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When There's **No Will**, There **Is** a **Way**

Intestacy laws direct the distribution of a decedent's assets.

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Many people go through life without giving much thought to the distribution of their personal property and assets upon their demise. They typically believe that if they do not have a Will, their property will automatically pass to those closest to them, whether it be a relative, best friend or lover.

Although sometimes this may be the case, especially for smaller Estates, the norm is quite the contrary. The bottom line is if you do not have a Will, the state will write one for you.

If one dies without a Will, it is called dying "intestate." We will now take you through a tour of intestacy law, including the potential issues that may arise, by following a decedent named Mr. Smith. Mr. Smith, a fictitious character, was an older gentleman who recently passed away. He left behind his second wife, Mrs. Smith, two children from his first marriage, a sister that practically raised him and an uncle who loaned him almost a million dollars to start his thriving photography business. Mr. Smith was also indiscreet and left behind Jane, his six-months-pregnant girlfriend, whom no one else knew about.

Mr. Smith was a very successful man. His photography business was worth several million dollars. He was the proud owner of a waterfront house in the Hamptons, a Maserati, antiques and paintings from all over the world, fine watches and jewelry, and hundreds of thousands of dollars in various bank accounts.

Unfortunately, Mr. Smith was always too busy to visit his attorneys to draft a Will. Almost a month after he passed away, his mistress Jane showed up to demand her child's share of Mr. Smith's Estate; his uncle wanted to get repaid on the verbal business loan; his sister felt entitled to something, and of course his two children felt like Mrs. Smith should receive nothing due to the short length of their marriage. Now, the salient questions are who gets what, and what is the correct legal procedure for distributing Mr. Smith's property.

Intestacy distribution is governed by the Estates Power and Trust Law (EPTL), as well as the New York State's Surrogate Court Procedure Act (SCPA). Someone with an interest in Mr. Smith's Estate must petition the court to become the Administrator/Administratrix of his Estate. That is a fiduciary appointed by the Surrogate's Court to stand in Mr. Smith's shoes to marshal his assets, pay the Estate's debts and make appropriate distributions. Once the petition is granted, the court issues Letters of Administration (Letters), which serve as a certificate that the named Administrator/Administratrix is authorized to act on the decedent's behalf. With these Letters, the Administrator/Administratrix can open an Estate account and transfer title to property, including the house, car and bank accounts.

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Pursuant to SCPA §1001, Letters must be granted to eligible distributees in the following order: "… (a) the surviving spouse, (b) the children, (c) the grandchildren, (d) the mother or father, (e) the brothers or sisters, (f) any other person who are distributees …" Accordingly, letters would go to Mrs. Smith, unless she is disqualified.

Mrs. Smith immediately filed an Administration petition with the Surrogate's Court in the county where Mr. Smith last resided. Mr. Smith's two children filed a cross-petition and filed "Objections" to disqualify Mrs. Smith due to the short duration of their marriage.

EPTL §5-1.2 clearly sets forth six grounds on which a spouse may be disqualified. A spouse may be disqualified if there was a final decree or judgment of divorce within this state or outside of the state, or that the marriage was void as incestuous, or that there was a final decree or judgment of separation, that the surviving spouse abandoned the deceased spouse, or that the surviving spouse failed to provide support.

Interestingly, New York is one of the few states that permit a marriage to be annulled post-mortem pursuant to Domestic Relations Law §140. However, this has very little force or effect on the laws regarding distribution. Pursuant to EPTL §5-1.2, the marital status of the parties at the time of death prevails. The law does not concern itself with the length of the parties' marriage, as long as the marriage was in effect and valid at the time of death. Accordingly, Letters must be granted to the surviving spouse, unless disqualified for some other reason, i.e., being a convicted felon.

Once Mrs. Smith obtains Letters, she has a fiduciary duty to collect all of decedent's assets and make appropriate distributions. Here is where Mrs. Smith became disappointed. As a surviving spouse, pursuant to EPTL §4-1.1 she would have been entitled to the entire Estate. However, since Mr. Smith also left children, Mrs. Smith is only entitled to the first $50,000 of the Estate and then half of the residuary Estate. The two children share equally in the other half of the residuary Estate.

