

**Matter of Thomas**

2021 NY Slip Op 31972(U)

July 7, 2021

Surrogate's Court, Bronx County

Docket Number: 2015-2827

Judge: Nelida Malave-Gonzalez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

## SURROGATE'S COURT, BRONX COUNTY

July 7 , 2021

ESTATE OF MAYNELL THOMAS, Deceased  
File No.: 2015-2827

In this probate proceeding, Richard Judkins, an alleged son of the decedent and a potential objectant, appeared and after SCPA 1404 examinations of the two attesting witnesses were conducted by his counsel, the petitioner, a niece of the decedent and the nominated executor, Tracy Thomas, challenged his status as a distributee and requested a hearing to determine the same. The court heard testimony and received evidence at a hearing.

The decedent died on July 28, 2015 at the age of 78 and a purported will dated April 23, 2015 is being offered for probate, in which the sole beneficiary is another niece, Garnette Thomas. As per the petition, the sole distributees are 3 siblings of the decedent: Irving Thomas, Lillian Nunn, both of whom signed waivers and consents to the petition, and Albert Thomas, who was cited and has not filed objections to the instrument. After the return date of citation, the petition was amended to reflect Richard Judkins as a "purported son" of the decedent, triggering this hearing.

The decedent's brother Albert Thomas traveled from his home in Virginia to testify. His testimony revealed: the decedent is the youngest of four sons and he was close to the decedent both in his relationship and age as the decedent was one year younger; Albert lived with the decedent for many years and met Richard several times; the decedent indicated to Albert that Richard was his son; and significantly, Albert was aware that if it is established that Richard is the decedent's son, he would be deemed a non-distributee and therefore not entitled to a share in this estate. On cross examination, in substance, petitioner's counsel elicited that the decedent's nieces cared for him prior to his demise from lung cancer.

Also testifying on Richard's behalf was Henrietta Jones Smalls, the decedent's co-worker at Kmart in North Bergen, New Jersey starting in approximately 1970 until the time she left her employ in 1992. She testified that she occasionally traveled with the decedent from the Bronx to New Jersey and at some point the two dated. During this period the two car pooled together and she had keys to his apartment, occasionally spending the night. She testified that while she did not see Richard visit the apartment, the decedent had a large wedding photo of the Richard and his wife. Also, although Albert was a neighbor in the same housing complex she did not realize he was related to the decedent until she met him at a birthday party being thrown for the decedent. Moreover, while she never saw Richard at the decedent's home, she testified that the decedent brought Richard to Kmart where he worked during the summer, stating:

Well Kmart was a big store. It had a big warehouse. And we was allowed to bring our childrens [sic] out there during the Summer months to work. I took my daughters out there too, and that's how I met Maynell's [the decedent] son. I met all of the Summer kids like that, 'cause I worked in data entry and we would put their cards in payroll, had their cards for payroll.

Further detailing how she was certain of this fact, Ms. Smalls testified:

I remember that, you know, when we have Summer kids there, everybody show off their kids. At lunchtime I would have my daughters with me. I had two daughters. I would have my daughters, and I'd say this is my daughter, introduce my daughters to my co-workers, and that is how I met Richard. [The decedent] was introducing him as his son.

Lana Caldwell, Richard's mother also testified. She indicated that Richard was one of her three children. She met the decedent initially when the two worked at Holly Stores in Manhattan and dated the decedent while he was married to his wife Elaine, whom she knew as well. The relationship started when the decedent and his wife were separated and she was pregnant with his child. When asked on direct whether anyone else was Richard's father she was emphatic that the decedent was the father. She never sought child support because the decedent cared for Richard, including taking him on weekends during his marriage. Her testimony revealed that Elaine knew about the child and often times held Richard out as if he were her child. Further, she knew Albert and actually saw Albert

when she received medical treatment at Harlem Hospital as he was an employee there. Albert was keenly aware that Richard was the decedent's son.

On cross examination she testified that she had three nonmarital children, all with different fathers. Further, she testified that two of the children, including Richard, were given the surname Judkins, her maiden name. During extensive questioning from petitioner's counsel, she explained that her eldest child was given the father's name at the insistence of her parents, as she had not reached majority when the child was born and they insisted the child bear his father's name in order to prevail in Family court support proceedings. Moreover, when questioned why she didn't push her son Richard to insure that paternity was established, she replied that she felt the decedent and her son had a relationship and no one would "come into his life as [the decedent's] only living child and take that right away from him."

