

## Intestate Succession Rights and Children Born Out of Wedlock

A 21-year old unmarried man dies without a will. An [application for letters](#) of administration is filed with the clerk of superior court by his mother and father. The only persons identified on the application as entitled to share in the decedent's estate are his mother and father. No spouse or child is listed. No property is listed on the preliminary inventory included in the application as property of the estate or property that may be added to the estate to pay claims. The only other property identified is a potential claim from wrongful death under [G.S. 28A-18-2](#). Based upon the application and an [oath/affirmation](#) from both parents, the clerk of superior court enters an [order authorizing the issuance of letters](#) and issues [letters of administration](#) to the parents of the decedent.

After the clerk issues the letters, a motion is filed in the estate **alleging that a minor child is the sole heir to the decedent's estate**. The motion states that the decedent was the minor child's natural father. The motion asks the clerk to determine that the child is an heir of the decedent so that any funds from the wrongful death action will go to the minor child. [G.S. 28A-2-4\(a\)\(4\)](#) (applicable to estates of decedents dying on or after January 1, 2012) (stating that the clerk has original jurisdiction of estate proceedings, which includes proceedings to ascertain heirs).

### A. What law must the court apply to determine whether the child has a right to inherit via intestate succession?

Although the minor child was born out of wedlock, whether the child has a right to take from the decedent (the putative or alleged biological father) through intestate succession depends on whether the child (i) was legitimated during the lifetime of the father, or (ii) remained illegitimate at the father's death, but some other statutorily prescribed action was taken that triggers the child's right to take from the decedent. (The child may also have intestate rights if the child was adopted by the putative father. However, adoption, including adoption under G.S. Chapter 48 and equitable adoption, is beyond the scope of this post. [G.S. 29-17](#); *Lankford v. Wright*, 347 N.C. 115 (1997) (adopting the doctrine of equitable adoption in NC).)

#### 1. Legitimated During the Lifetime of the Father

Although the child was born out of wedlock, the child may have been legitimated during the lifetime of the putative father one of three ways and thus may be entitled to inherit as a legitimate child the same as if born in lawful wedlock. **None of the methods below may occur after the death of the putative father.** See *Helms v. Young-Woodard*, 104 N.C. App. 746 (1991) (holding that a legitimation action must be reduced to judgment before the death of the putative father for the illegitimate child to inherit via intestate succession); *Tucker v. City of Clinton*, 120 N.C. App. 776 (1995) (holding that legitimation statutes inoperative after death of the father).

**a. Mother Unmarried at Conception through Birth.** If the child's mother was unmarried from conception through birth, the decedent could have filed a petition under [G.S. 49-10](#) before the clerk of superior court to legitimate the child prior to his death. If the clerk determined the decedent was the biological father of the child, the clerk would have entered an order declaring the child legitimated while the father was alive.

**b. Mother Married at Conception, Birth, or In Between to Another Man.** If the child's mother was married at conception, birth, or any time in between to a man that was not the child's biological father, the putative father could have filed a petition under [G.S. 49-12.1](#) before the clerk of superior court to legitimate the child prior to his death. If the clerk determined the decedent was the biological father of the child, the clerk would have entered an order declaring the child legitimated while the father was alive.

**c. Mother and Putative Father Marry After Birth.** The child may also have been legitimated during the lifetime of a putative father if the mother of the child and the putative father married each other after the birth of the child. [G.S. 49-12](#).

**2. Born Out of Wedlock and Not Legitimated During Lifetime of the Father, but Otherwise Meets Statutory Requirements of [G.S. 29-19\(b\)](#).**

Even if the child does not have the right to inherit as a legitimated child, the child may still be able to inherit from the decedent via intestate succession if any one of the following occurred:

**a. Separate Action to Establish Paternity.** The decedent had been finally adjudged as the father in either (i) a criminal action for nonsupport of the child under [G.S. 49-1 through G.S. 49-9](#); or (ii) a civil action to establish paternity under [G.S. 49-14 through G.S. 49-16](#).

**b. Written Acknowledgement Filed with the Clerk of Superior Court.** The decedent acknowledged during his lifetime and the child's lifetime that he was the father of the child in a written instrument:

i. Executed or acknowledged before a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made, and

ii. Filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

**c. Death Prior to or Within One Year of Birth and DNA Test.** The decedent died prior to or within one year after the birth of the child and can be established to have been the father of the child by

DNA testing.

[G.S. 29-19\(b\)](#).

## **B. Why does the child's status as legitimated under G.S. 49-10, -12, or -12.1 versus born out of wedlock and entitled to take under G.S. 29-19(b) matter?**

The child's status as legitimate or not at the father's death has a big impact on the automatic right of the child to inherit via intestate succession. A child that is born out of wedlock but later legitimated during the father's lifetime by one of the means set forth in subsection 1 above has the right to take by intestate succession from the father and his heirs **the same as if born in lawful wedlock**. [G.S. 29-18](#). The legitimation triggers an **automatic right** to inherit via intestate succession at death and the child does not have to take any further action in the estate of the father after his death to protect those rights.

In contrast, a child born out of wedlock who is not legitimated during the father's lifetime but is otherwise is entitled to inherit through intestate succession under G.S. 29-19(b) is **only** entitled to take if the child has given written notice of the basis of his or her claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors. [G.S. 29-19\(b\)](#). However, if the child is a minor, the six month time limit to file a claim is tolled. See *Jefferys v. Tolin*, 90 N.C. App. 233 (1988) (holding [G.S. 1-17](#) applies to toll the six month time limitation in G.S. 29-19 during a person's minority).

## **C. Recent NC Court of Appeals Decision: [In re Estate of Williams](#)**

The facts of the case described at the start of this post are drawn from a decision published by the NC Court of Appeals on March 1, 2016, [In re Estate of Williams](#). In that case, the decedent was never married to the child's mother and there was no evidence that the clerk entered an order legitimating the child pursuant to G.S. 49-10 or G.S. 49-12.1 while he was alive. Therefore, for the clerk to determine that the child was entitled to take via intestate succession, the clerk had to find that one of the three statutory requirements set forth in G.S. 29-19(b) was met.

There was no evidence that a court finally adjudged the decedent to be the father in a paternity or criminal nonsupport action. Furthermore, the DNA prong of the statute was added by the General Assembly in 2013 and did not apply retroactively. It did not serve as a basis for establishing intestate rights for the child in [Williams](#) because the father died and the child was born in 2011.

The remaining prong – an acknowledgement of paternity filed with the clerk of superior court – took up the bulk of the analysis of the clerk at the hearing and the superior court and NC Court of Appeals on appeal in [Williams](#). There was evidence that the decedent signed an acknowledgment before an appropriate officer. However, the acknowledgement was not filed with the clerk of superior court during the decedent's lifetime. [G.S. 29-19\(b\)\(2\)](#). The NC Court of Appeals, applying

an earlier holding of the court, stated that **strict compliance, rather than substantial compliance**, with G.S. 29-19(2) is required. Because the acknowledgement in Williams was not filed with the clerk and there was no other basis for triggering the child's right to inherit via intestate succession, the court affirmed the clerk's original order that determined the child was not entitled to inherit from the decedent via intestate succession.