11 Misc.3d 245
Surrogate's Court, Cortland County, New York.

In the Matter of the ESTATE
OF Jason PESSONI, Deceased.

Nov. 10, 2005.

Synopsis
Background: Mother and father filed separate petitions for letters of administration with respect to estate of intestate son and objected to each other's petitions. Mother moved for summary judgment.

[Holding:] The Surrogate's Court, Cortland County, Julie A. Campbell, J., held that father abandoned child within meaning of statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child.

Motion granted.

West Headnotes (15)

[1] Descent and Distribution
Unworthiness or Misconduct in General

"Abandonment," within meaning of statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child, is 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. McKinney's EPTL 4–1.4.

1 Cases that cite this headnote

[2] Descent and Distribution
Unworthiness or Misconduct in General

Issue for determining whether father was disqualified from taking distributive share of deceased child's estate on ground that father abandoned child was whether father evinced an intent to forego his parental rights as manifested by his failure to visit with child or to communicate with him while he was a child. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[3] Descent and Distribution
Unworthiness or Misconduct in General

"Abandonment," within meaning of statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child, includes the withholding of one's presence, care, and the opportunity to display voluntary affection. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[4] Descent and Distribution
Unworthiness or Misconduct in General

A parent's long-distance love and occasional visits do not constitute the natural and legal obligations of training, care, and guidance owed by a parent to a child, as would preclude a finding of abandonment under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[5] Descent and Distribution
Unworthiness or Misconduct in General

Incidental acts by a parent, including occasional visits or the occasional giving of money to the child, fall far short of showing a willingness to perform parental duties and to provide a child with the parental care and attention to which he is entitled, as would preclude a finding of abandonment under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[6] Descent and Distribution
Unworthiness or Misconduct in General

Neither insubstantial or infrequent visits or communications, nor a parent's subjective intent, are sufficient to preclude a finding of abandonment under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[7] **Descent and Distribution**
Unworthiness or Misconduct in General

A parent's merely being on speaking terms with child at time of child's death does not constitute a resumption of parental relationship and duty so as to remove the disqualification of abandonment under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[8] **Descent and Distribution**
Unworthiness or Misconduct in General

Father "abandoned" child within meaning of statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child, even though father paid child support pursuant to court order, where father had no contact with child since at least 1989 when child was approximately 15 years old and continuing through child's death at age 30, with the exception of a few letters exchanged in 1993, and father did not exercise his court ordered visitation rights or pursue any legal remedy to their alleged denial. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[9] **Descent and Distribution**
Unworthiness or Misconduct in General

Disqualification of parent from taking any distributive share of estate of deceased child may be premised on two separate and distinct statutory criteria: (1) failure or refusal to support child, or (2) abandonment of child. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[10] **Descent and Distribution**
Presumptions and Burden of Proof

Descent and Distribution
Sufficiency of Evidence

Burden is on the party asserting disqualification under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child, and the proof of abandonment must be clear. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[11] **Descent and Distribution**
Unworthiness or Misconduct in General

Where the evidence establishes that a parent made child support payments pursuant to a court order, but otherwise neglected and abandoned child, parent is not entitled to inherit from child's estate. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[12] **Descent and Distribution**
Unworthiness or Misconduct in General

"Abandoned," within meaning of statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child, connotes a failure by a parent, for a material period prior to the child's death, to perform the duties of care and training of a child recognized as essential for the development of the rising generation. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[13] **Descent and Distribution**
Unworthiness or Misconduct in General

Mother's alleged "poisoning" of son against father, which allegedly caused father's estrangement from son for over 15 years,

was immaterial in determining whether father abandoned son under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child; sole inquiry was whether father did or did not, in fact, by his own voluntary action discontinue performance of his legal duty of personal training and care of son. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[14] **Descent and Distribution**
Unworthiness or Misconduct in General
Even a court order restricting parental visitation, while it may lessen the measure of the parent's obligation, does not eliminate it, so that, in determining whether the non-custodial parent has fulfilled his responsibility of care and training to the extent permitted by the order, the test is whether there is a failure to meet even this reduced standard, under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child. McKinney's EPTL 4–1.4.

Cases that cite this headnote

[15] **Descent and Distribution**
Unworthiness or Misconduct in General
Father's inconsolable grief over death of son from whom he had been estranged for 15 years and father's many credits as a veteran, husband to new wife, and father and provider to new child, did not preclude a finding of abandonment under statute prohibiting a parent from taking any distributive share of estate of deceased child on ground that parent abandoned child; father's many credits did not inure to the benefit of deceased son. McKinney's EPTL 4–1.4.