Richard also testified at trial. His testimony was that his mother indicated to him that "Tommy" Maynell Thomas (the decedent) was his father; he would frequently go to work with the decedent where he was employed at Kmart and Caldors; the decedent introduced him as his son to the decedent's co-workers and a girlfriend, Henrietta; Richard met the decedent's father, albeit he couldn't recall his name; he met the decedent's brother, Albert, who was employed at Harlem Hospital, where Richard was born. On cross examination, Richard revealed that he was 48 at the time of

trial; he visited frequently with the decedent from the age of 10 to approximately 21, at which time he had children of his own, who would visit the decedent with him. Further, on cross examination Richard testified he left New York for Alabama when he was approximately 25 years old; and had no pictures of himself with the decedent; Richard did not know the decedent's date of birth, however he knew the decedent was married to Elaine, had an older brother and a younger brother (who testified) and a sister "that wasn't a sister for real."

On behalf of the petitioner, the decedent's nieces, Garnette and Tracy Thomas, both testified in sum and substance that the decedent never informed either of them he had a son. When Garnette cleaned out the decedent's apartment there were no pictures of Richard. She further acknowledged that she met Richard at the decedent's funeral, and although he did not introduce himself as the decedent's son, he attended with another woman, whom she could not identify. Further, on cross examination she admitted that she was informed by the funeral director that Richard was claiming to be the decedent's son, and when Richard asked to have a word with her outside the funeral home, she refused to speak to him. Tracy also testified she became aware at the funeral that Richard was being introduced as the decedent's son.

Pursuant to EPTL 4-1.2 (a)(2)(c), a non-marital child is the child of his father if parentage is established by clear and convincing evidence from either: (i) a genetic marker test or (ii) proof that the parent open and notoriously acknowledged the child as his own. As stated in the Commentaries to NY CLS EPTL 4-1.1:

In 2010, the Legislature amended EPTL 4-1.2 and ameliorated some of the difficulty a non-marital child faces in attempting to establish paternity. While a non-marital child previously had to establish both clear and convincing evidence and open and notorious acknowledgment of paternity by the father, now the child must establish paternity by clear and convincing evidence which may include, but is not limited to, evidence derived from a blood genetic marker test or open and notorious acknowledgment. 2010 N.Y. Laws 64, enacted April 28, 2010 and applying to estates of decedents dying on or after that date." NY CLS EPTL § 4-1.2.

The non-marital child will be held to the statutory proofs required at the time of the father's death. *Matter of Malavase* (133 AD2d 759 [2d Dept 1987]) *Matter of Marks*, 16 Misc3d 334 [Sur Ct, Bronx County 2007]).

In this matter, the credible testimony of Albert and Henrietta clearly and convincingly establishes that Richard is the son of the decedent, especially since Albert's testimony was against his self interest, and Henrietta Jones Smalls, a disinterested witness, established that the decedent held Richard out to be his son (see *Matter of Scott-Heron*, N.Y.L.J., May 6, 2019, at 25, col. 2 (Sur Ct, New York County 2019). Somewhat

troubling is the omission of Richard as an alleged son in the petition, despite the nieces awareness at the funeral that Richard was asserting he was the decedent's son. The nieces are incentivized to deny Richard's status as a distributee insofar as no one would challenge the instrument as Albert instructed his attorney not to challenge the will advising his counsel to leave it alone as "something he never had" would be something he would never miss. Accordingly, this decision constitutes the order of the court finding Richard is the decedent's son based upon the decedent holding him out openly and notoriously as such (SCPA 4-1.2 [a] [2] C) [ii]).

The Chief Clerk is directed to serve a copy of this decision and order to respective counsel, and as the Court is aware that Richard's counsel Stewart D. Pollak, is now suspended from the practice of law (See Matter of Pollak, 181 AD2d 312 [2<sup>nd</sup> Dept 2020]), a copy of this decision and order is to be mailed to Richard as well.

Proceed accordingly.

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE