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10/14/2016 3:00:40 PM
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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
PROBATE DIVISION
Case Type: Special Administration

In the Matter of:

Court File No. 10-PR-16-46

Estate of Prince Rogers Nelson,

Decedent,

REVISED DECLARATION OF SUSAN N. GARY

I, Susan N. Gary, declare as follows:

1. I have been engaged by Brianna Nelson and V.N. to provide expert testimony on Minnesota law governing the determination of intestate heirs and whether Duane Nelson is the son of John L. Nelson under Minnesota intestacy law.

2. I am the Orlando J. and Marian H. Hollis Professor of Law at the University of Oregon in Eugene, Oregon, where I have taught Trusts and Estates and Estate Planning for over 23 years. My scholarship includes work on the definition of family for inheritance purposes, with a focus on the parent-child relationship, and I have co-authored a casebook on trusts and estates. I served as a Special Advisor to the Joint Editorial Board for Uniform Trust and Estate Acts when it revised the Uniform Probate Code's definitions related to the parent-child relationship. I have served as Reporter for two Uniform Acts developed by the Uniform Law Commission, and I currently serve as the Reporter for the Oregon Law Commission's Probate Modernization Work Group, a project that is reviewing and revising Oregon's probate code. I received my B.A. from Yale University and my J.D. from Columbia University. Prior to entering academia I practiced with Mayer, Brown & Platt in Chicago, and with DeBandt, van Hecke & Lagae in Brussels. I am an Academic Fellow and Regent of the American College of Trust and Estate Counsel. I hold or have held leadership positions in the Trust and Estate, Aging and the Law, and Nonprofit and Philanthropy Law Sections of the Association of American Law Schools, the Real Property, Trust and Estate Section of the American Bar Association, the Oregon State Bar, and the NYU National Center on Philanthropy and the Law. I am a Trustee of the University of Oregon Board of Trustees.

Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

3. My responses to the following questions are based on my review of Minnesota statutes and cases, court documents filed in connection with this estate proceeding, transcripts of depositions of Norrine Nelson and Sharon Nelson, a conversation with Brianna Nelson, and other information provided to me by Lisa Braganca, counsel for Brianna Nelson and V.N. I understand that discovery is ongoing. As new information is obtained through discovery, I will consider how such information affects my opinion and revise this report and my opinion accordingly.

I. How does Minnesota determine who is a parent and child for purposes of determining who is an heir of a decedent under the intestacy statutes?

Intestacy statutes determine heirs based on family relationships determined for inheritance purposes. When a decedent dies without a spouse, other relationships for intestacy purposes are determined based on parent-child relationships. Once a parent-child relationship is established, other relationships flow from that determination. The child inherits through the parent, and children of the child inherit through the child. A determination of siblings depends on whether the siblings share a common parent. In Minnesota, a sibling who shares one parent with the decedent is treated the same as a sibling who shares both parents. Minn. Stat. § 524.2-107.

A. The Minnesota Probate Code[1] Does Not Provide a Complete Definition of Parent and Child

In 2010 Minnesota amended its intestacy statutes, with revisions based on the 2008 Amendments to the Uniform Probate Code. The statutes provide a number of rules for determining who is a parent and who is a child for purposes of intestacy, but do not provide a complete definition of the meaning of parent and child for purposes of intestacy. The Minnesota Probate Code states, "Unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions." Minn. Stat. § 524.1-103. Thus, an understanding of the Minnesota law on inheritance by intestacy requires analysis of both the statutes and any pertinent cases.

The Minnesota Probate Code contains several provisions relating to the parent-child relationship. The statutes describe the effect of the parent-child relationship as follows:

> Except as otherwise provided in section 524.2-119, subdivisions 2 to 5 [related to adopted children], ***if a parent-child relationship exists or is***

[1] Minn. Rev. Stat. 524.1-101 states that chapter 524, containing the probate statutes, shall be known as the "Uniform Probate Code." For purposes of this Memorandum, I will refer to the Minnesota statutes as the "Minnesota Probate Code" to distinguish the statutes as adopted in Minnesota from the Uniform Probate Code itself.

Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

> ***established under this part***, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

Minn. Stat. § 524.2-116 (emphasis added). This provision anticipates that a parent-child relationship could exist and be established outside the rules that follow this statement ***or*** be established by the rules in the statutory sections in this part of the Probate Code. If the intention had been to limit the definition of parent-child relationship to those relationships established under the rules set forth in the statutes, the words "exists or" would not have been necessary.

The Minnesota Probate Code then provides rules for three categories of parent-child relationship: a genetic relationship, Minn. Stat. § 524.2-117, an adoptive relationship, Minn. Stat. §§ 524.2-118 and 524.2-119, and the relationship considered a parent-child relationship for a child conceived by assisted reproduction. Minn. Stat. § 524.2-120. The statutes do not say that only a child who fits within one of these categories can be considered a child of a particular parent for purposes of intestacy.

In addition to Minn. Stat. §§ 542.1-103, 524.2-116, described above, two additional statutes make clear that the statutory categories do not limit the definition of parent and child. Minn. Stat. § 524.2-122 says that the statutes do not affect the doctrine of equitable adoption. Although that doctrine is not directly applicable to the facts of the Prince Rogers Nelson estate, this section reflects the view of the legislature that the new statutes do not affect existing common law. Further, the definition of child in Minn. Stat. § 524.1-201 says that the word includes a child entitled to take "under law" and "excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant." Those categories of children are excluded; other categories are not.

B. The Parentage Act Does Not Apply to Determinations for Intestacy Purposes

The Minnesota Probate Code does not provide a complete definition of parent-child relationship for these purposes, so it is necessary to consider other Minnesota law related to intestacy and inheritance. The Parentage Act is not applicable to determinations of parentage for intestacy purposes and should not be used in the intestacy context.

As a policy matter, the Uniform Law Commission intentionally chose not to incorporate the Uniform Parentage Act definition of the parent-child relationship into the intestacy statutes. The rationale of the Uniform Law Commission was that the purposes of the Probate Code (intestacy and inheritance) and the Parentage Act (custody and child support) are different, and that different definitions were appropriate. The Uniform Probate Code differs from the Uniform Parentage Act in several significant ways, and the drafting committee did not intend that the Uniform Parentage Act be used to fill the gaps in the probate definition of the parent-child relationship.

Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

When the Uniform Law Commission decided to revise the Uniform Probate Code to address issues created by assisted reproductive technology, I was asked to be a Special Reporter to the Joint Editorial Board for Uniform Trust and Estate Acts (the "JEB-UTEA"). Initially, the JEB-UTEA discussed revisions with respect to the definition of parent and child, and later a separate drafting committee was created for other amendments to the Uniform Probate Code. The drafting committee incorporated into the 2008 Amendments the definition of the parent-child relationship that had been developed by the JEB-UTEA. I was involved during the discussions of the JEB-UTEA, from 2003-2005, before the appointment of the drafting committee.

The JEB-UTEA concluded that the intestacy statutes needed a separate definition, and intentionally chose not to refer to the Uniform Parentage Act. Thus, when Minnesota adopted the Uniform Law Commission's revisions, it was adopting definitions that were intentionally separate from and different from the Uniform Parentage Act.

Two policy considerations underlay the JEB-UTEA's approach to revising the definition of the parent-child relationship. First, the JEB-UTEA determined that because intestacy presents different issues from family law, the intestacy rules should be different from the Uniform Parentage Act and other family law statutes. Second, the JEB-UTEA wanted to protect children and intentionally chose to be over-inclusive in some respects, to include as many children as possible within the definition of parent and child. As an example, if a child's genetic parents, P1 and P2, divorce and P1 marries P3 who then adopts the child, should the child be able to inherit from and through P1, P2 or P3? Under adoption rules related to custody and child support, P2 would have given up parental rights in order for P3 to adopt, and P2 would have no rights or responsibilities with respect to the child. *See* Minn. Stat. §§ 259.59. But under the Uniform Probate Code, the child can inherit from and through all three parents. *See* Minn. Stat. § 524.2-119.

