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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1955-15T1

IN THE MATTER OF THE ESTATE OF LOUIS M. ACERRA.

Argued October 18, 2017 – Decided December 7, 2017

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, Docket No. P-000180-15.

Brian E. Ansell argued the cause for appellant/cross-respondent Mark Acerra (Ansell Grimm & Aaron, PC, attorneys; Brian E. Ansell, of counsel and on the brief; Kristine M. Bergman, on the brief).

Stephen J. Caccavale, argued the cause for respondents Eileen Sippel, Suzanne Simons, Sharon Mego, Gayle Oka and Mary Jane Cavanagh (Rudolph & Kayal, PA, attorneys; Stephen J. Caccavale, of counsel and on the brief).

Scott W. Kenneally argued the cause for respondent/cross-appellant Phillis Wallace (Starkey Kelly Kenneally Cunningham & Turnbach, attorneys; Scott W. Kenneally, of counsel and on the brief).

Lawrence B. Litwin argued the cause for respondent/cross-appellant Richard K. Litwin.

John W. Callinan argued the cause for respondent Estate of Louis M. Acerra.

Mark F. Casazza argued the cause for respondents Raquel Acerra, Louis M. Acerra, Joseph M. Acerra, Robert M. Acerra, Jr., Joan Acerra-Marangello, and Dominick Acerra, Sr., (Rudnick Addonizio Pappa & Casazza, attorneys, join in the briefs of respondents Eileen Sippel, Suzanne Simons, Sharon Mego, Gayle Oka and Mary Jane Cavanagh, and respondent Estate of Louis M. Acerra).

Melissa Bayly, Deputy Attorney General, argued the cause for respondent Department of Health, Office of Vital Statistics and Registry (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Melissa Bayly, of counsel and on the brief).

PER CURIAM

This case arises from the administration of the intestate estate of decedent Louis M. Acerra. When decedent died, he was unmarried, had no children or siblings, and was predeceased by his mother and maternal grandparents. His biological father has never been identified. Decedent died from burns he suffered in a fire caused by a defective or negligently repaired product. The ensuing lawsuit settled for a large sum and the estate received a significant share. Numerous relatives and an individual claiming to be decedent's psychological father assert their right to inherit under the laws of intestacy to the exclusion of others.

Appellants Phyllis Wallace and Mark Acerra, the biological children of decedent's maternal grandmother and grandfather, and

thus, decedent's aunt and uncle by the "whole-blood," claim they should inherit the entirety of decedent's estate, to the exclusion of decedent's aunts and uncles by the "half-blood" and his purported psychological father.

Cross-appellant Richard K. Litwin contends he is decedent's presumed biological father for purposes of intestate inheritance because he equitably adopted decedent and acted as his psychological father.

Respondents Eileen Sippel, Suzanne Simons, Sharon Mego, Gayle Oka, and Mary Jane Cavanagh are the biological daughters of decedent's maternal grandmother, but not his maternal grandfather, and thus, decedent's aunts by the "half-blood." They claim they should inherit equally to decedent's aunts and uncles by the "whole-blood" and to the exclusion of decedent's purported psychological father.

Respondents Raquel Acerra, Louis M. Acerra, Joseph M. Acerra, Robert M. Acerra, Jr., Joan Acerra-Marangello, Dominick Acerra, Sr., Michelle Louise Acerra, and Louis James Acerra, who are more remote additional relatives by the "half-blood," also claim they should inherit from the estate by representation to the exclusion of decedent's purported psychological father.

Litwin appeals from the September 11, 2015 order declaring he is not entitled to distribution of any portion of the intestate

estate. Appellants and Litwin appeal from various aspects of the December 11, 2015 judgment: (1) declaring Litwin is not a "parent" of the decedent within the meaning of the laws of intestacy and is not entitled to any distribution from the estate; (2) denying Litwin's application for an award of attorney's fees; and (3) declaring all of decedent's aunts and uncles, whether related through one grandparent or both maternal grandparents of the decedent, inherit the same share of the estate, with those of more remote degree taking by representation. After a review of the record and applicable principles of law, we affirm.

I.

We discern the following undisputed facts from the record. Decedent died intestate on January 17, 2012, at the age of thirty. He had never married and had no children or siblings. He was predeceased by his mother, who died in 2009, and his maternal grandparents. Decedent's biological father remains unknown.

At the time of his death, decedent was survived by his aunt Phyllis Wallace and his uncle Mark Acerra, who were born to the same parents as his mother, and are thus his aunt and uncle by the whole-blood. In addition, he was survived by Sharon Mego, Suzanne Simons, Gayle Oka, Mary Jane Cavanagh, and Eileen Sippel, who are the biological daughters of his maternal grandmother but not his maternal grandfather, and are thus aunts by the half-blood.

