



NEW JERSEY LAW REVISION COMMISSION

Final Report on Inheritance from a Child

October 15, 2020

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.
Please consult the New Jersey statutes in order to determine the law of the State.

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Background

In January 2018 the New Jersey Law Revision Commission (“the Commission”) authorized a project regarding the circumstances under which a biological parent may be precluded from inheriting the estate of a child, based on the Appellate Division decision in *In re Estate of Fisher*.¹ The Appellate Court noted that the biological father had not taken the steps necessary to allow for continued visitation rights while his son was alive, but he also had not manifested “a settled purpose to *permanently forego all* parental duties and relinquish *all* parental claims to the child.”²

In an effort to determine New Jersey’s treatment of this subject in relation to other states, and at the request of the Commission, Staff examined how other states treat parental abandonment in the context of inheritance from a child.³

Fifty-State Survey

State approaches to a parent’s fitness to inherit from a child vary. A number of states do not focus on disqualifying behavior per se, rather have requirements that a parent must meet to be eligible to inherit from a child. Generally, these states require that the parent openly held out the child as his or her own, and did not withhold support.⁴ The majority of states recognize abandonment as a specific category that precludes inheritance from a child.⁵ These states follow one of three approaches for determining abandonment: inclusion of a statutory definition, reference to another statutory standard, or case law interpretation.⁶

- *Definitional approach*

Some statutes define “abandonment” broadly. For example, Maryland’s code states that

A parent shall be deemed to have abandoned a minor child under subsection (a) (1) of this section if the conduct of the parent demonstrates a settled purpose willfully and intentionally to relinquish all parental rights and

¹ *In re Estate of Fisher*, 443 N.J. Super. 180 (App. Div. 2015).

² *Id.* at 200 (emphasis in the original).

³ The NJLRC would like to thank Sydney Groll, a former pro bono intern with NJLRC, for her research into this subject. The analysis that follows is based on her memorandum.

⁴ See AS § 13.12.114; A.R.S. § 14-2114; HRS § 560:2-114; M.C.L.A. § 700.2114; MCA 72-2-124; S.C. Code 1976 § 62-2-114; SDCL § 29A-2-114; U.C.A. 1953 § 75-2-114; 14 V.S.A. § 315.

⁵ See Cal. Prob. Code § 6452; C.R.S.A. § 15-11-114; C.G.S.A. § 45a-439; Ga. Code Ann. § 53-2-1; 755 ILCS 5/2-6.5; KRS § 391.033; 18-C M.R.S.A. § 2-113; MD Code, Estates and Trusts, § 3-112; M.S.A. § 524.2-114; N.J. Stat. § 3B:5-14.1; N. M. S. A. 1978, § 45-2-114; McKinney’s EPTL § 4-1.4; N.C.G.S.A. § 31A-2; NDCC, 30.1-04-09; R.C. § 2105.10; 20 Pa.C.S.A. § 2106; 31 L.P.R.A. § 2261; V.T.C.A., Estates Code § 201.062; VA Code Ann. § 64.2-308; 15 V.I.C. § 87; W. Va. Code, § 42-1-11; W.S.A. § 852.14.

⁶ The following states are silent on this issue: Ark., Fla., Ind., Iowa, Kan., La., Mass., Nev., N.H., R.I., Wash., and Wyo.

duties with respect to the child and to renounce and forsake the child entirely.⁷

Others, such as Ohio, are more specific:

“Abandoned” means that a parent of a minor failed without justifiable cause to communicate with the minor, care for the minor, and provide for the minor’s maintenance or support as required by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor.⁸

- *Definition by reference*

Many states which define abandonment via reference to another statutory provision in their respective codes use boilerplate language. The following language has been adopted by several states:

The child died before reaching eighteen years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under the laws of this state other than this code on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.⁹

- *Common Law Approach*

Lastly, some states defer to the courts to determine what constitutes abandonment.¹⁰ Regardless of the approach taken, a parent’s duty to support is a bedrock principle.¹¹ Lack of financial support during a child’s lifetime correlates with a finding of abandonment.¹²

The Court in *In re Estate of Fisher* examined the issue of abandonment. In *Fisher*, the father paid child support throughout his son’s life, and refused the mother’s offer to give up his

⁷ MD Code, Estates and Trusts, § 3-112.

⁸ R.C. § 2105.10; *see also* W.S.A. § 852.14.