She also has to deal with the issue regarding the unborn child from Mr. Smith's girlfriend, Jane. It has long been held that under New York law, an unborn child has certain rights, including, but not limited to, the right of inheritance, contingent on that child being born alive.

To protect that unborn child's inheritance rights, Jane filed a petition with the Surrogate's Court for a decree establishing that the child would be entitled to an intestate distribution. The court then appointed a limited guardianship over the property of the unborn child. The guardian then requested that the court stay any further proceedings until the child is born, so that paternity could be established.

For children born out of wedlock to establish their alleged inheritance, EPTL 4-1.2(a)(2)(c) mandates that paternity must be established by clear and convincing evidence. Paternity may be established by a genetic marker test. The court could issue an order to compel the production of the decedent's blood and/or tissue samples that are available for the purposes of conducting DNA testing.[1]

It was established that the baby was the decedent's child. The baby now shares in the half of the decedent's residuary estate with his other two children. The baby's interest would be advocated for by the court-appointed guardian.

Now that Mrs. Smith has an idea of who gets what initially, she begins to gather the decedent's assets. Certain items are non-testamentary, meaning that they automatically pass by operation of

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law. Such items include joint bank accounts, deeds written with a right of survivorship, life insurance policies naming a beneficiary, etc.

As Mrs. Smith was gathering the documents for the house in the Hamptons, she found the deed, which surprisingly still had Mr. Smith's ex-wife's name on it. It appeared that Mr. Smith intended to take her off the deed, but again, did not have time to go to his attorney to execute the necessary documents. She also found the separation agreement, wherein decedent's ex-wife agreed to relinquish her interest in the house and sign any necessary documents to effectuate the same. The separation agreement was then incorporated into a final judgment of divorce.

Accordingly, Mr. Smith's ex-wife could not claim any interest in his house. Furthermore, if Mr. Smith also neglected to remove the ex-wife's name on non-testamentary assets, the Surrogate's Court could intervene. For example, assuming the ex-wife relinquished her rights to the decedent's life insurance or pension plan, the court could direct her to disgorge any proceeds received from these non-testamentary assets. Those monies would then become part of decedent's residuary estate.[2]

Now that the house is part of the Estate, Mrs. Smith has a choice. She may keep the house and buy out the other half that would go to Mr. Smith's children, or she could simply sell the house and put the proceeds into the Estate account. Considering the length of their marriage and the problems the children were already raising, she thought it was best to sell the house.

That was just the beginning of the fight. Within the 40 days that she was married to Mr. Smith, they traveled for a month straight. During their travels, Mr. Smith bought her many exquisite art and antiques from Europe, Asia and the Middle East. The two children and the guardian over the baby's property argued that all of that personal property belonged to the Estate and that they were entitled to half of everything.

Instead of going to a hearing in the Surrogate's Court to determine whether or not the items were gifted to Mrs. Smith, Mrs. Smith decided to distribute her gifts as though the property belonged solely to the decedent. She followed the proper procedure by having all the valuables appraised and providing a detailed inventory to the children. Any items that Mrs. Smith wanted to keep had to be paid for at the appraised price; the same applied to the children. Everything else was sold and the monies went into the Estate account.

Mrs. Smith then had to make a decision regarding what she should do with the business, and of course decedent's uncle showed up to collect the alleged business loan of $99,500. Mrs. Smith had no idea how to run a photography business. She decided to target his competitors, and found another business that would buy decedent's photography business, including all of the equipment, and also retain his employees. She quickly jumped on the deal and hired a forensic accounting firm to complete the required business appraisal. She collected $2.5 million from the sale of the business.

As far as decedent's uncle was concerned, he did not have any promissory note or documents evidencing the money that he loaned Mr. Smith. Instead, he had a copy of a cashed check made directly to Mr. Smith almost two years before he launched his business. This could be considered a gift, or a personal loan. Without more evidence, the uncle's only option would be to file a claim against the Estate as a creditor. Luckily, the children were on his side and convinced Mrs. Smith to pay him half of what was allegedly owed to settle the debt. Everything was put in writing and the uncle executed a Receipt and Release form, which was filed with the Surrogate's Court.