Richard Litwin claims to have equitably adopted decedent and to be decedent's psychological father. Litwin was in a relationship with decedent's mother at the time of decedent's birth in 1981. Litwin lived with decedent's mother until she passed and with decedent his entire life. Litwin raised decedent as if he were his own son by providing him with food and shelter, and assisting with his college tuition. Decedent's mother had legal custody until a March 21, 1995 order awarded Litwin custody when decedent was fourteen years old. However, Litwin was not decedent's stepfather as he never married decedent's mother. Nor did he ever legally adopt decedent. In 1990, genetic paternity testing conclusively determined that Litwin was not decedent's biological father.

In 2009, decedent suffered grievous injuries in a house fire caused by a defective dishwasher. He sustained third degree burns to most of his body but lived more than two years after the fire until finally succumbing to his injuries in January 2012. From the time of the fire until decedent's passing, Litwin cared for decedent, paid for his living expenses, and arranged his doctor's appointments.

Following the fire, Litwin filed a lawsuit, individually and on decedent's behalf, against the manufacturer of the dishwasher and other defendants alleging negligence. In addition to claims

for the injuries sustained by decedent, Litwin asserted claims for his own injuries, including an emotional distress claim pursuant to Portee v. Jaffee, 84 N.J. 88 (1980), based on his observations of decedent at the fire scene.[1] Following motion practice and the successful interlocutory appeal, the parties reached a global settlement, with the estate receiving $4,706,250 less costs and attorney's fees, and Litwin receiving $3,956,250 less costs and attorney's fees for his personal injury, and Portee claims. The costs and contingent attorney's fees were deducted from the respective recoveries received by the parties. Thus, the estate paid the costs and contingent attorney's fees relating to its portion of the settlement.[2] Similarly, Litwin paid the costs and

[1] A Portee claim is "a cause of action for damages to a bystander as a result of witnessing an injury-producing event to one with whom the bystander has an intimate or familial relationship." Litwin v. Whirlpool Corp., 436 N.J. Super. 80, 86 (App. Div. 2014) (citing Portee, supra, 84 N.J. at 101). In that interlocutory appeal, we reversed a summary judgment order dismissing Litwin's Portee claim because he had not made sufficient observations of the decedent at the fire scene. We held "that under the [summary judgment] standard, plaintiff observed the kind of result that is associated with the aftermath of traumatic injury and that it was not necessary for him to have been inside his home observing [decedent's] body burning in order to satisfy the observation prong supporting a Portee claim." Id. at 88. The issue of decedent's legal relationship to Litwin was not before the court.

[2] The record shows that costs totaling $432,070.91 and attorney's fees of $1,184,873.94 were deducted from the estate's portion of the settlement.

contingent attorney's fees relating to his portion of the settlement.

On May 15, 2015, Litwin commenced this matter seeking to be declared decedent's legal father under the New Jersey Parentage Act, N.J.S.A. 9:17-38 to -58, so he could inherit from decedent's estate. In response, Mark Acerra filed an answer and counterclaim seeking distribution of decedent's estate pursuant to the intestacy statute, N.J.S.A. 3B:5-4(e), as well as opposition to Litwin's application to be declared decedent's father. Thereafter, Phyllis Wallace filed an answer also seeking distribution of the estate pursuant to N.J.S.A. 3B:5-4(e).

On September 28, 2015, the trial court entered an order dismissing Litwin's complaint with prejudice, finding that Litwin was not the father of the decedent under N.J.S.A. 3B:5-4, and was thus not entitled to inherit from decedent's estate.

On September 18, 2015, Eileen Sippel, Suzanne Simons, Gayle Oka, Mary Jane Cavanagh, and Sharon Mego, filed answers and counterclaims asserting they are entitled to inherit by representation under N.J.S.A. 3B:5-4(e) and 3B:5-7.[3]

[3] Although not listed as parties in those answers, Raquel Acerra, Louis Acerra, Joseph Acerra, Robert Acerra, Jr., Joan Acerra-Marangello, Dominick Acerra, Sr., Michelle Louis Acerra, and Louis James Acerra later joined the litigation as additional alleged heirs.

Litwin filed a motion for reconsideration of the September 28, 2015 order. On November 13, 2015, the trial court rendered an oral decision containing detailed findings of fact and conclusions of law, which were subsequently embodied in the December 11, 2015 judgment. The trial court: (1) denied Litwin's motion for reconsideration; (2) determined Litwin had failed to prove his status as decedent's legal father pursuant to N.J.S.A. 3B:5-10 and N.J.S.A. 9:17-38; (3) dismissed Litwin's complaint with prejudice; (4) denied Litwin's application for an award of attorney's fees from the estate; (5) ordered the substitute administrator to conduct a genealogical search for potential heirs of the estate; and (6) declared that relatives of the "half-blood" and "whole-blood" take equally under the intestacy statutes. The court entered a stay of these rulings on December 11, 2015.

