SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

Probate Proceeding, Will of

ROY L. GILMORE, SR., a/k/a
ROY GILMORE, a/k/a
ROY L. GILMORE,

File no. 346747

Dec. No. 848

Deceased.

----------X

In this probate proceeding, two non-marital children have moved to have their status as children entitled to benefits under the after-born statute (EPTL 5-3.2) determined. In a prior decision (Dec. No. 80, Feb. 7, 2008), the court ruled that any question regarding a party's status in a probate proceeding should be determined as a preliminary matter and stayed all other proceedings (*citing Matter of Levin*, NYLJ, Mar. 18, 1996, at 36 [Sur Ct, Nassau County]).

Rather than question any of the underlying facts, such as proof of paternity, the parties have consented to have the motion submitted assuming the truth of the movant's allegations for a determination of whether as a matter of law those allegations state a cause of action entitling the claimants to after-born status.

The decedent died on January 13, 2007, survived by eleven children; three from a first marriage, four from a second marriage and four alleged non-marital children. The will offered for probate benefits only one child from the first marriage, Angela Manning, the petitioner and named executrix, who inherits the entire estate valued at several million dollars.

EPTL 5-3.2 creates a rule of presumed intent for a testator who may have inadvertently omitted a child born after he executed his will (*McLean v McLean*, 207 NY 365 [1913]). If he gave something to existing children and the after-born is neither provided for nor mentioned in the will and unprovided for by some settlement, the after-born shares in the gift to existing

children.

Case law has granted non-marital after-born children the same rights as marital after-born children if they can establish their inheritance rights under EPTL 4-1.2 (*Matter of Wilkins*, 180 Misc 2d 568 [Sur Ct, New York County 1999]). Since the Wilkins case was decided, the after-born statute has been amended to address the rights of after-born non-marital children (L. 2007 ch. 423, eff. Aug 1, 2007). The amendment provides: "For purposes of this section, a non-marital child, born after the execution of a last will shall be considered an after-born child of his or her father where paternity is established pursuant to section 4-1.2 of this chapter."

While the amendment became effective only after decedent's death, it essentially codifies preexisting case law.

The claimants allege that after the decedent executed his will on June 24, 1996, he underwent DNA tests in 2005 and 2006 which revealed to him for the first time that he was their biological father. Although the claimants were in fact born long before the execution of decedent's will, they claim that non-marital children, only known or acknowledged by their father after execution of his will, should be accorded the same presumption of inadvertent disinheritance as an after-born child and extended the same rights.

Generally, a child is entitled to after-born rights only if born after execution of the will (*Matter of Von Finckenstein*, 179 Misc 375 [Sur Ct, Ulster Co. 1943]; *Matter of Walsh*, NYLJ May 13, 1998, at 31 [Sur Ct, Nassau County]). There is no reported exception to this rule other than for a child adopted after the execution of a will, even though born previously (*Matter of Guilmartin*, 156 Misc 699 [Sur Ct, Kings County 1935], *affd* 250 AD 762 [2d Dept 1937], *affd* 277 NY 689 [1938]; *Matter of Stier*, 74 Misc 2d 634 [Sur Ct, Nassau County 1973]).

The statute itself speaks clearly of a "child born after the execution of a last will" (EPTL 5-3.2 [a]). The claimants argue that the meaning should be extended to a non-marital child who is known or acknowledged by a decedent only after execution of his will. However, this court is not at liberty to conjecture about, add to or subtract from words having a definite and plain meaning. To engraft exceptions where none exist are trespasses by a court upon the legislative domain (*City of Buffalo v Lawley,* 6 AD2d 66 [4th Dept 1958]; McKinney's Cons. Laws of NY Book 1, Statutes, § 76). When a statute is free from ambiguity and its sweep unburdened by qualification or exception, a court must apply the language as it is written (*Zaldin v Concord Hotel,* 48 NY2d 107 [1979]; 2 A Sutherland, Statutory Construction [7th ed.] § 46:1).

The 2007 amendment to EPTL 5-3.2 quoted above specifically restricts a non-marital child's entitlement to "a non-marital child, born after the execution of a last will." "This court may not ignore a statute's language in an effort to derive or construct a legislative intent that could easily have been articulated by the Legislature when it drafted the [amendment] ... The court will not exceed its authority by reading the [claimant's] language into the statute" (*New York State Crime Victims Bd. v T.J.M. Productions Inc.*, 176 Misc 2d 777, 785 [Sup Ct, New York County 1998]; *affd* 265 AD2d 38 [1st Dept 2000]; *see also* 97 NY Jur 2d, Statutes, § 104). It is accordingly concluded that claimants are not entitled to any rights under the after-born statute (EPTL 5-3.2).

This is the decision and order of the court.

Dated: December 23, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court