IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

IN RE:	:	
	:	No. 41-98-0349
ESTATE OF DEVIN WILLIAM MOYER,	:	
Deceased	:	

OPINION and ORDER

This case arises out of the unfortunate death of Devin William Moyer, a young boy struck by a car while on a daycare outing. It is not surprising that several parties are haggling over who are the proper legal heirs to Devin's estate, for the answer to that question will determine who receives the proceeds of the impending wrongful death suit or survival action based on his death. It will also answer the question most interesting to counsel: whose client can bring the tort action?

Under Pennsylvania's intestacy laws Devin's parents would ordinarily be the joint beneficiaries of his estate. Devin, however, was not blessed with Leave It to Beaver parents.[1] The complete failure of both his mother and father to fulfill their responsibilities to Devin raises the question of whether either parent has forfeited rights to his estate.

We previously decided this question in relation to Mrs. Moyer. In a harshly worded opinion we found that Mrs. Moyer had been a virtually worthless mother, who lost custody of her children and left her mother to care for them while she pursued her own selfish interests. Unfortunately, we could not find a forfeiture under the "failure to support" prong of the statute because of the strict wording of that portion of the applicable statute and the

[1] He did, however, have a caring, dedicated maternal grandmother who stepped in as primary caretaker and who, in this court's opinion, deserves to be the sole beneficiary of his estate. See our previous opinion, issued 13 August 1999.

irrational governing caselaw,[2] which prohibits forfeiture so long as the parent occasionally provides the child with a few morsels of food.

Now Mrs. Moyer is back in court seeking to secure Devin's entire tort pie for herself by excluding Devin's father, Carl Moyer. Unlike our previous decision under the "support" prong, the wording of the statute at issue here permits us to do justice and find that Mr. Moyer's rights are forfeited under the "abandonment" prong. For unbelievable as it may sound, compared to her husband's deplorable conduct, even Mrs. Moyer comes off smelling like a rose.

Findings of Fact

There are little, if any, relevant factual disputes in this case. The parties stipulated that in the year prior to Devin's death on 30 July 1998, Mr. Moyer had no contact whatsoever with Devin. He never saw his son, never talked to him on the phone, and sent him no letters, cards, gifts, or presents. This case therefore turns on whether Mr. Moyer has offered an adequate excuse for his absence.

Conclusion of Law

Mr. Moyer has forfeited his rights to share in the proceeds of Devin Moyer's estate under 20 Pa.C.S.A. §2106(b).

Discussion

[2] Specifically, In re Estate of Teaschenko, 393 Pa. Super. 355, 574 A.2d 649 (1990), which held that forfeiture does not apply so long as a parent provides occasional meals or snacks for the child.

Pennsylvania law does not favor forfeitures. Therefore, forfeiture statutes must be strictly construed, and the party asserting forfeiture bears the burden of proof. In re Estate of Mary Fonos, 698 A.2d 74, 76 (Pa. Super. 1997). The statue governing forfeiture, 20 Pa.C.S.A. §2106(b), states:

> Any parent who, for one year or upwards previous to the death of the parent's minor child, has willfully neglected or failed to perform any duty of support owed to the minor or dependent child or who, for one year, has wilfully deserted the minor or dependent child shall have no right or interest under this chapter in the real or personal estate of the minor or dependent child.

There is no question of failure to support because while in prison, a portion of Mr. Moyer's work release money was taken for child support. Therefore, the sole issue is whether Mr. Moyer wilfully deserted Devin in the year prior to his death.

There is scant appellate direction on this subject. In fact, the only case addressing the desertion prong appears to be Winslow Estate, 19 D. & C. 4th 349 (1993). Fortunately, Winslow is not binding on this or any other court, for we strongly disagree with its conclusion that even minimal contacts with a child precludes forfeiture by desertion. Such a strict reading of the statute is not justified in this court's opinion. Forfeiture does not involve a fundamental right, as in the case of termination of parental rights. It merely involves a financial issue–the right to benefit economically from a child's estate, and such economic rights are far more easily lost than fundamental rights. Although we realize that forfeiture statutes must be strictly construed, we need not construct a threshold so high as to transform the statute into a watershed gushing out financial rewards to absentee parents like Mr. Moyer.

