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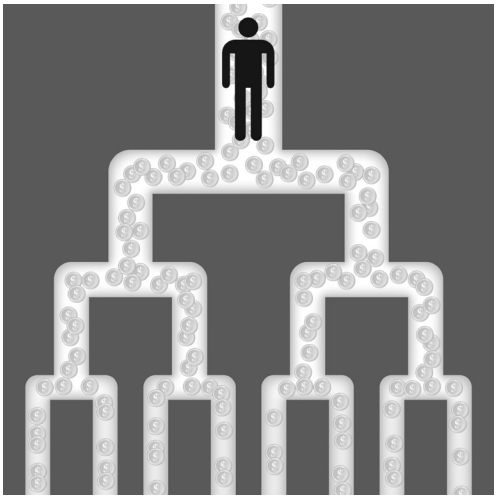
'Brewer' Raises New Issues Regarding Estate Distribution

BY TERENCE E. SMOLEV AND CHRISTINA JONATHAN

On March 7, 2012, the Nassau County Supreme Court issued an order that directed the wrongful death proceeds of two of Brewer's children to be held in escrow until the Surrogate's Court issued a decree to distribute the same. Thus, the Surrogate's Court had to compromise the wrongful death order by first ascertaining who the distributees are, which included Brewer, the children's fathers, the children's siblings, grandparents and unknown heirs. Then the court could decide who would be qualified to take the net proceeds of the settlement, pursuant to the applicable statutes and case law.

Surrogate Judge Edward W. McCarty III, who was a former assistant district attorney, stated in his opening remarks that during his career he "walked through over 100 nightmarish homicide scenes. The photographs of [Brewer's] homicide scene makes it one of the worst that I have experienced." On Feb. 28, 2008 at about 4 a.m., 27-year-old Brewer went into her 8-year-old daughter's bedroom and slit the sleeping child's throat. She then drowned her infant son in the bathtub and laid him in his sister's bloody bed. Brewer noticed that her daughter was still alive, drowned her and returned her to bed. She then drowned her other son and laid his dead body besides his brother and sister. Finally, Brewer attempted to kill herself three times, and after failing, she called 911.

Apparently, the Westbury community and Child Protective Services (CPS) were individually and collectively absent for the cries of help from Brewer and neighbors over the years, which lead to the wrongful death action on behalf of the children. The children's brutal murders resulted in a $350,000 financial settlement by Nassau



County due to CPS' negligence. Surrogate McCarty expressed his disappointment in CPS, who in 1978 also failed a young boy who was beaten and bitten over 24 times by his mother in that same New Cassel community. CPS pledged to never allow this grave negligence to happen again. The Brewer children's deaths indicate otherwise.

It was undisputed that Brewer murdered her three children. However, she was never convicted of the crime due to her severe mental illness. Brewer genuinely believed that the death of her children would break a voodoo curse under which they had been living. At first blush, it may seem obvious that Brewer should not be entitled to any part of her children's Estate since the settlement was a direct result of her murders. Surprisingly, there were very persuasive arguments made to support Brewer's claim and the current law.

Brewer's attorneys relied on several insanity cases that allowed distributees to collect from their victim's estate. Some of these cases included *Matter of Wirth*, 59 Misc. 2d 300, where a husband was entitled to his intestate distributive share even though he killed his wife, because he was found not criminally responsible by reason of insanity. In *Matter of Fitzsimmons*, 64 Misc. 2d 622, an insane man murdered his parents and was entitled to his distributive share. Further, in *Matter of Eckardt*, 184 Misc. 748, a woman was acquitted of killing her husband while sleepwalking in a somnambulist state, and was entitled to take her distributive share. Brewer's position, supported by these cases and several more, was that a person who is not found guilty by reason of mental illness is excused from criminal punishment of the crime.

In his decision dated Dec. 23, 2013, Surrogate McCarty described *Brewer* as a "classic illustration of the equitable dilemma between two moral public policies." The distinguishing factor that ultimately lead to McCarty's ruling was that none of the insanity cases were ever addressed in the context of a wrongful death proceeding. This was the first time that a New York Surrogate's Court had to decide the specific issue of "whether a person who pleads guilty by reason of mental disease or defect in a criminal proceeding is disqualified from sharing in the proceeds of a wrongful death compromise arising out of the killing of her children at her own hands."[1]

The starting point of the legal arguments was based on the well-established law that "one who takes the life of another should not be permitted to profit from his own wrong and shall be barred from inheriting from the person slain." *Riggs v. Palmer*, 115 N.Y. 506. In *Riggs*, a grandson was disqualified from taking an inheritance in his grandfather's estate because he murdered his grandfather solely to inherit. In that case, "the Court of Appeals articulated the long-accepted principle 'that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his crime,'" as noted by Surrogate McCarty in his decision. Interestingly, there are no express statutory provisions denying a murderer from inheriting from the victim. Nevertheless, the numerous cases since *Riggs* reaffirmed the common law principle that one should not profit from his crime. Such person is precluded from becoming a distributee of the victim's estate.

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Brewer was not as straight forward though, since Brewer was never convicted of the three children's murders. The expert opinions of two board certified psychiatrists, hired by the Nassau County District Attorney, concluded that Brewer was not responsible for their murders due to her "inability to substantially understand the nature and consequences of her action due to the mental disease," as acknowledged by McCarty during the hearing.

