

<b>Matter of Ball</b>
2004 NY Slip Op 30404(U)
March 26, 2004
Surrogate's Court, Tompkins County
Docket Number: File No. 03-16-A
Judge: John C. Rowley
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STATE OF NEW YORK  
 SURROGATE'S COURT : COUNTY OF TOMPKINS

Constant L. Olney  
 CLERK

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 In the Matter of the Administration Proceeding

DECISION

ESTATE OF LUKAS NATHANIEL BALL,

File Nos. 03-16-A &  
 03-16a-A

Deceased  
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Angela Ball (hereafter, "mother") and James Harris (hereafter, "father") were the biological parents of Lukas N. Ball, born June 28, 2001. Lukas died February 11, 2003 while in the care of a local daycare provider. By Petition filed September 3, 2003, the mother seeks a decree awarding Letters of Limited Administration to herself. By Petition filed September 8, 2003, the father seeks a decree awarding Letters of Limited Administration to himself. On October 21, 2003, the mother filed objections to the father's petition alleging, among other things, that the father was disqualified from taking an intestate share of the infant decedent's estate because he had abandoned his parental relationship with the infant decedent following his birth (EPTL 4-1.4). On October 23, 2003, the father filed objections to the grant of letters to the mother on the grounds that she was incompetent to execute the fiduciary duties of an administrator and that she contributed to the death of the infant by her choice of daycare providers.

Following denial of motions for summary judgment, the Court held an evidentiary hearing on February 9, 2004. Dirk Galbraith, Esq. appeared for the mother and Thomas Kheel, Esq. for the father. Both parents testified and various exhibits were received into evidence. The Court took judicial notice of two related court files, the Family Court Support case involving the parties (F-0948-02) and the Family Court Custody case involving the parties (V-0761-02) and made them a part of this record. At the start of the hearing, the father withdrew his objections to the mother being named administrator of the estate. Therefore, the only issue to be decided is whether the father had abandoned his parental relationship with the infant decedent. Upon review of the facts and applicable law, the Court finds that he did.

#### FINDINGS OF FACT

Angela Ball and James Harris met in August of 2000 and started dating immediately. Their relationship continued into December of 2000. In October of 2000, the mother determined that she was pregnant and informed the father. She recalled that he was surprised but happy over the news. The father testified that he was happy for the mother but that he had doubts that the child was his. He had always believed that he was unable to father children. However, this had never been medically determined. The father was also suspicious that the mother's old boyfriend was the father because the mother kept running into him. Nonetheless,

the father acknowledged that the mother always said that he was the father. By January of 2001, the parties were estranged. Both provided different reasons for the break up of their relationship. The father's telephone records reveal several telephone calls between the households in January and a one minute call in February. There was apparently no other contact between the parties until the end of 2001.

Lukas was born June 28, 2001. The mother did not list any father on the child's birth certificate. She also applied to Seneca County for medicaid assistance without listing the name of the child's father. By letter dated December 27, 2001, the mother's attorney asked the father about his intentions with regard to their child. This prompted an immediate response from the father including telephone contact with the mother and the scheduling of a visit between the father and Lukas. They had a one hour visit on January 1, 2002.

The father's second and last visit with Lukas took place in the Summer of 2002, the exact date of which was disputed. Although the father testified that he attempted to contact the mother numerous times between January and June to arrange a visit, his telephone records show otherwise. His records reveal a one minute telephone call in February, a one minute telephone call in March, and a 21 minute telephone call in June. In any event, a visitation was arranged at Stewart Park. The parties met there and then went out to dinner. The father stated that he gave the mother \$40.00 cash during the visit. The mother acknowledged receiving an unknown amount of money from him. In addition, at the hearing, the father produced a receipt for a \$150 money order made out to the mother and dated July 27, 2002. The mother acknowledged receiving this money order but insisted that this was not child support but actually partial repayment of a \$500.00 debt the father owed the mother. There was conflicting evidence as to whether this money was paid before or after the visit.

