

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

IN THE MATTER OF THE ESTATE OF)	PROBATE NO. ST-09-PB-108
PAULIANO REMY,)	
Deceased.)	
_____)	

SMITH, ALAN D., Magistrate

MEMORANDUM OPINION

(Filed: April 18, 2012)

Summary

Pauliano Remy ("Pauliano") died intestate, leaving only his mother, Shayna Martin ("Martin") and his father, Paul Remy ("Remy"). Martin asserts that Remy "neglected", "refused to provide for" and/or "abandoned" Pauliano and therefore should not be entitled to a share of his son's Estate. Martin, as the petitioner, has the burden to prove one or more of these failures of Remy by a preponderance of the evidence. Based on the evidence presented, the Court concludes that Remy's omissions constituted "neglect", "refus[al] to provide for" and "abandonment". Therefore, Remy will be treated as having predeceased Pauliano and will not be entitled to one-half of the Estate.

Facts

Pauliano was born in St. Thomas, Virgin Islands on April 20, 1988 to Martin and Remy. Remy moved to Florida in 1994.¹ Pauliano lived with Martin in St. Thomas from the time of his birth until approximately 2001 when he moved to Florida to live with Remy for an unspecified portion of one school year.² Pauliano returned to St. Thomas to live with Martin because he was, in Remy's words, unable or unwilling to comply with certain "rules" that Remy had set. Pauliano died on June 1, 2007, at the age of nineteen, without wife or issue. He is survived by both Martin and Remy.

Between Pauliano's birth and the time Remy move to Florida, it is unclear how often Remy met with Pauliano. Although it is unclear whether it was before or after moving to Florida, Remy recalled visiting with Pauliano at least one time when he was approximately six years old. On that occasion, Remy visited him at Remy's mother's home, near Martin's home. Years later, after Pauliano returned to St. Thomas from Florida, Remy visited with him twice during a trip he made to St. Thomas to attend the graduation of another child of his. During these visits, Remy met and talked with Pauliano outside of Martin's home about Pauliano's behavior, attitude, need to attend church, etc. The evidence does not suggest, nor can the Court find, that there were any other specific instances where Remy had any face-to-face contact with Pauliano except for the period that they lived together in Florida. According to Remy, Pauliano often went to the homes of his mother and sister, both of whom lived near Pauliano and Martin, and was "always" in

¹ This finding is based on the testimony of Remy and his written fax transmittal to Court dated February 6, 2012.

² This finding is based on the testimony of Remy and Martin and a copy of an affidavit executed by Martin on September 26, 2001, granting authorization for Pauliano to reside and live in the State of Florida, which was offered as evidence by Remy.

contact with Pauliano through them. Remy's mother and sister did not testify. Martin, however, did not dispute Remy's claim. Remy attended Pauliano's funeral in St. Thomas.

Throughout Pauliano's life, Remy was under court order to make child support payments to Martin. Remy made some payments to the Department of Justice – Paternity and Child Support Division and never made payments directly to Martin. At the time Pauliano died, Remy had fallen behind with his payments. The last payment that he made prior to Pauliano's death was sometime in 2007 and was in the approximate amount of \$700.00. As of July 25, 2011, Remy owed Martin \$3,347.64 in back child support. Remy also contributed \$150.00 towards Pauliano's funeral.

Discussion

Virgin Islands law provides that when a deceased person dies without leaving a spouse or issue, but is survived by both of his parents, each parent shall take one-half of his estate.³ The law, however, further provides:

No distributive share of the estate of a decedent shall be allowed under the provisions of this chapter . . . in the estate of a child to a parent who has neglected or refused to provide for such child during infancy or who has abandoned such child during infancy whether or not such child dies during infancy, unless the parental relationship and duties are subsequently resumed and continue until the death of the child. If the . . . parent is deprived of a distributive share in the estate of a decedent by the provisions of this section the estate of such decedent shall be distributed . . . as though such spouse or parent had predeceased the decedent.⁴

Martin alleges that Remy "neglected or refused to provide for [Pauliano]" and/or "abandoned [Pauliano] during infancy". Therefore, she petitions the Court to treat Remy as having predeceased Pauliano. If the Court finds for Martin, Martin would take the entire Estate.⁵

Standard of Proof

The Virgin Islands Legislature has not, for purposes of barring inheritance, established the standard of proof required to demonstrate that a parent "neglected or refused to provide for" and/or "abandoned" a child. The Legislature has, however, expressly provided that the burden of proof in child protection cases involving parental neglect⁶ or abuse is "clear and convincing evidence."⁷ Similarly, parental rights can only be terminated after presenting "clear and convincing evidence".⁸ These statutory standards are consistent with the U.S. Supreme Court's

³ V.I. CODE ANN. tit. 15, § 84(2) (1996).