Psychiatry and questions of culpability for individual actions have a significant history in the law, absolving individuals of their murders due to mental defect/disease, as previously discussed herein. However, there is a lower standard of mens rea applicable in the civil context, in which Brewer possessed the requisite intent for disqualification as a distributee. The ultimate distinguishing factors in *Brewer* is that Brewer intended to kill all three of her children that night and that the estates would not have been funded but for these murders. Hence, the unique legal principles of *Brewer* created new law, which Surrogate McCarty labeled the Brewer rule:

> [A] person found not responsible for a crime due to mental disease or defect who has the ability to recognize that her conduct was morally wrong when undertaken shall not financially benefit from that action.

It is well established that one who comes into equity must come with clean hands, a maxim known by every law student. McCarty's decision was guided by this very principle. He reasoned in his decision:

> [W]hile this court has struggled with the plea of not guilty by reason of mental disease or defect, the court is also cognizant of Leatrice Brewer's admission concerning the methodical manner in which she took the lives of her three children. To ignore Leatrice Brewer's own admissions concerning her children's deaths by allowing her to share in a fund which would otherwise not have existed but for her conduct, disturbs the conscience of the court.

Often, judges turn to equity when a legal decision does not feel right. Here, the decision resulted from that sinking feeling of repugnancy if Brewer was allowed to financially profit from the gruesome murder of her three innocent children. Surrogate McCarty grounded the Brewer rule in equity by adopting the dissent in the Ford decision:

> [T]he fact that the state cannot criminally punish an insane defendant is irrelevant to a determination of whether it is equitable for the killer to inherit from the victim. It is one thing to say that the state should not imprison one who was insane when she committed the murder. It is quite another to say that the insane murderer can profit from her crime. The only relevant focus here must be upon the killer's moral and personal responsibility for the crime.[2]

Surrogate McCarty described 'Brewer' as a "classic illustration of the **equitable dilemma** between two moral public policies."

McCarty's decision was not based on the mechanical application of the insanity defense, which would absolve a person with a mental disease or defect from a crime. Brewer was always cognizant of the fact that she murdered her three children, which she admitted in her plea allocution for the criminal trial. The children's deaths were exactly the results that Brewer intended, and the court "will not relieve Ms. Brewer from moral responsibility." The Brewer rule, grounded in morality and equity, may now have to withstand the scrutiny of the appellate courts, but as of this date, it is the controlling law on this issue.

In addition, Brewer's disqualification to collect from the children's estate opened the door to several other issues that McCarty has yet to decide, the crux of which is who is entitled to the deceased children's $350,000 estate. Pursuant to New York's EPTL Law §4-1.1, distribution shall be made first to the children's parents. If it cannot go to the children's parents, then it goes to the issue of the parents. If it cannot go to the issue of the parents, then it would go to one or more grandparents.

Brewer's deceased children had different fathers. Her oldest child, whose throat she slit and then drowned, was fathered by Ricky Ward. Ward left both Brewer and his daughter shortly after the child was born. Less than two years later, Brewer had her two sons with a man named Innocent Demesyeux. Upon information and belief, Demesyeux also left Brewer and his two sons.

According to EPTL Law §4-1.1, the fathers are entitled to their respective children's portion of the estate. However, the legal principle of abandonment may disqualify them from collecting. EPTL Law §4-1.4(a) specifically provides that a parent who has failed or refused to provide for a child under age 21, or who has abandoned such child, is prohibited from taking a distributive share. "Abandonment amounts to a voluntary breach or neglect of the duty to care for and train a child and the duty to supervise and guide the child's growth and development."[3] The law is clear for abandonment, but ascertaining whether or not the Fathers are disqualified under that provision is not as black and white. To assist in his ruling, Surrogate McCarty appointed a noted attorney, Kenneth J. Weinstein, to act as guardian ad litem for possible unknown distributees. Weinstein is responsible for investigating familial relationships with the deceased children, if any, and the cases that may support such persons' qualification to collect from the estates.

If both fathers are disqualified, by law their issue could still collect. At this time, we do not know if the two fathers had any other children. Brewer, on the other hand, had recently given birth to another baby. Under New York's EPTL Law §4-1.1, this baby is eligible to collect from her deceased half-sister and half-brothers' estates and may in fact have the best chance of receiving the money if the fathers are disqualified. This may not rest well with Brewer's grandmother, who sat in the courtroom during the hearing on Nov. 6, 2013 waiting to hear McCarty's decision, as she too may qualify as a distributee.

Brewer, which started off with the complex issue of Brewer's ability to collect from her children's estate, led to the aforementioned interesting question pending before the Nassau County Surrogate's Court, of where the money now goes. We hope to write about that decision early next year.

1. Nassau County Surrogate's Court Decision, *In the Matter of Innocent Demesyeux*, File No: 350391/A and *In the Matter of Michael Demesyeux*, File No.: 350392/A.
2. See *Ford v. Ford*, 307 Md. 105, 138-39, 512 A.2d 389 [Ct of Appeals, Md 1986].
3. See *Matter of Wigfall*, 20 Misc. 3d 648, 652 (Sur. Ct., Westchester County 2008).