Cases that cite this headnote

Attorneys and Law Firms

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Montgomery Delaney, Esq., Laub & Delaney, LLP, Attorney for John Pessoni.

Opinion

JULIE A. CAMPBELL, J.

***245** This is a contested proceeding for the appointment of an administrator for the estate of Jason Pessoni, who died intestate on May 20, 2005, survived by his parents, John Pessoni and Mary Ann Loehmann, and his brother, Eric Pessoni. The estate consists of personal property having a value of approximately $10,000 and a cause of ****299** action for conscious pain and suffering and wrongful death. On June 15, 2005, decedent's father, John ***246** Pessoni, filed a petition for letters of administration. On July 15, 2005, decedent's mother, Mary Ann Loehmann, filed a petition for letters of administration. On July 27th and August 22nd Ms. Loehmann and Mr. Pessoni, respectively, filed objections to each other's petitions.

Ms. Loehmann has moved for summary judgment with respect to the applicability of EPTL 4–1.4. Ms. Loehmann disputes Mr. Pessoni's qualification as distributee based on EPTL 4–1.4, which prohibits a parent from any distributive share in the estate of a deceased child where such parent "has failed or refused to provide for, or has abandoned" such child before age 21, and has not resumed the parent-child relationship prior to the child's death.

In support of her summary judgment motion Ms. Loehmann has submitted the transcript of John Pessoni's deposition testimony which establishes that he and Mary Ann Loehmann separated when the boys were very young and thereafter, for a time, he exercised some visitation with them. In 1983 he re-married; in 1985 he and his new wife had a son; and sometime in the mid–1980s he stopped seeing or talking to Eric and Jason. He states that he gave up trying to exercise any visitation or maintain any contact in 1989, when Jason moved upstate. [1] He acknowledges that he never saw or spoke to Jason at least from the time he was 15 years old through to his death. He attributes that in part because he didn't know Jason's whereabouts. However, during the last year-and-a-half he has been in contact with Eric, who knew his brother's whereabouts; John Pessoni's parents were in touch with and saw the boys right up until the paternal grandmother's death 5 years ago; and Jason wrote at least two letters to his father in 1993 when he was in the Marine Corps. Thus, it would appear that he had the means to determine Jason's whereabouts

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during his adulthood had he had any interest in doing so. Mr. Pessoni never saw Jason or had any contact with him after Jason got out of the Marines. Rather, he testified that he was waiting for the boys to come to him.

[1] **[2]** **[3]** **[4]** **[5]** **[6]** **[7]** Abandonment within the meaning of EPTL 4–1.4 has been defined as "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" [***247** *In re Emiro,* 5 Misc.3d 1002(A), 2004 WL 2255343 (N.Y.Sur., 2004)]. The issue is whether the father evinced an intent to forego his parental rights as manifested by his failure to visit with the decedent or to communicate with him while he was a child [*In re Estate of Gonzalez,* 196 Misc.2d 984, 768 N.Y.S.2d 276 (N.Y.Sur., 2003)]. The abandonment contemplated by the statute includes the withholding of one's presence, care and the opportunity to display voluntary affection [*In re Herbster's Estate,* 121 N.Y.S.2d 360 (N.Y.Sur., 1953)]. It is a voluntary breach or neglect of the duty to care for and train a child, and the duty to supervise and guide his growth and development [*Ibid.*]. A father's long-distance love and occasional visits do not constitute the "natural and legal obligations of training, care and guidance owed by a parent to a child" [*In re Estate of Gonzalez, supra, quoting Mtr. of Arroyo,* 273 A.D.2d 820, 710 N.Y.S.2d 492 (Fourth Dept., 2000)]. Incidental acts, including occasional visits or the occasional giving of money to the child, fall far short ****300** of showing a willingness to perform parental duties and to provide a child with the parental care and attention to which he is entitled [*Ibid.*]. Neither insubstantial or infrequent visits or communications, nor the father's subjective intent, are sufficient to preclude a finding of abandonment [*In re Estate of Gonzalez, supra, citing* DRL 111(6)]. Merely being on speaking terms at the time of death does not constitute a resumption of parental relationship and duty so as to remove the disqualification [38 N.Y. Jur.2d, Decedents' Estates, 142].