Litwin filed a motion for reconsideration of the December 11, 2015 judgment and for leave to file an amended complaint adding an additional count to declare him the equitable father of the decedent and to impose a constructive trust. On January 15, 2016, the trial court rendered an oral opinion and order denying his motion.

This appeal followed. Appellants raise the following arguments: (1) the trial court erred in concluding the estate should be divided equally amongst relatives of the "half-blood"

and the "whole-blood"; and (2) the trial court erred in its interpretation of N.J.S.A. 3B:5-7 by determining descendants of one of decedent's grandparents, but not both, are "half-blood" relatives for purposes of intestate distribution.

In his cross-appeal, Litwin raises the following arguments: (1) he is entitled to inherit decedent's intestate estate because he is presumed to be the biological father of the decedent pursuant to the Parentage Act; (2) he is entitled to inherit the estate under N.J.S.A. 3B:5-14.1; (3) he has a constitutional right to be treated as decedent's father for purposes of intestacy under the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution; (4) as the psychological father of the decedent, he is entitled to inherit through intestacy; (5) he should inherit the estate because he equitably or constructively adopted the decedent; (6) he is decedent's father based on the doctrines of collateral estoppel and stare decisis; (7) the trial court failed to apply applicable equitable principles; and (8) the trial court erred by denying his application for attorneys' fees.

II.

Our review is plenary because "a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty,

L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995). "On appeal, a trial judge's statutory interpretation is reviewed de novo." In re Estate of Fisher, 443 N.J. Super. 180, 190 (App. Div. 2015) (quoting Commerce Bancorp, Inc. v. InterArch, Inc., 417 N.J. Super. 329, 334 (App. Div. 2010)), certif. denied, 224 N.J. 528 (2016).

III.

Regulating succession or intestate inheritance is a legislative province. Estate of Sapery, 28 N.J. 599, 605 (1959); Estate of Holibaugh, 18 N.J. 229, 235 (1955). "The Legislature has plenary power over the devolution of title and the distribution of [an] intestate's property." Cassano v. Durham, 180 N.J. Super. 620, 622 (Law Div. 1981) (citing Holibaugh, supra, 18 N.J. at 235). This appeal requires that we interpret several legislative enactments.

"It is well settled that the goal of statutory interpretation is to ascertain and effectuate the Legislature's intent." State v. Olivero, 221 N.J. 632, 639 (2015) (citing Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)). "Our analysis of a statute begins with its plain language, giving the words their ordinary meaning and significance." Fisher, supra, 443 N.J. Super. at 190 (citing Olivero, supra, 221 N.J. at 639). See also Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ., 221 N.J. 349, 361 (2015). "Statutory language is to be interpreted 'in a common

sense manner to accomplish the legislative purpose.'" Olivero, supra, 221 N.J. at 639 (quoting N.E.R.I. Corp. v. N.J. Highway Auth., 147 N.J. 223, 236 (1996)). "When that language 'clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms.'" Ibid. (quoting McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001)). "We need not look beyond the statutory terms to determine the Legislature's intent when the statutory terms are clear." Estate of Rogiers, 396 N.J. Super. 317, 324 (App. Div. 2007) (citing State v. Churchdale Leasing, Inc., 115 N.J. 83, 101 (1989)), certif. denied, 213 N.J. 46 (2013). "Only if a statute is ambiguous do we resort to extrinsic aids to ascertain the Legislature's intent." Ibid. (citing Wingate v. Estate of Ryan, 149 N.J. 227, 236 (1997)).

A.

We first address Litwin's claim that he should be declared the sole heir of decedent's estate because he is the presumed father of the decedent under the Parentage Act.

The intestate estate of a decedent not survived by a spouse or domestic partner, or by any children, passes to the surviving parents in equal shares. N.J.S.A. 3B:5-4. The Probate Code defines a "parent" as "any person entitled to take or who would be entitled to take if the child, natural or adopted, died without

a will, by intestate succession from the child whose relationship is in question and excludes any person who is a stepparent, resource family parent, or grandparent." N.J.S.A. 3B:1-2. "Where the relationship of parent and child must be determined for purposes of intestate succession, the parent/child relationship may be determined according to the Parentage Act." Rogiers, supra, 396 N.J. Super. at 323 (citing N.J.S.A. 3B:5-10).

The Parentage Act defines the "parent and child relationship" as "the legal relationship existing between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." N.J.S.A. 9:17-39.

