is born. The client, as a prospective heir, is now tasked with proving the family tree before estate assets can be distributed. As the practitioner, the goal is to establish that the client is entitled to inherit and eliminate the possibility that any unknown heirs exist. Depending on the size and scope of the family tree, this may be a daunting task. However, a kinship proceeding provides a unique opportunity for the attorney to assume the role of detective, genealogist, and litigator.

In many cases, the surviving relative does not learn about the decedent's death until contacted by a third party, such as an heir search company or the public administrator. The client now looks to the practitioner to help navigate a kinship proceeding. The client may feel frustrated with the task of proving kinship, especially when the surviving members of the family are in agreement about who should inherit. However, the steps required to prepare for a successful kinship hearing should not be taken lightly, even if there is no dispute among the surviving heirs. The practitioner should manage the client's expectations while explaining the items needed to adequately prepare for a kinship hearing.

The Commencement of a Kinship Proceeding

Unlike a probate proceeding, which is typically commenced by a nominated executor, kinship proceedings often manifest when the public administrator is appointed to act as the fiduciary due to an absence of family members with standing to administer the estate. For instance, under New York law, when the sole living relative of the decedent is a first cousin, he does not have standing to become a fiduciary. Instead, the public administrator will become the fiduciary.¹

While the public administrator is busy administering the estate, several months may pass before the administration is completed and the estate accounting is filed. The practitioner should use this precious time to gather as much information as possible to draft a complete family tree and gather supporting documentation.

The fiduciary's accounting, once filed, will demonstrate the assets collected and expenses paid. It will also list so-called "alleged heirs." They are "alleged" because kinship has not yet been proven. At this point, objections to the designation of the clients as "alleged heirs" must be made as well as a request to schedule the kinship hearing. The act of filing these objections commences the kinship matter. It signals to the fiduciary and the court that an alleged heir, sometimes called a claimant, intends to prove their relationship to the decedent.

Once objections are filed, the court sets a date for a preliminary conference to set dates for discovery to be exchanged and a date for the kinship hearing. The kinship hearing date is crucial because all proof must be submitted within one year of that date.² The time to complete proof is limited to prevent ongoing delay and to allow the fiduciary to settle the account and be discharged.³

The Kinship Hearing

The kinship hearing is a trial of the family tree where all parties will have the chance to question and probe the evidence presented. The practitioner representing the alleged heirs may need to contend with both the public administrator as well as a guardian ad litem representing unknown heirs, who will seek to probe or unravel the evidence

presented. As the fiduciary of the estate, the public administrator has an interest in having the court's determination of the true heirs and a full discharge on the approval of the accounting. Therefore, if documentary evidence is missing, the public administrator will object to any distribution subject to the submission of proper evidence.

In addition, a court always appoints a guardian ad litem in kinship proceedings on behalf of potential "unknown heirs." Her role is to perform due diligence and to review the evidence to determine whether any unknown heirs exist and are entitled to share in the inheritance. Lastly, the Attorney General is a statutory party and will have the opportunity to appear.⁴

The hearing is held in the Surrogate's Court of the decedent's domicile and before a court attorney referee.⁵ Kinship hearings are tried by the court only; juries are not available for this purpose.⁶ The court attorney referee is the finder of fact and may also ask pointed questions to the extent she believes that some fact or issue needs to be clarified for the record. The burden of proof for the claimant is the fair preponderance of the evidence.⁷

Thus, it is not enough to show that the client is related to the decedent, the practitioner must also prove that there is no one closer in lineage to the decedent that may cut off the client's right to the inheritance. In New York, the legal right to the assets of the estate is governed by § 4-1.1 of the Estates Powers and Trusts Law (EPTL). For example, if the claimant is a first cousin of the decedent, she must prove the entire family tree up to grandparents on both the maternal and paternal sides.⁸

The Investigation and Collection of Evidence

The investigation phase can unearth family information that may be helpful or, on occasion, harmful to the case. This makes for interesting investigative work. The best way to start the investigation is to conduct interviews with the client, friends, co-workers and neighbors of the decedent to develop a consistent and corroborated family tree. Since the family tree is at the heart of the evidence presented at the kinship hearing, the importance of developing it through exhaustive investigation and documentation cannot be stressed enough.

A thorough examination of the decedent's personal items may lead to helpful information, especially if the claimant has limited information regarding the family's genealogy. When the public administrator is the fiduciary, it will have accumulated a file of the decedent's personal documents, such as the decedent's certified documents, letters, photos, address book and cell phone. An appointment can be made to view and copy these items. Even though the originals must remain with the public administrator, they can be deemed to be part of the record at the hearing.