⁴ § 87(5). This provision was adopted in 1957 from section 87 of New York Decedent Estate Law (repealed by L. 1966, ch. 952, eff. Sept. 1, 1967).

⁵ See § 84(3).

⁶ "Abandonment is a form of neglect." V.I. CODE ANN. tit. 5, § 2502(1) (1997). "[Neglect] shall also mean an abandoned child . . ." § 2502(20).

⁷ § 2548(d). Prior to this standard of proof being codified, the courts determined "clear and convincing evidence" to be the most sensible standard. *In re: Application of Commissioner of Social Welfare*, 15 V.I. 368, 381-86 (Terr. Ct. 1978).

⁸ § 2250(b).

holding in *Santosky v. Kramer* that a “fair preponderance of the evidence” in these types of matters violates due process, but that a “clear and convincing” standard satisfies it.⁹

Specifically regarding inheritance cases, however, few jurisdictions have expressly stated the burden of proof, and no commonly accepted standard has emerged from this Court’s review of the jurisprudence in this area. At least one state has adopted, by statute, the standard that the estate must prove by a “preponderance of the evidence” that the parent abandoned the deceased child.¹⁰ Furthermore, case law in at least two states holds that proof by a “preponderance of the evidence” is the proper standard. Both of these states have expressly distinguished between the “clear and convincing” standard applicable in parental termination cases and the “preponderance” standard for inheritance matters.¹¹ On the other hand, in at least one state, “[t]he burden is on the party asserting disqualification[,] and the proof of abandonment must be clear.”¹² Similarly, with the closely-related issue of whether a neglectful or abandoning parent can recover in an action for the unlawful death of his child, at least one jurisdiction requires the defendant to prove abandonment by “clear and convincing evidence” before the action can be dismissed.¹³ In another jurisdiction, in order for someone other than a natural parent to recover in a wrongful death action of a child, he must prove abandonment by the natural parent through “clear and convincing evidence”.¹⁴ On yet another related issue, whether a husband who neglects or refuses to support his wife can inherit from her, at least one state initially requires the alleging party to set forth sufficient facts to demonstrate neglect or refusal to support; the burden then shifts to the party against whom the allegations are made to prove that there were no such willful acts or omissions.¹⁵

Given the silence of the Virgin Islands Code governing decedents’ estates, the absence of any “majority rule” among the states on this issue, and minimal legal and policy guidance in case law of other jurisdictions, the Court must ground its decision on the plain meaning of the statute and considerations of public policy. Specifically, it is appropriate to adopt a standard that is (a) consistent with the burden proof applied by courts in the State of New York when the Virgin Islands Legislature enacted the provision, (b) serves the ends of justice and (c) fulfills the intent of the Virgin Islands’ Legislature.

As Title 15 of the Virgin Islands Code, including § 87(5), is derived from former New York law, the Court should consider what burden of proof New York courts required to prove “neglect”, “refusal to provide for”, and abandonment.¹⁶ At the time this provision was in effect

⁹ *Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982).

¹⁰ OHIO REV. CODE ANN. § 2105.10(D)(2). See also *Keybank Nat’l Assn. v. Hanns*, 2009 WL 1111255, *5 (Ohio Ct. App. April 24, 2009).

¹¹ *N.J. Div. of Youth and Family Serv. v. M.W.*, 942 A.2d 1, 13 (N.J. Super. Ct. App. Div. 2007); *In re Estate of Lunsford*, 610 S.E.2d 366, 370-71 (N.C. 2005).

¹² *Estate of Pessoni*, 810 N.Y.S.2d 296, 300 (N.Y. Sur. Ct. 2005) (emphasis added).

¹³ *Baker v. Sweat*, 637 S.E.2d 474, 477 (Ga. Ct. App. 2006) (citing *Uniroyal Goodrich Tire Co. v. Adams*, 472 S.E.2d 518, 519 (Ga. Ct. App. 1996)).