With regard to other financial support for the child, the evidence was somewhat ambiguous. The father testified that during his first visit he gave the mother \$120.00. While the mother could not recall the amount of money he provided, she acknowledged receiving money from the father at that point. As for court-ordered child support, the father testified that he initiated contact with Seneca County in January 2001 to take financial responsibility for Lukas. DNA tests were completed and an order of filiation entered July 11, 2002. Tompkins County then commenced a support action against the father on August 7, 2002. Based upon his disability status, a minimum order of \$25.00 per month was made effective the date of filing. By all accounts, the father was current with his \$25.00 per month payments at the time of the child's death.

At the hearing, the father asserted that he arranged for Lukas to receive Social Security Disability benefits under the father's case. Apparently, this resulted in a payment to the mother of \$2,200.00 for Lukas. The father also testified that he received an \$11,000.00 check in

September of 2002 to settle a Worker's Compensation case<sup>1</sup>. None of this money was paid to the mother for child support as the father did not report it as income and he did not feel it was necessary to offer any of it voluntarily.

In June of 2002, the mother commenced a custody proceeding against the father. At a court appearance in August, the father requested an adjournment to speak with an attorney. He subsequently decided to proceed without an attorney. On September 9, 2002, the father filed a counter-petition for custody, pro se. At a pre-trial conference held September 25, 2002, the father consented to an order of sole custody to the mother with visitation as the parties could agree upon. The order also provided that the father could apply to the court for a formal schedule of visitation if he desired one. Between September 25, 2002 and February 11, 2003, the father neither had any visitation with the child nor filed an application in Family Court requesting intervention.

When asked about this, the father claimed that he made several telephone calls to the mother seeking to arrange visitation. His telephone records revealed a one minute telephone call on November 27, 2002 and a one minute telephone call on December 9, 2002. The father claimed that he made other calls from his cellular telephone but was unable to produce records of this. The mother testified that the father may have called to arrange visitation during this period but she had no specific recollection of this. She indicated that she had been willing to work with the father to arrange visitation but he did not follow through. It was her opinion that visits needed to start out at her house since the father had only seen Lukas twice but she favored weekend visitation with the father over time.

#### Conclusions of Law

E.P.T.L. § 4-1.4(a) provides, in 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 the child is under the age of twenty-one years..." Under this statute, if the father here failed to support Lukas or if he abandoned him, he would be barred from inheriting from the child.

The failure to support standard is the clearer of the two. Family Court Act § 413 codified the requirement for parents to financially support their children in accordance with their means. In this case, seven months after the child's birth, the father initiated the procedure to get a support order in place. He was ultimately required to pay \$25.00 per month effective August 7, 2002, some fourteen months after his son's birth. The father was current in his court ordered child support at the time of his son's death. No information was provided to the court regarding

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<sup>1</sup> The father did not report this income on either his September 5, 2002 or his February 6, 2003 Financial Disclosure Affidavits filed in connection with the Child Support case, nor did he disclose it during the February 6, 2003 Child Support hearing.

the father's financial obligations for the mother's confinement costs or those associated with the birth of the child. At the hearing, the father contended that he paid an additional \$440.00 in child support directly to the mother.

Based upon his compliance with the child support order and the additional money he claims to have paid, the father argues that he legally supported Lukas. Given the statutory scheme for the assessment of child support, the Court presumes that the amount of child support ordered reflects the ability of a parent to provide such support. This is not the end of the inquiry, however. There was evidence provided by the father himself that he was in a position to pay more than \$25.00 per month in child support. By not declaring his \$11,000.00 Workers' Compensation income, the father appears to have defrauded the Court and succeeded in keeping his support obligation to a minimum. The father conceded that he never considered using any of these funds for the support of his son. Thus, the father was paying a maximum of \$300.00 per year in child support while receiving substantial income. In the Court's view, this deception must result in the conclusion that the father did not support the child according to his means.