The "parent and child relationship" between a child and the natural father may be established by various methods, including prior paternity adjudication, execution of a Certificate of Parentage prior to birth, default judgment, court order, or scientific testing. N.J.S.A. 9:17-41(b). Proof of adoption may also establish the "parent and child relationship." N.J.S.A. 9:17-41(c).

While conceding that he is not decedent's natural or legally adoptive father, Litwin nonetheless contends he is decedent's presumed father pursuant to the presumptions of paternity found

in N.J.S.A. 9:17-43(a), which provides a man is presumed to be the biological father of a child if:

> (4) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; [or]
>
> (5) While the child is under the age of majority, he provides support for the child and openly holds out the child as his natural child.
>
> [N.J.S.A. 9:17-43(a).]

The foregoing presumptions may be rebutted by clear and convincing evidence. N.J.S.A. 9:17-43(b). Notably, however, a presumption of paternity "is rebutted by a court order terminating the presumed father's paternal rights or by establishing that another man is the child's biological or adoptive father." N.J.S.A. 9:17-43(b). "As indicated by the legislative history of that provision, '[t]hese presumptions are intended to facilitate the flow of benefits from the father to the child.'" J.S. v. L.S., 389 N.J. Super. 200, 204 (App. Div. 2006) (alteration in original) (quoting Statement of the Assembly Judiciary, Law, Public Safety and Defense Committee on S. 888 (L. 1983, c. 17), reprinted in comments to N.J.S.A. 9:17-38), certif. denied, 192 N.J. 295 (2007). "Those statutorily recognized rights, privileges, duties and obligations cease upon the determination of non-paternity, through genetic testing or other clear and convincing proof rebutting the

presumption." Ibid. (citing Monmouth County Div. of Soc. Servs. v. P.A.Q., 317 N.J. Super. 187, 198 (App. Div. 1998), certif. denied, 160 N.J. 90 (1999)).

Litwin does not contest the results of the genetic testing which conclusively determined he is not the decedent's natural father. The determination of non-paternity through genetic testing constitutes clear and convincing proof rebutting the presumption of paternity. Ibid. See also N.J.S.A. 9:17-41(b). Accordingly, Litwin's reliance on the Parentage Act is misplaced.

Here, we have no need to examine extrinsic aids to determine the Legislature's meaning of the term "parent." The meaning of the statutory language is clear. A parent includes a father and child relationship, either natural or adoptive. Neither is present here. Therefore, Litwin does not qualify as a parent under the Probate Code for purposes of the intestacy laws.

"It is not the function of this Court to 'rewrite a plainly-written enactment of the Legislature []or presume that the Legislature intended something other than that expressed by way of the plain language.'" DiProspero v. Penn, 183 N.J. 477, 492 (2005) (alteration in original) (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)). Indeed, "we cannot 'write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment.'" Ibid. (quoting Craster v. Bd. of Comm'rs of

Newark, 9 N.J. 225, 230 (1952)). It is not the role of the courts to act as a "super-legislature." Camden City Bd. of Ed. v. McGreevey, 369 N.J. Super. 592, 605 (App. Div. 2004) (citing Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 222 (1985)).

Once genetic testing conclusively established Litwin was not decedent's natural father, any presumption of paternity was incontrovertibly rebutted. A parent and child relationship cannot be conferred upon Litwin by receiving decedent into his home openly, providing support for him, and holding him out as his natural child if genetic testing has excluded him from being the decedent's natural father.

Litwin further contends he is entitled to inherit decedent's estate under N.J.S.A. 3B:5-14.1, which provides a parent of a decedent shall lose all right to intestate succession if:

> (1) The parent refused to acknowledge the decedent or abandoned the decedent when the decedent was a minor by willfully forsaking the decedent, failing to care for and keep the control and custody of the decedent so that the decedent was exposed to physical or moral risk without proper and sufficient protection, or failing to care for and keep the control and custody of the decedent so that the decedent was in the care, custody and control of the State at the time of death[.]
>
> [(emphasis added).]

The plain meaning of the statute does not support Litwin's claim to inheritance. N.J.S.A. 3B:5-14.1 applies to parents, not more remote relatives, such as aunts and uncles. Litwin urges this court to extend the equitable principles applied to a physically abusive and neglectful parent in New Jersey Division of Youth and Family Services v. M.W., to aunts and uncles under N.J.S.A. 3B:5-14.1. 398 N.J. Super. 266, 290 (App. Div.), certif. denied, 196 N.J. 347 (2008). We do not agree.