¹⁴ *Lawson v. Atwood*, 536 N.E.2d 1167, 1170 (Ohio 1989).

¹⁵ *In re Wallace’s Estate*, 263 A.2d 421, 422 (Pa. 1970). That court speaks of this as being the procedure to establish a forfeiture, which suggests that it may apply in the case of a parent neglecting or abandoning a child. See *Id.*

¹⁶ See *Berkeley v. West Indies Enterprises, Inc.*, 480 F.2d 1088, 1092, 10 V.I. 619 (3d Cir. 1973) (stating that language of a local statute taken from a statute of another jurisdiction shall be construed the same as it is construed in the foreign jurisdiction); *Matter of Buckley’s Estate*, 536 F.2d 580, 582, 13 V.I. 345 (3d Cir. 1976) (stating that

in New York, its surrogate courts appeared to have used a preponderance of the evidence standard.¹⁷ The Court finds this highly persuasive in its analysis.

As regards the ends of the justice, this Court does not find here that, unlike with cases where parental rights of a living child are being terminated,¹⁸ there are due process concerns. Therefore the Court need not consider federal constitutional law which mandates that such rights can only be terminated through “clear and convincing evidence”.¹⁹ In support of this conclusion, the U.S. Supreme Court has stated that “application of a ‘fair preponderance of the evidence standard’ indicates both society’s ‘minimal concern with the outcome,’ and a conclusion that the litigants should ‘share the risk of error in roughly equal fashion.’”²⁰ The High Court also recognizes that an intermediate standard of proof is appropriate when “when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than the mere loss of money.’”²¹ Consequently, in government-initiated proceedings, a “clear and convincing” standard is necessary when an individual is threatened with “a significant deprivation of liberty” or “stigma”.²²

Terminating the parental rights during the life of the child is a drastic remedy that has far-reaching consequences and constitutes “a significant deprivation of liberty”.²³ Moreover, such proceedings are often government-initiated, involve more than money and result in some degree of stigma. A finding of “neglect[] or refus[al] to provide for” and/or “abandon[ment]” of one’s child solely for purposes of inheritance does not, in the Court’s opinion, implicate a parent’s liberty interest because only the right to inherit is affected. In other words, ultimately only money is at stake in this kind of litigation. Additionally, any stigma that might result from the finding required to disqualify a parent as heir is *de minimus*. Therefore, the Court will not adopt the clear and convincing standard. Rather, it will, as did the courts in New York, adopt and apply the preponderance of evidence standard.

Neglect, Refusal to Provide, and Abandonment

Courts in New York use a two-step analysis in parental inheritance disqualification cases. First, they determine whether there has been “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, which are normally concomitant to the father-child relationship[]”²⁴ Second, the New York courts ask

“the contemporary judicial interpretation of statutes of foreign jurisdictions that are adopted *in haec verba* by the Virgin Islands is assumed to be carried over into the law of the Virgin Islands”).

¹⁷ *In re Guilianelli's Estate*, 166 N.Y.S.2d 206, 208 (Sur. Ct. 1957).

¹⁸ *See Santosk*, 455 U.S. at 768-69.

¹⁹ The Virgin Islands, along with a majority of other American jurisdictions, implemented a standard of proof greater than a “fair preponderance of the evidence.” before the U.S. Supreme Court made its ruling based on due process. *Id.* at 749. At the time of this decision, the Virgin Islands was one of fifteen American jurisdictions to have a “clear and convincing” standard. *Id.* at 750.

²⁰ *Id.* at 755 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). The Court compares this to the burden of proof in criminal matters where “the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.” *Id.*

²¹ *Id.* at 756 (quoting *Addington*, 441 U.S. at 424).

²² *Id.* at 756 (quoting *Addington*, 441 U.S. at 425-26).

²³ *Id.*

²⁴ *In re Musczak's Estate*, 92 N.Y.S.2d 97, 99-100 (Sur. Ct. 1949).

whether there has been “a failure to contribute to the material well-being of the child.”²⁵ If a parent fails in either respect, he will be barred from taking his share of the estate.²⁶ In 1957, using this two-step analysis and applying the very statute the Virgin Islands Legislature adopted, the New York Surrogate Court disinherited a father who had separated from the child and his mother, had made at least 150 weekly-support payments of ten dollars before the child died, attempted to see the child once after the separation, refused to pay hospital bills for the child’s birth, and very seldom inquired concerning the child’s health or well-being.²⁷ Shortly thereafter, in 1960, the Surrogate Court barred a parent from inheriting after he failed to provide financial support to his son during almost eleven months immediately preceding the child’s death.²⁸ More recently in 2005, notwithstanding the fact that the “father paid child support pursuant to a court order”, another New York Surrogate Court, after summarizing the jurisprudence in that state, concluded that “[a]bandonment . . . [as is used in the statute is] defined as ‘a voluntary breach or neglect of the duty to care for and train a child, and the duty to supervise and guide a child’s growth and development.’”²⁹ The Court further stated that “abandonment contemplated by the statute includes the withholding of one’s presence, care and the opportunity to display voluntary affection.”³⁰ And, in light of the facts in this case, the following observations by the Court are significant:

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” [citation omitted]. Incidental acts, 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 [citation omitted]. Neither insubstantial or infrequent visits or communications, nor the father’s subject intent, are sufficient to preclude a finding of abandonment [citation omitted]. 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 [citation omitted].³¹

Finally, in commenting on the intent of the legislature, the *Pessoni* Court stated:

“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 [citations omitted].” Justice is not fostered by rewarding in any fashion a parent who purposefully fails to provide any emotional or nurturing support to a child [citations omitted]. No dividend should be permitted to flow from the dereliction of that duty [citation omitted]. The obvious intent of [the disinheritance statute] 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. The statute reflects society’s view

²⁵ *Id.* at 100.

²⁶ *Id.*

²⁷ *In re Guilianelli’s Estate*, 166 N.Y.S.2d at 209.

²⁸ *In re Jordan’s Estate*, 200 N.Y.S.2d 608, 610 (Sur. Ct. 1960).

²⁹ *Estate of Pessoni*, 810 N.Y.S.2d at 299 (quoting *In re Emiro*, 5 Misc.3d 1002(A) (N.Y. Sur. Ct. 2004)).

³⁰ *Id.* at 299 (quoting *In re Herbster’s Estate*, 121 N.Y.S.2d 360 (N.Y. Sur. Ct. 1953)).

³¹ *Id.* at 299-300.

“of certain privileges which attach to family relationships” [citation omitted]. It is difficult to imagine a case more suited to the application of the statute.³²

The Court finds that Remy “abandoned” and “neglected” Pauliano by failing to guide, care for, and supervise Pauliano’s growth. Remy left the Virgin Islands 1994 at which time Pauliano was approximately six years old. Although it is unclear how many times Remy visited Pauliano before Remy moved to Florida and also before Pauliano moved to Florida, it is clear that Remy only visited once after Pauliano returned to live in St. Thomas. The only other face-to-face contact Remy ever had with his son was during the portion of a school year that Pauliano lived in Florida. Otherwise, the only contact Remy had with his son was indirectly through Remy’s mother and sister. The Court finds that the role Remy played in Pauliano’s life to be so lacking and unacceptable that it fell to the level of “abandonment” and “neglect”.

Although Martin must only prove one element, the Court concludes that Remy also “failed to provide for” Pauliano financially. The Court finds it highly relevant that Remy only made sporadic child support payments to Martin and was often in arrearages. Remy was more than \$3,000.00 behind in child support when Pauliano died. This is sufficient for the Court to find that Remy “failed to provide for” Pauliano.

Conclusion

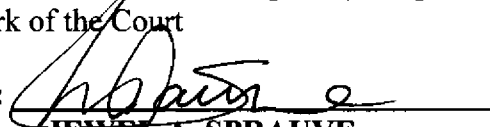
Based on the testimony and documents admitted, the Court finds by a preponderance of the evidence that Martin proved that Remy “neglected”, “refused to provide for” and “abandoned” Pauliano. Accordingly, the Court will grant Martin’s petition and treat Remy as having predeceased Pauliano. In effect, Martin will be the sole heir and will take the entire Estate.

DATED: April 12, 2012



ALAN D. SMITH
Magistrate of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY: 
JEWEL A. SPRAUVE
Court Clerk Supervisor 4/19/12

³² *Id.* at 302.