In the alternative, the father will be disqualified from inheriting from his son's estate if he had abandoned his son. Although "abandonment" is not defined in the statute, at least one court has held that the criteria for abandonment contained in Domestic Relations Law §§ 111[2][a] and 111[6] should be applied. Matter of Gonzalez, 196 Misc.2d 984 (Bronx County, 2003). These sections of the Domestic Relations Law provide that a parent has abandoned a child when he "evinces an intent to forgo his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so". DRL § 111[2][a]. Moreover, insubstantial or infrequent visits or communication will not defeat a claim of abandonment nor will the subjective intent of the parent. DRL § 111[6]. Abandonment has also been found when the proof establishes that a parent neglects or refuses to "fulfill the natural and legal obligations of training, care and guidance owed by a parent to a child". Matter of Arroyo, 273 A.D.2d 820 (4<sup>th</sup> Dep't. 2000). The facts of the instant case will be evaluated under both standards.

Here, the father had a total of two contacts with Lukas over the child's 19 month life. The father had no contact with the child or the child's mother from the time of the child's birth in June of 2001 until January 1, 2002. The mother has proven that this lack of contact was the father's choice. After the couple ceased communicating in January of 2001, the father apparently made no effort to learn what happened with her pregnancy. This changed after he received a letter at the end of December, 2001, asking him if he was going to assume the responsibilities of a parent. Inexplicably, the father now believed the child was his and he began a flurry of activity including contacting the mother, arranging a visit, providing some money for the child, and notifying DSS. Nonetheless, the Court finds that the father abandoned Lukas for the first six months of the child's life by failing to visit and communicate with the child or the child's mother although able to do so. The father's claim that the mother hid the child's birth from him is deemed incredible.

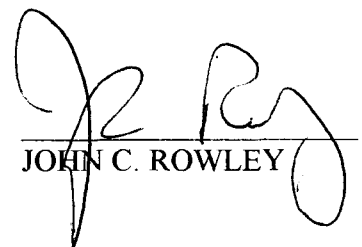
After the January 1, 2002 visit, the father did not see Lukas again until the end of July. He had minimal telephone contact with the mother during this seven month period. He did complete paternity testing and was legally established as Lukas' father in July. At best, he provided \$310.00 worth of support to the mother by the time of his second and last visit. Between that visit and the child's death, more than six months later, the father consented to entry of a \$25 per month support order and sole custody to the mother with visitation as the parties could agree. At the Surrogate's hearing, the father claimed that the mother prevented him from having more contact with Lukas by demanding \$150.00 per visit. This allegation was denied by the mother and is not credited by the Court. The father's agreement to a custody/visitation order that left visitation at the parties' discretion is inconsistent with this claim. Although there was some evidence that the parties had different views of what visitation should look like, at least at the outset, the evidence supports the conclusion that the father failed to pursue visitation. The stipulated order provided the father with the right to return to court to seek a schedule for visitation if he was not satisfied with the visitation that the mother would agree to. While he had no visits over the next five months, he took no steps to seek court intervention.

This evidence supports the conclusion that after initially abandoning the child, the father failed to resume and continue his parenting responsibilities up until the time of the child's death (E.P.T.L. § 4-1.4). Alternatively, the evidence supports the conclusion that the father abandoned the child during this period by failing to have contact with him for six or more months.

The same conclusion is reached under the "training, care, and guidance" standard. The mother has established that the father provided no training, care, or guidance for this child with the exception of his minimal financial support. The father assumed none of the responsibilities of parenthood during his two brief visits. The mother was solely responsible for the child from its birth to its untimely death.

Therefore, the mother's petition is granted and the father's denied. An order consistent with this decision is to be submitted within 10 days by the mother's attorney.

Dated: March 26, 2004



JOHN C. ROWLEY

Decision signed, filed and entered March 26, 2004 in Liber 13, Misc., page 620