[8] The evidence here, primarily the father's own deposition testimony, clearly established that John Pessoni had no contact with Jason since at least 1989 and continuing through Jason's death, with the exception of a few letters exchanged in 1993.

Initially, the father asserts that the Court should only be concerned with facts up to 1996, when Jason became 21, and that anything between that year and the date of death is irrelevant. That argument is contrary to the statute which requires that the Court consider whether "the parental relationship and duties are subsequently resumed and continue until the death of the child" [EPTL 4–1.4]. In the instant case it is highly relevant that, even after the child reached the age of majority, no relationship was resumed.

The father here argues that inasmuch as he paid child support he cannot be found to be disqualified under EPTL 4–1.4. The mother does not dispute that the father paid child support pursuant to a court order. However, she asserts that he ***248** otherwise neglected and abandoned decedent, at least from the time he was approximately 15 years old, and continuing to the time of death at age 30.

Estates Powers and Trusts Law section 4–1.4(a) provides in pertinent part:

> No distributive share in the estate of a deceased child shall be allowed to a parent who has failed or refused to provide for, or has abandoned such child while such child is under the age of twenty-one years, whether or not such child dies before having attained the age of twenty-one years, unless the parental relationship and duties are subsequently resumed and continue until the death of the child.

[9] **[10]** The statutory criteria are set forth in the conjunctive. Disqualification of a parent under the statute may be premised on either of two criteria: (1) failure or refusal to support the child; or (2) abandonment of the child. "These two criteria are separate and distinct, and, therefore, proof of either will cause the parent to be disqualified" [*Mtr. of Emiro, supra; see, also Estate of Kris Robert Hughes,* N.Y.L.J. 3/29/02, p. 23, col. 3; *In re Pridell's Estate,* 206 Misc. 316, 133 N.Y.S.2d 203 (N.Y.Sur., 1954)]. The statute recognizes the separate and distinct responsibilities for support of a child and for care, training and guidance during the child's formative years. The abandonment contemplated by the statute is the neglect or failure to fulfill the latter responsibility of care and guidance [*In re Pridell's Estate, supra*]. The burden is on the party asserting disqualification and the proof of abandonment must be clear [*Ibid.;* 38 N.Y. Jur.2d, Decedents' Estates, 142].

[11] **[12]** Consequently, where the evidence establishes that the father made child support payments pursuant to a court order, but otherwise neglected and abandoned decedent,

he is not entitled to inherit from the estate of the decedent [*In re Daniels' Estate,* 275 A.D. 890, 90 N.Y.S.2d 26 (1949); *In re Chernega's Estate,* 54 Misc.2d 137, 281 N.Y.S.2d 908 (N.Y.Sur., 1967)]. "Abandoned" under the statute connotes a failure by a parent, for ****301** a material period prior to the child's death, to perform the duties of care and training of a child recognized as essential for the development of the rising generation [*In re Schiffrin's Estate,* 152 Misc. 33, 272 N.Y.S. 583 (N.Y.Sur., 1934)]. Upon a determination of dereliction in that duty, the question of whether that parent had failed to perform his duty of support is immaterial [*Ibid.*]. A father who paid support, but otherwise had no involvement in his child's life is not ***249** entitled to inherit [*In re Guilianelli's Estate,* 7 Misc.2d 171, 166 N.Y.S.2d 206 (N.Y.Sur., 1957), *citing In re Schiffrin's Estate, supra*].

[13] **[14]** The father here also argues that his 15+ year estrangement from his sons was the fault of their mother who "poisoned" them against him. Such mitigating circumstances or reasons for a parent's abandonment of his children, even if supported by credible evidence [2], are immaterial to an inquiry under EPTL 4–1.4. The sole inquiry is whether the parent did or did not, in fact, by his own voluntary action discontinue performance of his legal duty of personal training and care of his children [*In re Schiffrin's Estate, supra*]. It has been noted that if the other parent were to blame for his separation from his children, he had legal remedies he could have pursued through the courts [*In re Emiro, supra; In re Schiffrin's Estate, supra*]. Even a court order restricting parental visitation, while it may lessen the measure of the parent's obligation, does not eliminate it, so that, in determining whether the non-custodial parent has fulfilled his responsibility of care and training to the extent permitted by the order, the test is whether there is a failure to meet even this reduced standard [37 N.Y. Jur.2d, Death 274]. The fact is that, regardless of his motives, the father here elected to absent himself from decedent's life and is thereby disqualified from inheriting [*In re Estate of Gonzalez, supra*]. The father here did not even exercise his court ordered visitation rights, nor did he pursue any legal remedy to their alleged denial. Such failure to avail oneself of court-ordered visitation evinces an intent to voluntarily relinquish such rights [*see Estate of Kris Robert Hughes, supra*].