Mr. Smith's sister was unfortunately not entitled to anything pursuant to intestacy laws. However, the wife and children all knew how fond Mr. Smith was of his sister and collectively agreed to give her certain personal items and a percentage from their shares of the residuary Estate.

Pursuant to SCPA §1001, Letters must be granted to **eligible distributees** in the following order: "(a) the surviving spouse, (b) the children, (c) the grandchildren, (d) the mother or father, (e) the brothers or sisters, (f) any other person who are distributees."

Mrs. Smith also had to figure out what to do with the Maserati. The entire time she thought that Mr. Smith owned the car outright. It turned out that he actually had a lease with over $50,000 owed. She had three choices as to how to proceed with this vehicle. Firstly, she could surrender the car, and then the Estate would be responsible for all of the additional costs on the lease. Secondly, she could take over the lease payments individually. Thirdly, she could sell the car and pay off what is owed to the bank, with any profits going into the Estate account. She chose the third option.

It has been almost six months since Mrs. Smith was granted Letters. She now has to file an inventory with the court. The inventory form lists all of decedent's assets, both testamentary and non-testamentary. The non-testamentary assets are used to determine the size of the decedent's Estate. In this case, there was the business at $2.5 million, the house at $1.5 million, all of the appraised property at $500,000 and the cash of $400,000, for a total of $4.9 million. The court's primary purpose in having this form filed is to ensure that the correct filing fee was paid by the petitioner.

Obtaining Letters is not free. The filing fee is paid by the petitioner, and is determined by SCPA §2402, based on the size of the Testamentary Estate. Here, the filing fee was $1,250. Mrs. Smith only paid $625 when she filed her Administration petition, thinking that the house and business were worth a lot less. She now has to pay the court the difference of $625 upon the filing on the Inventory form. The $1,250 fee is the maximum filing fee, and covers Estates that are valued over $500,000.

Mrs. Smith also needs to figure out if she has to file Estate tax returns. Estate tax is a tax on the decedent's right to transfer the decedent's property. In New York state, if required, an Estate tax return is due nine months after decedent's death, unless an extension is filed. An Estate is subject to New York Estate tax if the decedent was a resident of New York and the total of the federal gross estate, plus the federal adjusted taxable gifts and specific exemption, exceeds $2,062,500. Here, even after the adjustments, the total was greater than $2,062,500; therefore, Mrs. Smith had to file the required Form ET-706.

For the federal government, an Estate tax return is required if the Estate is greater than $5,340,000. This Estate was just shy of that number; therefore, no federal return was required. Nonetheless, it is recommended that a return be filed to prevent the IRS from subjecting the Estate to a potential future tax proceeding. The IRS could assert that the valuation of the decedent's assets were much greater than what was reported. This is fairly common when an Estate includes a lucrative business and extremely valuable art. The IRS could always audit and claim that the Estate was worth more than the threshold; however, if a return is filed, the IRS only has three years to make such an argument. Filing a return, whether or not Estate taxes are due, prevents the Estate from facing a potential audit after three years from when the return was filed.

Now that all of the decedent's property was distributed and sold, Mrs. Smith has to file another petition for Judicial Settlement of Account with the court. Therein, she will also have to submit a detailed accounting of all of decedent's assets and liabilities, including a schedule of creditor's claims. All interested parties, including the creditors will then be served with an Accounting Citation.

If there are no Objections filed to Mrs. Smith's accounting, once the creditor's claims are settled, the court will issue a final order and decree that allows Mrs. Smith to distribute the residuary Estate and close the Estate.

This entire procedure, although simplified in my example, could take several years. Mrs. Smith's story briefly outlines an Administrator's obligations. Each issue that she faced could have taken months to resolve, coupled with heated fights amongst the relatives. If only Mr. Smith had a Will, his surviving relatives could have also rested in peace after his demise.

1. *Matter of Estate of Ray. F. Morningstar*, 17 A.D.3d 1060 (2005).
2. *Estate of Landy v. Sondra Landy*, 267 A.D.2d 142 (1999).

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