Once established, the family tree will act as a roadmap to determine what documents and testimony are necessary to prove the tree at the hearing. Documentary proof for each individual on the tree is required, which may include a birth certificate, baptism record, marriage record, death certificate, obituary,



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prayer cards, and census records. When a document is preserved by the State of New York, such as a certified copy of a birth, marriage or death certificate, it is considered self-authenticating under CPLR § 4540 and may be admitted into evidence as an exception to the hearsay rule.⁹ If there is sufficient documentary evidence to establish the birth, marriage and death of an individual on the tree, other extrinsic evidence such as holiday cards, photos, letters and even third party affidavits are superfluous. In this instance, throwing in the "kitchen sink" may raise hearsay objections at the kinship hearing.

Because the United States is a country of immigrants, in many cases, records will need to be retrieved from overseas. This may present unique challenges, depending on how accessible and well maintained the records are in the foreign country. The client may consider retaining a reputable genealogist to obtain hard-to-get documents the average layperson or attorney cannot procure. In New York, foreign documents will also require authentication pursuant to CPLR § 4542.

Other considerations include obtaining records for individuals who survived the decedent but died some time later, otherwise known as a post-deceased relative. Efforts to establish the fiduciary for the post-deceased relative's estate will become necessary to prove that branch of the family tree. Ideally, after all documentation is collected, the practitioner will create a binder that includes the final family tree and original certified documents for each member of the tree. This binder will be copied and circulated at the hearing with the intention of entering all of the documents into evidence.

In addition to the documentary evidence that has been prepared well in advance of the hearing, testimony is required. Ideally, only two witnesses should be prepared to testify. The first witness should be a person who has known the decedent but is *not* an interested party (that is, he does not benefit financially from the proceeding).

The disinterested witness's primary purpose is to testify regarding whether the decedent had a spouse or issue, and to connect the decedent to the larger family tree.¹⁰ In New York, an interested party cannot testify with respect to any transaction or communication with the decedent pursuant to the Dead Man's Statute,¹¹ and a kinship hearing is no exception. Therefore, the interested heirs are not allowed to testify about the decedent in any way. During the investigative stage, the practitioner should already be thinking about which non-interested family member can be selected to testify.

The second witness may be the claimant, who can testify to the remainder of the family tree and pedigree information already personally known to him about every individual in the family tree, other than the decedent. Statements of personal and family history fall under an exception to the hearsay rule in New York.¹²

Proving the Family Tree

The family tree chart is offered for identification purposes prior to the testimony of the witnesses. It acts as a guide and checklist to make certain that each individual on the family tree is accounted for through the witnesses' testimony. The court attorney referee may review each document, subject to an objection, and then admit it into evidence. The client may request to have the original binder of documents returned after the matter concludes.

To the extent there are open issues, such as an outstanding death certificate, the matter will remain open pending submission of all outstanding documents. Every effort should be made to obtain the missing documents as quickly as possible, given the one-year time limit for proving the family tree.¹³

Once all documents are submitted, the respective parties rest their cases and await the report and determination of the court attorney referee and report of the guardian ad litem. If the kinship hearing is successful, the Surrogate will issue a decision and order outlining the distribution to the client, as a lawful heir.

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1. SCPA § 1001(f)(ii).

2. 22 NYCRR § 207.25(a). If the kinship proceeding was brought in an administration proceeding, then proof must be completed in six months. See 22 NYCRR § 207.25(b).

3. *Ibid.*

4. SCPA § 316.

5. SCPA §§ 205(1) and 506.

6. SCPA § 502.

7. 2 Harris N.Y. Estates: Probate Admin. & Litigation § 27:3 (6th ed.) citing *Matter of Deluca* (Dec. 19, 2011) N.Y.L.J. Slip Op 52U (Sur. Ct. Nassau Co).

8. EPTL § 4-1.1(d)(4) and Fritz Weinschenk, "An Update on Kinship Proof in Surrogate's Court," NYLJ (Oct. 9, 1992), at 1 col. 1.

9. CPLR § 4540 and § 4521.

10. If the decedent did have a spouse or issue that divorced or predeceased, as the case may be, then that will need to be presented.

11. CPLR § 4519.

12. New York Code of Evidence, Rule 804(b).

13. If the open issues cannot be resolved in this timeframe, the funds will be deposited with the New York State Comptroller's office. In this case, review SCPA § 2225, which creates a presumption that the claimants are the only heirs if certain criteria are established.

13. *Cf. Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993) (holding that police officer's torturing a suspect to obtain a confession is within the scope of employment).

14. See Terese E. Ravenell & Armando Brigandi, "The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation," 62 Villanova L. Rev. 839, 872 (2017).

15. Beth Fertig & Jim O'Grady, "Twenty Years Later: The Police Assault on Abner Louima and What It Means," WNYC News (Aug. 9, 2017), available at <https://tinyurl.com/svkn2wm> (quoting former United States Attorney Zachary Carter).

16. *Id.*

Governmental Liability ...

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ing or recklessness on the part of the officer or employee" (emphasis added).

11. "The duty to defend shall not arise where the Corporation Counsel determines that the injury or damage complained of was the result of the *intentional wrongdoing or recklessness* of the officer or employee" (emphasis added).

12. 162 A.D.3d 1463 (2018).