In M.W., a mother subjected her three children to a level of physical abuse and neglect that "would shock the cynical and wound the most hardened of heart." Id. at 271. In that case, the physical abuse and neglect was so severe that it caused the death of the decedent. The appellate panel held the trial court had the authority to retroactively terminate the mother's parental rights to the deceased child and impose the equitable remedy of a constructive trust to avoid the unjust enrichment that would result from the mother inheriting by intestacy a settlement paid by the State to the estate of the deceased child.

The unique facts in M.W. are distinguishable from the facts in this matter. M.W. involved a physically abusive parent whose conduct led to the death of her child. Here, decedent's aunts and uncles committed no such abusive acts or other wrongdoing. Nor

were they under a duty to support the decedent after the death of his mother.

We further note the legislative history of N.J.S.A. 3B:5-14.1 shows it was enacted in direct response to the decision in M.W. to preclude abusive or neglectful parents from inheriting the estate of their child. Fisher, supra, 443 N.J. Super. at 194. This matter does not involve abusive or neglectful parents. Thus, Litwin's reliance on N.J.S.A. 3B:5-14.1 is misplaced.

Litwin also contends as the decedent's psychological father, he should inherit the same intestate distributive share as if he were the decedent's biological or adoptive father. We disagree. Acting as a child's psychological parent does not confer a parent and child relationship for purposes of intestate succession.

"At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them." V.C. v. M.J.B., 163 N.J. 200, 221, cert. denied, 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000). In V.C., the Court discussed the concept of psychological parentage and the test for determining whether it applies. The Court noted the standards it developed "will govern all cases in which a third party asserts psychological parent status as a basis for a custody or visitation action regarding the child of a legal parent, with whom the third

party has lived in a familial setting." Id. at 227. The language in the opinion that "[o]nce a third party has been determined to be a psychological parent, . . . he or she stands in parity with the legal parent," is clearly limited to issues of custody and visitation. Ibid. (citing Zack v. Fiebert, 235 N.J. Super. 424, 432 (App. Div. 1989)).

Our courts have not applied the concept of psychological parentage beyond custody, visitation, and child support matters. See, e.g., Watkins v. Nelson, 163 N.J. 235, 254 (2000) (noting, in the context of a custody dispute, that "when a third party, such as a stepparent, establishes psychological parentage with the child, the third party stands in the shoes of a natural parent") (citing Zack, supra,, 235 N.J. Super. at 432-33); V.C., supra, 163 N.J. at 205, 230 (awarding plaintiff visitation rights to her former partner's biological children in recognition of her psychological parent status); K.A.F. v. D.L.M., 437 N.J. Super. 123, 127 (App. Div. 2014) (addressing the psychological parent concept in the realm of a custody dispute). We find no authority for the proposition that a psychological parent is considered a parent under our intestacy statutes.

Litwin asks this court to consider Monmouth County Division of Social Services v. R.K., 334 N.J. Super. 177 (Ch. Div. 2000). In R.K., a non-biological father signed a waiver of paternity and

paid child support for eight years. Id. at 181. Although he was not the child's biological father, the court found he was the child's psychological father and denied his application to modify the child support order entered against him. Ibid. Thus, the R.K. court recognized the psychological parent concept where a minor child would otherwise be without support. Ibid.

The present case involves the intestate succession of a deceased adult's estate rather than the custody, visitation, or support of a minor child. In contrast to R.K., Litwin never signed an acknowledgement of paternity or had a child support order entered against him. Rather, he voluntarily participated in genetic paternity testing that excluded him as the biological father of the decedent.

We also conclude that applying the psychological parent concept to intestate succession is inconsistent with the underlying purpose of the Parentage Act. See In re T.J.S., 419 N.J. Super. 46, 53-54 (App. Div. 2011) (noting the primary purpose of the Parentage Act is to "ensure that children born out of wedlock are treated the same as those born to married parents and to provide a procedure to establish parentage in disputed cases").

Further, it is not the role of this court to stretch the psychological parent to the clearly statutory area of intestacy law. "The intestacy laws are thought to fulfill the presumed

intent of decedent and, alternatively, to embody society's judgment as to how the decedent's property should devolve." M.W., supra, 398 N.J. Super. at 290. However, when the decedent leaves no will, distribution of his estate "must be in accord with the order specified in the intestacy statute even when the decedent expresses a contrary intent." Id. at 290-91 (citing Estate of Rozet, 207 N.J. Super. 321, 326 (Law Div. 1985) (finding that succession cannot be defeated even by a decedent's apparent intent to the contrary); Maxwell v. Maxwell, 122 N.J. Eq. 247, 255 (Ch. 1937) (finding that next of kin take by intestacy by force of law, regardless of what the decedent may have intended). "[O]ur case law interprets the language of N.J.S.A. 3B:5-4 to rule out any judicially created exception to intestacy distribution based on the wishes of the [decedent]." Id. at 291 (applying that principle to a seven-year-old decedent, "even though the child cannot opt out of the default distribution of the intestacy statute").