In the case of *In re Pridell's Estate, supra,* where it was established that the father had failed for a period of 7 years between his remarriage and the child's death to visit the child, to correspond with him, or make any inquiry or to show any concern for his health, education or progress, the Court found that the evidence indicated not only a neglect of all parental responsibility, but also a complete indifference and lack of concern for the welfare of the child, so as to constitute abandonment within the meaning of the statute.

[15] In opposition to this motion Pessoni has submitted an (unsworn) letter from the Director of the Ocean County Veterans ***250** Service Bureau stating that "since the death of his son Eric (sic), Mr. Pessoni is inconsolable in his grief," and an affidavit from his wife of 22–years telling the Court what " a wonderful father" he is. And he asks the Court to consider his exemplary life as a decorated combat veteran. The Court has no doubt that Mr. Pessoni is inconsolable over the death of a son from whom he had been estranged for 15 years. And while his wife may view him as a wonderful father, that would be in relation to another son, not the son who is the subject of this proceeding. Likewise, ****302** with respect to his many credits as a veteran, husband and provider, those qualities, however admirable, did not inure to the benefit of Jason and, consequently, have no relevance to the issue before the Court.

"It has long been an axiom in this state ... that the legislature is presumed to have intended to do justice, unless its language compels the opposite conclusion' " [*Mtr. of Caldwell v. Alliance Consulting Group, Inc.,* 6 A.D.3d 761 at 764, 775 N.Y.S.2d 92 (Third Dept., 2004), *quoting People ex rel. Beaman v. Feitner,* 168 N.Y. 360, 366, 61 N.E. 280 (1901); *see, also,* McKinney's Cons. Laws of N.Y., Book 1, Statutes, 141, 146]. Justice is not fostered by rewarding in any fashion a parent who purposefully fails to provide any emotional or nurturing support to a child [*Mtr. of Caldwell v. Alliance Consulting Group, Inc., supra*]. No dividend should be permitted to flow from the dereliction of that duty [*Ibid.*]. The obvious intent and purpose of EPTL 4–1.4 is to prevent this precise scenario, i.e., a parent who has been no part of the child's life showing up to share the spoils of his death. [3] The statute reflects society's view "of certain privileges which attach to family relationships" [*Ibid.* at 765, 775 N.Y.S.2d 92, *quoting Monopoli, "Deadbeat Dads": Should Support and Inheritance Be Linked?,* 49 U Miami L. Rev. 257, 258–259 (1994)]. It is difficult to imagine a case more suited to the application of the statute.

Ms. Loehmann has satisfactorily established Mr. Pessoni's ineligibility to be a distributive beneficiary under decedent's estate. As a parent who has abandoned the child during his minority, the father is disqualified from sharing in the son's estate [EPTL 4–1.4]. Consequently, he lacks standing to

receive ***251** letters of administration [SCPA 1001] and her motion for summary judgment will be granted and his petition for letters of administration will be dismissed.

Accordingly, Ms. Loehmann is the only petitioning party with standing.

The foregoing constitutes the opinion, decision and order of the Court.

Parallel Citations

11 Misc.3d 245, 810 N.Y.S.2d 296, 2005 N.Y. Slip Op. 25564

Footnotes

1 At age 14 or 15 Jason witnessed a murder and was placed in the witness protection program.

2 It should be noted that his own testimony was inconsistent in this regard. While alleging, on the one hand, that Ms. Loehmann thwarted or prevented his visitation with the boys, he also asserts, on the other hand, that she would bring them to stay with him when she wanted to go out.

3 For what its worth, a wrongful death award is divided between the eligible distributees in proportion to their pecuniary loss [*Hanson v. Erie County,* 120 A.D.2d 135, 507 N.Y.S.2d 778 (Fourth Dept., 1986); 37 N.Y. Jur.2d, Death 451]. Consequently, here, where the decedent was planning to relocate to reside with the mother to care for her during her illness and had no contact or relationship with the father for more than 15 years, even if the father were eligible to share a distributive award, it would appear that his share would be negligible, if any.

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