READ BETWEEN THE WORDS

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Author: LEE M. HOLMES

An Oklahoma inheritance statute, enacted over ninety years ago, provides in part: 84 O. S. §215: "Inheritance by and from illegitimate child." For inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child; . . . b) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, . . ."

Simple enough. No problem of interpretation. Many cases are annotated. Sometimes factual questions arose as to whether a man had publicly acknowledged a child or what constituted written acknowledgment. Technology develops without consideration of the legal aspects.

A client comes in to your office. He has one child conceived and born out of wedlock. He left town before the child was born. He never contributed to the child's support. Years later he returns to the community. The mother of the child has died. The child, a girl, grows up without being acknowledged in writing or verbally by her father. After she became an adult and married, she confronted her father. "I've been told all my life that you are my father. Is that true?" "Yes, it is." he replies. Thereafter for thirty years he is her father and the grandfather of her children. In his later years, he signs a paper, properly witnessed, acknowledging her "as his biological daughter and his sole heir". He puts property in joint tenancy with her. He names her as beneficiary of his life insurance and retirement benefits identifying her as his "daughter". He names her children as contingent beneficiaries and he identifies them as his grandchildren. He has offered to adopt her, but that does not seem necessary. He has already publicly and in writing identified her as his daughter. He is not married has no other children.

As his attorney, he asks you, "If I die without a Last Will and Testament, will my daughter inherit everything?" You consult the statute and review a copy of the written acknowledgment. The statute looks clear enough. It appears he has met the statutory requirements to "legitimize" her as his daughter. 84 O.S. §215 has been satisfied. Right?

The problem: He dies and his greedy relatives file for letters of administration claiming to be his heirs. He just "thought" she was his "biological daughter". They want tissue samples from the dead man and blood samples from the daughter for DNA tests to determine if she is in fact his biological daughter.

What do we read between the words? Prior to 1975 or 1980, you would always read into the statute the word "putative" before "father" because there was no way to prove the father was the biological father.

If she is not biologically his daughter, does she inherit anyway? If not, should the documents that identified her as his daughter and left property to her by survivorship or conveyance be set aside because of the mistake of fact?

Today, in the USA, approximately 40% of children are born out of wedlock when the mother is under 20 years of age, has not finished high school and is having her first child. In addition, children are born during marriages but the husbands are not the biological fathers. Some of these are conceived through in vitro fertilization and the husband knows the child is not his biological child. Some are conceived during an affair and the husband is never told that the child is not or may not be his biological child.

If a will, trust, document conveying a gift and other documents identify a person as a daughter, son, child, grandchild, issue or other similar identifying language but the identified person is not biologically the child or grandchild of the deceased person and has not been legally adopted, then that beneficiary is at risk of suffering through a lawsuit challenging the bequest, conveyance, etc.

The legal challenge: The decedent made 'daughter' a beneficiary because he erroneously thought she was his biological child. If she is not his biological daughter, all conveyances, bequests, establishment of survivorship rights, etc. which identified her as his daughter should be set aside because there was a mistake of fact.

How do we as lawyers handle the potential problems of mistaken or potentially mistaken biological relationships. Until fairly recently, this was not a problem. Now it is.
Should we change our documents to state:

"I have three children, John Doe, Mary Doe and Bob Doe. I think they are my biological children. Even if one or more of them is not my biological child, each of them is to be treated as my biological child." This is all right for a will or trust, but what about for an intervivos transfer?

A physician is your client. You are doing estate planning for him. Many medical students have been sperm donors. Do you need to ask him if he was? If he was, what legal advice do you give about his biological children? What if his sperm was frozen and not used. He has potential biological children.

Life and law sure were simple back in the old days.

Holmes, Holmes & Neisent, P.L.L.C.
Providing Legal Services for the Elderly, Disabled and Medicaid Advocacy
501 N.W. 13th, Oklahoma City, OK 73103
(405) 235-8455
www.medicaidoklahoma.com
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