"The laws of intestacy are not mandated by the State, but rather come into effect only when a decedent fails to devise his estate by will. They are a method of distribution by default." Rozet, supra, 207 N.J. Super. at 326. "For those dissatisfied with distribution by intestacy, the simple answer is to execute a will." M.W., supra, 398 N.J. Super. at 291. That option was fully available to decedent who was twenty-eight years old when

the fire occurred and thirty years old when he died. Had he desired Litwin to be his heir, he could have executed a will bequeathing some or all of his estate to him.

Litwin also argues he is entitled to inherit the estate because he equitably or constructively adopted the decedent. "New Jersey recognizes the doctrine of equitable adoption as a theory of inheritance under intestacy." In re W.R. ex rel. S.W., 412 N.J. Super. 275, 279 n.2 (Law Div. 2009) (citing Burdick v. Grimshaw, 113 N.J. Eq. 591, 596 (Ch. 1933)). "Equitable adoption is established when it is shown that the decedent agreed to adopt the child, the natural parent acted in reliance, and the child was treated as a child of the decedent, but there was no legal adoption." In re Adoption of A Child by N.E.Y., 267 N.J. Super. 88, 98 (1993) (quoting Kupec v. Cooper, 593 So. 2d 1176, 1177 (Fla. Dist. Ct. App. 1987)). In recognition of equitable adoption, courts have stated:

> [E]quitable adoption is a judicial construct used to uphold claims by a child not formally adopted to benefit from his or her "adoptive parents" in the same manner as the parent's natural or legally adopted children. The doctrine provides a remedy for a child in a promised but unfulfilled adoption by granting specific performance of an express or implied contract to adopt, and by estopping any challenge to the validity of the claimed adoption. It is used to ensure fundamental fairness to a child who would otherwise suffer an injustice.

> [Trust Under Agreement of Vander Poel, 396 N.J. Super. 218, 232 (App. Div. 2007), certif. denied, 193 N.J. 587 (2008).]

"Typically, the principle of equitable adoption is applied to benefit the foster child rather than the adoptive parent, and mainly in the context of allowing the child to inherit from a deceased parent's estate." Matter of Adoption of Baby T., 311 N.J. Super. 408, 415 (App. Div. 1998), rev'd and reinstated, 160 N.J. 332 (1999). "Whether the equitable adoption concept is applicable must be decided in the context of a specific claim because each claim is distinct and is supported by policy considerations peculiar to it." Id. at 416.

In Hendershot v. Hendershot, the court held the testator had entered into a binding oral agreement supported by consideration to adopt his stepson and to make a will bequeathing and devising a share of his estate to his stepson. 135 N.J. Eq. 232 (Ch. Div. 1944). The court ordered specific performance of the agreement which had been partially performed.

To find an equitable adoption has occurred, courts generally require proof of an agreement to adopt. For example, in Burdick, in which a stepson sought enforcement of an alleged oral adoption agreement to allow him to inherit from his stepfather's estate, the court explained the necessity for exacting proof to enforce

an alleged oral agreement to adopt a child. Supra, 113 N.J. Eq. 591.

> While a court of equity -- when to do otherwise would result in palpable injustice -- should unhesitatingly decree an adoption and its incidental and resultant rights of inheritance, where there has been no formal statutory adoption effected, it should, however, always require that the adoption agreement be first established by proof of the type and character required in such cases, with respect to the production and sufficiency of which it should be rigid and exacting.
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> Sight, however, must not be lost of the fact that parol agreements of that character are not looked upon with favor by the courts. Such is but the natural result of the fact that they are easily fabricated and most difficult to disprove, since they most usually are not brought into controversy until after the grim reaper has intervened and forever hushed the voice of the alleged promisor . . . . It is because of these facts that the courts have come to regard this class of oral agreements with grave suspicion, have subjected them to close scrutiny and have allowed them to stand only when established by evidence that is clear, cogent and convincing, leaving no doubt with respect to their actual making and existence.
>
> [Id. at 597-98 (citations omitted).]

Because the stepson in Burdick did not present "direct cogent evidence" that the decedent specifically agreed to adopt him, the court found the evidence to be "manifestly deficient" and falling far short from establishing the stepfather had made a specific

agreement to adopt the stepson. Id. at 599, 602. Accordingly, the court ruled an equitable adoption did not exist.

Additionally, courts have found an equitable adoption to exist where there is clear and convincing evidence that an adoption must have occurred. Ashman v. Madigan, 40 N.J. Super. 147 (Ch. Div. 1956). In those instances, direct evidence of such an agreement is "unnecessary, if, as here, the statements and conduct of the adopting parent are such to furnish clear and satisfactory proof that an adoption must have existed." Id. at 150.