⁹ *See* C.R.S. 15-11-114(1)(a); 18-C M.R.S. § 2-113 (1)(B); Minn. Stat. § 524.2-114(a)(2); N.M. Stat. Ann. § 45-2-114(A)(2); N.D. Cent. Code, § 30.1-04-09(1); W. Va. Code § 42-1-11(a).

¹⁰ Ky., N.Y., N.C., and Pa. *See, e.g., Matter of Estate of Martirano*, 172 A.D.3d 1610, 1612 (N.Y. App. Div. 2019). (“With regard to abandonment, “a parent may be disqualified under [EPTL 4-1.4\(a\)](#) if that parent [voluntarily] neglected or refused to fulfill the natural and legal obligations of training, care and guidance owed by a parent to a child.”) *See also In re Estate of Fuller*, 2014 PA Super 39, 87 A.3d 330, 334 (2014). (“By definition, we hold that desertion in the context of Section 2106 is a parent's intentional and willful abandonment of a minor or dependent child.”)

¹¹ *See Thomas B. v. Lydia D.*, 69 A.D.3d 24, 28 (2009) (“Sir William Blackstone's 18th century *Commentaries on the Laws of England* captures the essence of the common law rule: ‘The duty of parents to provide for the maintenance of their children is a principle of natural law ... [but the parent] is only obliged to fund them with necessaries ... for the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle or lazy children in ease and indolence.’”)

¹² 32 Am. Jur. Proof of Facts 3d 83 (Originally published in 1995). ([I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. ...)

parental rights in return for an end to his support.¹³ This, plus the father’s efforts to contact his son, while sporadic, demonstrated to the Court that no abandonment as contemplated by N.J.S. 3B:5-14(b)(1) occurred.¹⁴

Non-biological Parents and Inheritance from a Child

Two years after *Fisher*, the Appellate Division heard another case involving a parent’s ability to inherit from a child. In *Matter of Estate of Acerra*,¹⁵ the Appellate Division considered whether a father, while admittedly neither biological nor adoptive, may nonetheless share in the estate of a child as a “psychological parent.”¹⁶

Background

In 2009 Louis Acerra sustained severe injuries in a house fire caused by a defective dishwasher.¹⁷ He lingered for more than two years, during which time his psychological father, Richard Litwin, cared for him, paid his living expenses, and arranged doctor’s appointments.¹⁸ Litwin filed a lawsuit on Acerra’s behalf alleging negligence, and included a *Portee* claim based on his observing Acerra at the fire scene.¹⁹ Acerra’s estate received \$4.7 million, minus costs and attorney’s fees, and Litwin received \$3.95 million, minus costs and attorney’s fees.²⁰

Acerra never married and had no children or siblings.²¹ He was predeceased by his mother, who died in 2009, and both maternal grandparents.²² His biological father was never known.²³ Richard Litwin was in a relationship with Acerra’s mother at the time of Acerra’s birth in 1981.²⁴ Litwin lived with Acerra’s mother until her death, and with Acerra for his entire life.²⁵ Litwin treated Acerra as his own son, providing him with food and shelter, and assisting with his college tuition.²⁶ Acerra’s mother had legal custody of him until a 1995 order awarded Litwin custody, when Acerra was fourteen.²⁷ Since Litwin never married Acerra’s mother, he was not a stepfather, and he never legally adopted Acerra.²⁸ Further, a 1990 genetic paternity test proved that Litwin

¹³ *Fisher*, 443 N.J. Super at 200-201.

¹⁴ *Id.* at 202.

¹⁵ *Matter of Estate of Acerra*, 2017 WL 6048117.

¹⁶ The term “psychological parents” was used and defined at length in *N.J. Div. of Youth & Fam. Serv. v. Huggins*, 148 N.J. Super. 86 (1977).

¹⁷ *Id.*

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 2. Litwin’s *Portee* claim was upheld without any discussion of his relationship to Acerra, although the opinion in that matter referred to Litwin alternatively as the father and stepfather.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The Court does not note the circumstances giving rise to the custody award.