While it is true the Superior Court has created an outrageously high threshold for the support prong of the statute, In re Estate of Teaschenko, 393 Pa. Super. 355, 574 A.2d 649 (1990), we need not do the same for the desertion prong because that wording is very

different. Whereas the support prong is satisfied only when a parent has willfully neglected or failed to perform *any* duty of support owed to the minor or dependent child, the desertion prong requires merely that the parent has willfully deserted the child. The obviously more lenient language for the desertion prong is well justified because while financial support may be difficult and even impossible for some parents, even the most impoverished parent can provide his or her child with love, comfort, security, and emotional support, which are every bit as important as money. Therefore, failure to maintain contact with a child is rightly judged more harshly than failure to offer financial support.

We need not go into a lengthy discussion of the technical meaning of desertion because it is clear from the stipulated facts that Mr. Moyer deserted Devin, since he had no contact whatsoever with him during the time at issue. The sole question is whether that desertion was willful.

Mr. Moyer has offered two excuses for deserting his son.[3] First, he alleges that Ms. Betts, the maternal grandmother who had custody of Devin, prohibited him from seeing the child. The testimony showed that Ms. Betts told Mrs. Moyer that Mr. Moyer could not come on her property, and Ms. Betts relayed that message to Mr. Moyer. Her reasons for this prohibition were sound: Mr. Moyer has a long criminal history, a severe anger problem, and a serious alcohol problem. He also physically abused Mrs. Moyer multiple times, and possibly Devin, as well. Ms. Betts therefore had good reason to consider him dangerous and exclude him from her residence.

Mr. Moyer, however, as Devin's father, had a legal right to see his child, and Ms. Betts had no power to prevent him from doing so. Mr. Moyer appeared to understand this,

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[3] Generally, the court found Mr. Moyer to be an extremely uncredible witness. However, as the following discussion indicates, even if we believed his every word his excuses would still not pass muster.

for he testified that he spoke to a Children and Youth worker about the possibility of seeing Devin, and was told he must go through the legal channels and file a petition for custody. He also was familiar with the idea of supervised visitation. Yet he failed to take any action whatsoever to enforce his parental rights; he never even saw Devin during the year in question, which is especially curious given the fact that some time in 1997 he lived a mere 300 yards from Devin. Indeed, Mr. Moyer has not seen Devin since April 1996.

If this were a petition for termination of parental rights, Mr. Moyer's proffered excuse would not save him. The caselaw under 23 Pa. C.S. § 2511(a)(1)[4] is very clear about what a parent must to do to avoid termination. A non-custodial parent has a continuing duty to love, protect and support his child and to maintain communication and association with the child even after separation. In re V.E., 417 Pa. Super. 68, 611 A.2d 1267 (1992). He must exert himself to create and maintain a place of importance in the child's life. In re Adoption of M.J.H., 348 Pa. Super. 65, 501 A.2d 648 (1985). When confronted with obstacles, he is expected to exhibit reasonable firmness in attempting to overcome the barriers confronting him. Commonwealth v. Arnold, 445 Pa. Super. 384, 665 A.2d 836 (1995) ; In re Adoption of Sabrina, 325 Pa. Super. 17, 472 A.2d 624 (1984). He must act affirmatively, with good faith and effort, to maintain the parent-child relationship to the best of his ability, even in difficult circumstances. In re Adoption of Dale A., II, 453 Pa. Super. 106, 683 A.2d 297 (1996). He must use all available resources to preserve the parental relationship. In interest of Q.J.R., 444 Pa. Super. 460, 664 A.2d 164 (1995).

Mr. Moyer's conduct falls far short of this standard. Upon learning that Ms. Betts did not want him on her property, he caved in and gave up any hope he might have had for

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[4] "The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition has either evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties."

contact with Devon.[5] It is certainly understandable that given Mr. Moyer's criminal history he chose not to step on Ms. Betts' property. However, that is no excuse for failing to attempt to gain partial custody or supervised visitation with his son. He took no legal action in this regard, even after being specifically advised to do so.[6] In short, Mr. Moyer exhibited no firmness whatsoever in overcoming the obstacles between himself and his son.

If Mr. Moyer's parental rights could be terminated due to his failure to take any action to maintain a parental relationship, surely his inheritance rights could be forfeited as well, for termination of parental rights must surely invoke a much higher standard. Termination of parental rights involves a living, breathing child whose future is at stake. A court must consider the needs and welfare of the child, who will lose his relationship with his birth parent. In a forfeiture case, however, the child is dead. The only interest at stake is the financial benefits from the estate. Additionally, termination of parental rights strips a parent of one of the most fundamental rights protected by our Constitution. Forfeiture, by contrast, is merely a struggle over money. It is a sort of "tit for tat" inquiry, turning on whether the parent's actions toward the child during his lifetime are statutorily sufficient to entitle him or her to benefit from the child's death. Mr. Moyer's conduct is far from sufficient to justify permitting him to share in Devin's estate.

Mr. Moyer's second excuse for his desertion is that a Protection from Abuse order prevented him from contacting Devin during the year in question.[7] The final PFA order,

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[5] Based on Mr. Moyer's lack of contact with Devon since April 1994, we find it extremely difficult to believe that Mr. Moyer had any interest in seeing Devon during the year in question. This is confirmed by the credible testimony of Mrs. Moyer that the only time she saw Mr. Moyer during that year, he did not even inquire about Devin.

[6] Mr. Moyer simply stated that he intended to do so at some point.

[7] A temporary PFA was issued on 7 Januaury 1998, and a final order was entered on 16 January 1998.

however, was entered by stipulation; it specifically states that it is entered upon agreement of the parties. Mr. Moyer testified that he voluntarily agreed to the order because he was "in the wrong," and that he understood he had a right to a hearing on the matter. He adamantly maintained he never physically abused Devin, yet he waived his right to go into court to prove it. Moreover, he did not request that a provision granting supervised visitation be included in the order, which is routinely done in such cases and which this court surely would have granted. For these reasons, Mr. Moyer's decision to stay away from Devin must be considered willful.

Although Mr. Moyer did not exactly testify that he did not understand the clear wording of the order, he did say he believed the order only prevented him from seeing Devin at Ms. Betts' home, but not in other places. Even if we believed that testimony, it would only return us to the same nagging question, to which Mr. Moyer has provided no adequate answer: why did he take no legal action to enforce his parental rights? His utter failure to do so without a legitimate excuse can only equate to a willful desertion of his son.

Conclusion

For the reasons stated above, the court finds that Mr. Moyer has willfully deserted Devin within the meaning of 20 Pa.C.S.A. §2106(b), and thus has forfeited his right to share in Devin's estate. And so Mrs. Moyer prevails again, this time winning the *entire* jackpot from any tort action brought on Devin's behalf. Although this is clearly a case of the pot calling the kettle black, it is nonetheless true that this kettle is very, very black. As for Mrs. Moyer, her fate is in the hands of a power greater than ours–the Superior Court, which when reviewing our previous opinion has the opportunity to admit its Teaschenko folly and prevent Mrs. Moyer, too, from profiting from the estate of the son she failed so miserably.

O R D E R

AND NOW, this _____ day of December, 1999, for the reasons stated in the foregoing opinion, the petition for forfeiture filed by Debra Moyer is granted and it is ordered that Carl Moyer has no rights to share in the estate of Devin William Moyer and has no rights to recover from a wrongful death or survival action brought because of his death.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq., Law Clerk
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