In the present case, Litwin has not established clear and convincing evidence that an agreement to adopt the decedent ever existed. At best, Litwin claims he intended to marry decedent's mother Louanne Acerra and adopt decedent. In his certification dated July 20, 2015, Litwin stated: "Over the years, on numerous occasions, I discussed adopting Louis with both Louanne and Louis." He further stated: "Louanne and I often discussed that I wanted to adopt Louis. I also discussed with Louis that I wanted to adopt him." Litwin believed that if he married Louanne, he "would be deemed to have adopted Louis" without filing any formal adoption papers. Unfortunately, Louanne Acerra died before they were married.

The record demonstrates Litwin did not enter into an enforceable agreement to adopt the decedent. Nor did he take any

steps to initiate an adoption proceeding. The trial court correctly concluded an equitable adoption did not exist.

Litwin's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Litwin has failed to establish a parent and child relationship under the purely statutory intestacy laws because he is neither a natural nor adoptive parent. Therefore, the trial court correctly concluded he is not entitled to inherit from decedent's estate.

B.

We next address Litwin's application for an award of attorney's fees from the estate pursuant to Rule 4:42-9(a)(3) and out of a fund in court pursuant to Rule 4:42-9(a)(2). Under either subsection, the award of counsel fees is discretionary. See R. 4:42-9(a)(2) (stating a court "in its discretion may make an allowance out of such a fund"); R. 4:42-9(a)(3) (stating "the court may make an allowance"). The trial court denied counsel fees under both subsections of the rule.

"[A] reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443-44 (2001)). The same standard of review applies to the denial of counsel fees.

Rule 4:42-9(a)(3) permits a court, in its discretion, to make an allowance for attorneys' fees in certain probate actions, providing in pertinent part:

> In a probate action, if probate is refused, the court may make an allowance to be paid out of the estate of the decedent. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate.
>
> [R. 4:42-9(a)(3).]

Reasonable cause under the rule requires the moving party to "provide the court with a factual background reasonably justifying the inquiry as to the testamentary sufficiency of the instrument by the legal process." In re Will & Codicil of Macool, 416 N.J. Super. 298, 313 (App. Div. 2010) (citation omitted).

Here, Litwin was not contesting the validity of a will or codicil. He was litigating his claim to entitlement to distribution as an intestate heir. His claim lacked merit and was denied. Defending against Litwin's claim caused the estate to incur substantial attorney's fees. Had he succeeded, the legal services performed by his attorney would have benefitted only him, not the estate. Under these circumstances, Litwin did not qualify for an award of attorney's fees. See In re Trust Agreement Dated Dec. 20, 1961, 399 N.J. Super. 237, 260-62 (App. Div. 2006)

(holding a claimant who succeeded only in being added to a class of beneficiaries who may receive a distribution benefitted only himself and is not entitled to an award of attorney's fees), aff'd, 194 N.J. 276 (2008); Estate of Silverman, 94 N.J. Super. 189, 194-95 (App. Div. 1967) (disallowing fees for that portion of case prosecuted by plaintiff to advance his own interests); Estate of Balgar, 399 N.J. Super. 426 (Law Div. 2007) (holding services benefitting only the litigant and not the estate do not qualify for an attorney's fee award). Under the facts in this matter, the denial of Litwin's application for an award of attorney's fees was not an abuse of discretion.

During oral argument, Litwin also argued he should be awarded attorney's fees under the fund in court doctrine. This issue was not briefed by Litwin. Our rules require an appellant to identify and fully brief any issue raised on appeal. R. 2:6-2(a). Parties to an appeal are required to make a proper legal argument, supporting their legal argument with appropriate record references and providing the law. State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977); see also Sackman v. N.J. Mfrs. Ins. Co., 445 N.J. Super. 278, 297-98 (App. Div. 2016). It is not the appellate court's duty to search the record to substantiate a party's argument. 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011).

For these reasons, a party's failure to properly brief an issue will be deemed a waiver. See, e.g., Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); N.J. Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div.), certif. denied, 222 N.J. 17 (2015). An appellant may escape that waiver only in the interests of justice. Otto v. Prudential Prop. & Cas. Ins. Co., 278 N.J. Super. 176, 181 (App. Div. 1994).

Because Litwin did not address this claim in his brief, we consider the claim waived and abandoned. See Drinker Biddle & Reath LLP v. N.J. Dep't. of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011). For the following reasons, the interests of justice do not require us to consider this issue as we find Litwin's fund in court claim to have no merit.

The respective litigation costs and contingent attorney's fees generated by the underlying negligence action were deducted from each plaintiff's settlement recovery. As a result, the estate paid for the costs and fees relating to its portion of the settlement. Accordingly, the fund in court doctrine does not apply to the negligence recovery.