²⁸ *Id.*

was not Acerra's biological father.²⁹ Louis Acerra died intestate in January 2012 at the age of thirty.³⁰

In May 2015, Litwin filed suit to be declared Acerra's legal father under the New Jersey Parentage Act, N.J.S. 9:17-38 to -58, in order to inherit from Acerra's estate.³¹ Acerra's "whole-blood" uncle and aunt (children of both Acerra's maternal grandmother and grandfather) answered and counterclaimed, opposing Litwin's motion.³² They sought to inherit the entirety of Acerra's estate, to the exclusion of Acerra's many "half-blood" aunts, uncles, and other relatives, who themselves had filed suit to inherit.³³

In September 2015 the trial court dismissed Litwin's complaint with prejudice, finding that he was not Acerra's father and was ineligible to inherit from his estate.³⁴ The Appellate Court upheld the trial court's ruling, noting that based on the results from the paternity test, "any presumption of paternity was incontrovertibly rebutted."³⁵ It also rejected Litwin's contention of psychological parentage, finding that its application to intestate succession was inconsistent with the purpose of the Parentage Act.³⁶

The Appellate Division noted that in New Jersey, the concept of psychological parentage has been applied only in matters concerning custody, visitation, and child support.³⁷ The Court also noted that there is no authority allowing a psychological parent to be considered a parent for purposes of intestacy.³⁸ In the absence of any enforceable agreement to adopt the decedent, or any steps taken to initiate an adoption proceeding, the Court held the trial court was correct in concluding an equitable adoption did not exist, and therefore the father figure could not inherit.³⁹

Legislative Activity

To date, *Acerra* is the only New Jersey case to consider psychological parentage in the context of inheritance. Relatedly, the New Jersey Legislature recently considered the inheritance rights of non-biological relatives. Introduced in May 2018 in both the Assembly and the Senate, bill A3959/S2583 would have amended N.J.S. 3B:5-4. The bill proposed that, in the absence of enumerated close family members, and if the decedent had a predeceased spouse or domestic partner, the decedent's estate would pass according to the predeceased spouse or domestic partner's probated will.⁴⁰ The bill did not make it out of committee in either house.

²⁹ *Id.*

³⁰ *Id.* at 2.

³¹ *Id.* at 3.

³² *Id.* at 1.

³³ *Id.*

³⁴ *Id.* at 3.

³⁵ *Id.* at 6.

³⁶ *Id.* at 7.

³⁷ *Matter of Estate of Acerra*, 2017 WL 6048117 at 7.

³⁸ *Id.*

³⁹ *Id.* at 9.

⁴⁰ Courts historically have considered a relationship's substance, and not just its label, in deciding whether a plaintiff may sustain a cause of action under a statute. See *Dunphy v. Gregor*, 261 N.J. Super. 110 (1992) (fiancee of decedent

In 2019 the Legislature recognized non-biological parents in amendments to the New Jersey Parentage Act.⁴¹ The Act was amended to extend parental rights to individuals and couples who have become parents with assisted reproduction procedures, by allowing the spouse or partner of a natural or legal parent to seek an expedited judgment of adoption.⁴² However, the Act has yet to recognize de facto parents.⁴³

Uniform Probate Code

The Uniform Law Commission recognized de facto parents in the Uniform Probate Act of 2019.⁴⁴ Noting that amendments to the Probate Code were necessary after release of the Uniform Parentage Act in 2017, the 2019 Amendments to the Uniform Probate Act aim “to provide greater consistency in determining intestate shares within blended families, remove outdated terminology, and incorporate the concept of de facto parentage.”⁴⁵ The Amendments eliminated the reference to “genetic” parents in Section 2-117, although a de facto parent requires an adjudication of parentage under the Uniform Parentage Act or the state’s parentage act or similar statute.⁴⁶ Under new Section 2-116, once a parent-child relationship is established (under subpart 2, which defines a parent-child relationship), the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession.⁴⁷

The treatment of intestate inheritance under the Probate Code will be explored more fully in another Commission project currently underway, which will examine all amendments made to the Code in 2019.

Conclusion

Additional research recommended by the Commission confirmed that there is no uniform, nationwide approach to a non-biological parent’s inheritance from a child in the absence of a will. Further, recent legislation concerning this area of law indicates that the Legislature is aware of this issue and has elected not to modify the current law. Based on this, the Commission will discontinue further work in this area absent a legislative request for additional work on this subject matter.

qualified to bring a *Portee* claim), *but see Toms v. Dee Rose Furniture*, 262 N.J. Super. 446 (1993) (common-law wife of decedent could not recover dependency benefits under workers’ compensation statute).

⁴¹ N.J.S. 9:17-38 *et seq.*

⁴² P.L. 2019, c. 323.

⁴³ The New Jersey Law Revision Commission is currently drafting a revision to the New Jersey Parentage Act that addresses psychological parents and their rights and responsibilities. The Draft Tentative Report is available at www.njlrc.org.

⁴⁴ Uniform Probate Code Amendments (2019), published on Aug. 13, 2020. Available at www.uniformlaws.org (last visited Sept. 30, 2020).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*