Another difference from the Uniform Parentage Act also increases the likelihood that a parent-child relationship will be established. In Minn. Stat. § 524.2-120(7)(c), a child conceived after a person's death, using gametic material from the deceased person, will be considered the child of the deceased person in the absence of clear and convincing evidence that the deceased person did not consent to be a parent, so long as the person was married to the child's birth mother and no divorce proceeding was pending when the person died. In contrast, under the Uniform Parentage Act, consent must be established in writing, before the deceased person's death, and the consent must contemplate assisted reproduction occurring after that person's death. *See* Unif. Parentage Act § 707 (2002).

These differences demonstrate that the different purposes between the intestacy rules and the Uniform Parentage Act led to different legal rules for a determination of the parent-child relationship. The court in *Palmer*, the Minnesota

Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

case that provides additional information about the definition of the parent-child relationship for intestacy agreed:

> The distinct purposes of probate and family law justify the legislature's decision not to make the Parentage Act the sole means of establishing paternity for the purposes of probate.

In re Estate of Palmer, 658 N.W.2d 197, 200 (2003).

C. What Is the Role of a Determination of a Genetic Relationship?

A genetic relationship can be used to establish a parent-child relationship under the Minnesota Probate Code. Minn. Stat. § 524.2-117. It is one way of establishing a parent-child relationship, and it is not the only way.

The 2008 Amendments to the Uniform Probate Code replaced the word "natural" with the word "genetic," because using the term natural to refer to a parent biologically related to a child seemed to create a contrast with adopted children, who, the drafters thought, should not be considered "unnatural." The switch from "natural" to "genetic" was not intended to imply anything else. The term genetic is used in the statute in explaining one category of parent-child relationship, but the statutes do not limit the parent-child relationship to a relationship based on a genetic tie.

The Minnesota Probate Code defines "genetic father" by reference to the Parentage Act, the only reference to the Parentage Act remaining in the Probate Code. The term is used only to define genetic parent, and that term is used to provide that a child will be considered to have a parent-child relationship with the child's genetic parents, unless someone else adopts the child. Minn. Stat. § 524.2-117. This provision is only one of several ways a parent-child relationship can be established, as the succeeding statutory sections make clear.

Minnesota Probate Code §§ 524.2-118 and 524.2-119 use the term genetic in explaining when an adopted child will continue to be a child of the genetic parent for intestacy purposes. Under the statutes a child might be a child of two genetic parents and one adoptive parent.

The statutes on children conceived using assisted reproductive technology also contemplate that a child might not be the child of a genetic parent. A parent-child relationship does not exist between a child and a third-party donor, defined as someone who produces eggs or sperm used in assisted reproduction and who is not deemed a parent under other provisions in the statute. Minn. Stat. § 524.2-120(1), 524.1-201(54).

Although confirmation of a genetic relationship may be used, in some circumstances, to establish a parent-child relationship, a genetic relationship may

Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

not be determinative for intestacy purposes. If a parent-child relationship is established while the parent and child are alive, a post-death determination that the two are not genetically related will not affect the parent-child relationship for intestacy purposes. Thus, if a parent-child relationship is established for intestacy purposes under Minnesota law, the fact that a genetic relationship exists with someone else becomes irrelevant. In Minnesota law a parent-child relationship can be established through adoption, through assisted reproductive technology, or through clear and convincing evidence of the parent-child relationship.

D. Determination of Parentage Based on Clear and Convincing Evidence

Minnesota law on the determination of the parent-child relationship begins with the Minnesota Probate Code, but as already discussed, those statutes do not provide a complete or exclusive definition. The Minnesota Supreme Court has held that a determination of a parent-child relationship for intestacy purposes can be made using clear and convincing evidence. In re Estate of Palmer, 658 N.W.2d 197 (2003).