The legal services rendered by Litwin's attorney in the probate action redounded only to his own benefit, not to the benefit of the heirs of the estate. The fund in court exception to the American rule that parties bear their own attorney's fees

"does not apply when a party litigates a private dispute for its own personal gain." Henderson v. Camden Cty Mun. Util. Auth., 176 N.J. 554, 564 (2003) (citing Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 169-70 (1960); Janovsky v. Am. Motorists Ins. Co., 11 N.J. 1, 7-8 (1952)).

The record amply supports the denial of Litwin's application for counsel fees. We discern no abuse of discretion by the trial court.

C.

Finally, we address appellants' claims that the trial court erred by ruling relatives of the "half-blood" inherit equally to relatives of the "whole-blood" pursuant to N.J.S.A. 3B:5-4(e) and N.J.S.A. 3B:5-7. We disagree.

N.J.S.A. 3B:5-4 governs the intestate share of heirs other than a surviving spouse or domestic partner. In relevant part, it provides decedent's estate passes to his aunts and uncles, stating:

> If there is no surviving descendant, parent, descendant of a parent, or grandparent, but the decedent is survived by one or more descendants of grandparents, the descendants take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation[.]
>
> [N.J.S.A. 3B:5-4(e).]

Wallace and Acerra contend aunts and uncles of the "half-blood" do not inherit because, while subsections (c) and (d) of N.J.S.A. 3B:5-4 use the language "either of them" when describing distribution to descendants of the decedent's grandparents, subsection (e) does not. They further contend the "half-blood" concept in our intestacy law is limited to siblings and their issue, and, thus, respondents do not qualify as half-bloods within the meaning of the statute.

Appellants liken their situation to the facts in Bray v. Taylor, where the court noted that, by traditional common law rule, cousins by "half-blood" were not permitted to inherit under the fifth section of the intestacy statute, which extended only to brothers and sisters of the "half-blood," rather than collaterals of a more remote degree. 36 N.J.L. 415, 418 (E. & A. 1872). But see In re Estate of Peake, 115 N.J. Eq. 233 (Prerog. Ct.) (holding that relatives of half-blood and whole-blood take equally by representation), aff'd, 116 N.J. Eq. 565 (1934). The statute under review in Bray is no longer in effect. In light of the enactment of N.J.S.A. 3B:5-7, we do not consider Bray controlling authority.

The intent of the Legislature is clear. By enacting N.J.S.A. 3B:5-7, the Legislature clearly and unambiguously pronounced that relatives of the "half-blood" and the "whole-blood" inherit

equally under our law of intestacy. The language of the statute could not be clearer: "Relatives of the half[-]blood inherit the same share they would inherit if they were of the whole[-]blood." N.J.S.A. 3B:5-7.

Aside from the clear and unambiguous language of the statute, several more recent decisions support the conclusion that half-blood and whole-blood relatives take equally, and that the half-blood inheritance status is not limited to the sibling level of kinship. In Murphy v. Westfield Trust Co., the Court specifically recognized half-blood and whole-blood relatives are on equal footing. 130 N.J. Eq. 600, 601 (E. & A. 1942). In so ruling, the Murphy court did not distinguish between relatives of the half-blood at the sibling level, and relatives of the half-blood at more remote levels.

Further, in Wood v. Wood, the court rejected the argument that relationship to a decedent through a "double bloodline" entitles a relative to a greater portion of the intestate estate. 160 N.J. Super. 597, 602 (App. Div. 1978). The decedent in Wood died intestate, leaving a maternal grandmother and paternal aunt as his surviving heirs. Id. at 599. Thereafter, decedent's paternal aunt claimed she was entitled to a greater share of the decedent's estate. Ibid. The court held the estate should be equally distributed between the aunt and the grandmother,

concluding "a dual relationship does not entitle the holder to a multiple inheritance." Id. at 603 (citation omitted).

We hold decedent's aunts and uncles of the half-blood and the whole-blood inherit equally under our intestacy laws. N.J.S.A. 3B:5-7 mandates that result. The statute draws no distinction between relatives at the level of aunts and uncles, and those related by more remote degrees of kinship. For these reasons, we affirm the trial court's ruling that relatives of the "half-blood" and "whole-blood" inherit equally.

IV.

In summary, we affirm the trial court's ruling that Litwin, who is neither decedent's biological father nor his adoptive father, is not an intestate heir of the estate. We further affirm the trial court's decision to deny Litwin's application for counsel fees. We also affirm the trial court's ruling that in an intestate estate, relatives of the "half-blood" take equally with relatives of the "whole-blood."

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION