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Scott Rahn: Anticipating the Secret Scion in Estate Planning

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DNA genetic testing services like Ancestry and 23andMe give people unprecedented information about their personal genomes, sometimes introducing them to unknown siblings and children. These new connections can be exciting and sometimes fulfilling, or extremely disruptive. Discovering a previously unknown child or sister or brother, often after a parent has died, can erode family trust and harmony.

The possibilities of identifying unknown relatives through at-home DNA testing, often for less than $60, also can raise estate planning issues. Now, a child who might be a surprise to a surviving spouse and her children can potentially claim a stake in an inheritance by presenting evidence of a DNA match.

Although states have put DNA use to work to exonerate the wrongfully convicted or to identify murderers, laws are lagging in how we use the technology to identify unknown relatives who might have a claim to a piece of an estate.

As an estate litigator, I have a few suggestions for addressing and being proactive about this issue in your estate planning as states catch up to enact legislation to accommodate this technology and its potential impacts on probate matters.

For example, California's seemingly radical change to Probate Code §6453(b)(3) is the latest step in a legal trend evolving over several decades, reflecting the overall familiarity and utilization of DNA evidence in various areas of the law. Throughout the country, other states have created their own laws to establish paternity and procedures for inheritance. All states have adopted some form of the federal Uniform Parentage Act with their own variations. The act provides a legal framework establishing paternity, including standards for genetic testing and the court processes for determining paternity.

For many years, in California, for example, laws treated inheritance rights differently for legitimate and illegitimate children. Before the 1970s, social mores guided public policies encouraging marriage and discouraging children born out-of-wedlock. Legislatures assumed that if a parent and child had no relationship, and if the child was never recognized, the parent would not want the child to receive anything from the estate.

As time passed, however, and relationships and family constructs evolved, the state embraced a more progressive interpretation, recognizing in 1982 that a child is a child regardless of whether his or her parents were married. Still, an unknown child unable to take advantage of any of the presumptions of paternity available under the law faced a difficult battle to prove a deceased parent held them out as his or her own or, if the parent did not acknowledge the child, of proving it was impossible for the parent to have done so.

Then DNA technology became a reality in the 1980s. In 1989, in the landmark case of Sanders, the contested inheritor tried to prove paternity and a right to inherit by asking the court to order DNA tests from the decedent's recognized adult children. The court declined because the legislature had not sanctioned the use of DNA evidence to establish paternity. It took another 30 years, the O.J. Simpson trial, and countless episodes of *Law & Order* before the state officially recognized the legitimacy of DNA evidence in probate.

Now that anyone can do a DNA test at home, the rules of engagement have been dragged into the 21st Century. As part of standard tests, the new California law that took effect Jan. 1 allows courts to consider DNA evidence acquired during the parent's lifetime. To avoid disruption, such as a potential heir seeking emergency orders to stop funeral services or to exhume a deceased parent for DNA collection, the law limits the use of DNA to circumstances where the genetic material was obtained during the parent's lifetime, although this is something I see developing further over time.

So, when planning your estate, check your own state's rules to see whether DNA evidence is available because there are differences.

Missouri, for example, RSMo §474.060 says only that a child can inherit from a father if he can establish paternity by adjudication before the death of the father, or by clear and convincing proof. Arkansas A.C.A. § 28-9-209 identifies a legitimate child as someone whose parents were married before his or her birth; or as someone whose parents married after his or her birth and whose father acknowledges his paternity. The law says an illegitimate child may inherit after meeting a string of conditions but only if a claim is made within 180 days of the father's death. In Louisiana, La. C.C. Art. 197, a child may prove paternity after a father's death by clear and convincing evidence, but can only inherit if the claim is made within a year.

All states appear to address the issues of potential heredity claims by putting time limits on when paternity can be established post-death. Some laws also require DNA evidence to be processed by accredited labs or qualified experts who can interpret results.

That means 23AndMe and Ancestry may alert people that they have unknown relatives, but they cannot use the commercial DNA results themselves in a probate case. In fact, the fine print precludes users from utilizing their tests for such purposes.

If you're ready to plan your estate and haven't done a 23AndMe DNA test, should you get one? Should you risk finding an unknown child or having an unknown child find you? You may not have that much control, as the tests become more accurate as more users sign up, some have been able to triangulate their family members even when the parent did not take the test.

The bottom line here is that if you think there is any chance you or your heirs may have unrecognized children (or grandchildren) and you don't want to leave them anything, you should say so in your will. You decide who inherits your assets. Just be sure to be clear about your intentions. Most problems arise because a parent is secretive about these possibilities and, therefore, fails to clearly state intentions.

A relatively bulletproof estate plan names every child and grandchild born during your lifetime whom you would want to share in your inheritance, and states, "I disinherit all other heirs, known and unknown." It's the best way to protect the kingdom and to ensure your legacy is shared only with those you wish.