In *Palmer* the court was asked to determine whether the Parentage Act provided the exclusive means of determining parentage for purposes of intestate succession. The court concluded that it did not, and held that the parent-child relationship could be established by clear and convincing evidence. Nothing in the revisions to the Minnesota Probate Code changes this determination. Indeed, the case refers to the prior version of the Minnesota intestacy statutes, which said that the parent-child relationship "may" be determined by reference to the Parentage Act. That reference was dropped when the statutes were amended, so there is even less reason to consider the provisions of Parentage Act.

In *Palmer*, the person determined to be a parent did not live with the child and instead the child established the parent-child relationship with evidence of how the two functioned as parent and child, spending time together and engaging in activities together. The person determined to be a parent was listed on the child's birth certificate as the child's father (although not initially; the birth certificate was revised with this information), and the court noted that the father referred to the child as his son and the boy called the man "dad." Given the evidence, the court had no trouble finding that a parent-child relationship existed and that the younger man was the older man's son for purposes of the intestacy statutes.

A concern sometimes raised in connection with permitting the determination of the parent-child relationship beyond rules related to genetic relationship or adoption is that such a rule would be interpreted too broadly and would permit a caregiver or extended family member to assert that the person had the relationship of a parent. In *Palmer*, the three courts that heard the case had no difficulty in determining that the facts demonstrated clear and convincing evidence of a parent-child relationship. No genetic proof was required. Rather, the court considered how the father and son interacted, and the fact that they referred to each other as "son"

Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

and "dad" seems to be an important piece of the evidence. The relationship was not one of a caregiver or friend; it was a parent-child relationship. The clear and convincing evidence standard provides sufficient protection against a flood of opportunistic arguments.

I have elsewhere argued that intestacy statutes should be revised to permit a determination of the parent-child relationship by clear and convincing evidence. *See* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 Mich. J. of L. Reform 787 (2012). Minnesota already has that legal rule, clearly stated in *Palmer*, and not affected or changed by subsequent amendments to the intestacy statutes. Minnesota is at the forefront of legal thought in this respect, and should be commended for establishing and using a sensible rule.

II. Was Duane Nelson Sr. the child of John L. Nelson for purposes of the Minnesota intestacy statutes?

Under *Palmer*, parentage for purposes of the Minnesota intestacy statutes may be established by clear and convincing evidence. Based on my review of the documents filed in the Estate of Prince Rogers Nelson, and information provided by Celiza Braganca, I conclude that a parent-child relationship existed between John Nelson ("John") and Duane Nelson ("Duane").

When Duane was born, John was listed as the father on Duane's birth certificate. There is some evidence that another man, Joseph Griswold, was Duane's genetic father, but he appears to have had no contact with Duane. John held Duane out as his son, beginning at least by the time Duane's mother, Vivian Nelson, died when Duane was an adolescent. John treated Duane as his son throughout the rest of John's life. John referred to Duane as his son, and Duane referred to John as his father.

After Duane's mother died, Duane lived with his sister, Norrine, and participated in family gatherings that included various family members in the Minnesota area, including John. In middle school and high school he spent a lot of time with the decedent ("Prince"), who was nearly the same age, and they referred to each other as brother. The fact that Prince treated Duane as his brother and referred to Duane as his brother, indicates the family view that Duane and Prince had the same father.

When Duane left to start college, John drove Duane to the University of Wisconsin-Milwaukee where Duane had a basketball scholarship. John visited him at school to watch him play basketball, and John came for Duane's graduation ceremony (although Duane did not graduate, he participated in the ceremony). At a family gathering in connection with graduation, Norrine stated that Duane was not a "real Nelson." Duane's girlfriend, Carmen, remembers that John walked over to Norrine and told her that Duane was his son.

Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

After college, Duane moved back to the Minneapolis area and worked there. He participated in various family gatherings that included John. Duane's daughter, Brianna, was told that John was her grandfather, and the family treated her as John's granddaughter. She explained to me in a phone conversation that she remembers going to her "Aunt Norrine's" house after church for Sunday dinners when she was a young child. She remembers being there with her father, her grandfather and other family members, and she remembers her grandfather holding her on his lap and treating her as a grandchild. She said that her relationship with John was very important to her. She further said that no one had ever said anything to her suggesting that he was not her grandfather, until he died. Thus, her relationship with him was always that of grandfather and granddaughter. Brianna always considered John her grandfather, and he always treated her as his granddaughter.

John Nelson executed a will in 1986, leaving his entire estate to Prince. In 1989 another will was drafted for John by James Echtenkamp, a lawyer with a Minneapolis law firm. The draft will specifically disinherits John's children and names Duane as one of his children in several places in the will. Notes prepared in connection with the drafting of the will, list five people identified as John's children, including Duane. Prince is listed first, with Duane listed second. Paul Jones, a lawyer with a Los Angeles law firm, wrote some of the notes and others do not indicate authorship. I am told that Mr. Echtenkamp did not speak with John Nelson directly, and instead obtained the information necessary to draft the will from the Los Angeles lawyer. Even if the information came from someone other than John, the fact that Duane was listed as his child indicates that those around John thought of Duane as John's son.

In a copyright infringement lawsuit that Duane's sister, Lorna, brought against Prince, Duane, and John, Duane is identified as John's son. I am not aware of any effort by John Nelson, Prince, or Duane to say anything in the lawsuit to the contrary, and I am aware of nothing in the trial court record or appellate record contradicting the parent-child relationship of John and Duane. Indeed, the decision of the 8th Circuit Court of Appeals in that case states that that Prince and Duane are half brothers.

When Duane died, his death certificate listed John as his father, and no family member challenged or sought to change that statement on the death certificate. Duane's obituary lists John as his father. Although Norrine has stated that she wrote the obituary listing John as Duane's father to protect Brianna's feelings, the obituary reflects a statement she chose to make to the public at large as late as 2011. At that time, Tyka Nelson also publicly referred to Duane as her brother on Twitter.

III. How does a decedent's intent affect the determination of his intestate heirs?

The intestacy statutes are an approximation of what an "average" decedent might want. The statutes cannot and do not fit every family pattern, and anyone can avoid

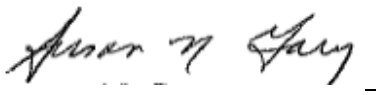
Filed in First Judicial District Court
10/14/2016 3:00:40 PM
Carver County, MN

the application of the intestacy statutes by executing a will or otherwise disposing of the person's property. When a decedent has not left a valid will, the law steps in to govern the disposition of the decedent's estate. In some cases a decedent may not know his heirs, and in others the decedent might have preferred one heir over another. Personal preferences do not matter in connection with the determination of intestate heirs. In this estate, Prince's interactions with various family members may have some bearing on whether John and Duane had a parent-child relationship—considered themselves father and son—because how others viewed their relationship is evidence of the way they viewed the relationship. The fact that Prince and Duane referred to each other as brothers suggests that they, and others, thought of Duane as John's son. However, once a parent-child relationship is established, the intestacy statutes operate mechanically, and a decedent's possible preferences do not affect the application of those statutes.

Evidence indicates that the decedent and Duane had a falling out during a period when Duane's mental health issues began to cause erratic and violent behavior. Although it is unfortunate when family members become estranged, bad feelings can and do develop among family members. An estrangement does not change the rules for intestacy, and does not affect the determination that John and Duane had a parent-child relationship.

4. I hereby declare that the above statements are true to the best of my knowledge and belief, and I understand they are made for use as evidence in court and are subject to penalty for perjury.

DATED: October 14, 2016



Susan N. Gary