Matter of Lee
2021 NY Slip Op 30984(U)
March 31, 2021
Surrogate's Court, New York County
Docket Number: 2016-1385/A
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application by Deanna Jane Lee, as Administrator of the Estate of

EMMA MEI LEE,
also known as Alex Caraballo,
Deceased,

For an Order Disqualifying Edward Caraballo as a Distributee of the Decedent, Pursuant to EPTL 4-1.4

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DECISION and ORDER
File No.: 2016-1385/A

M E L L A, S.:

Papers Considered	Numbered
Notice of Motion by Petitioner Deanna Jean Lee for Summary Judgment and Disqualification under EPTL 4-1.4, together with Affidavit of Deanna Jane Lee, In Support of Motion, Attaching Her Petition for Disqualification and Exhibits thereto	1, 2
Memorandum of Law in Support of Motion	3
Affidavit of Edward T. Caraballo, in Opposition to Motion	4
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This motion seeks summary judgment to disqualify pro se respondent Edward Caraballo as a distributee and estate beneficiary for failing to provide support for the parties' child, decedent Emma Mei Lee (*see* EPTL 4-1.4[a][1]).[1] This matter arises under tragic

[1]The record indicates that decedent may have been a gender non-conforming or transgender individual and also used or did use the name "Alex." The portion of EPTL 4-1.4(a)(1) which provides for disqualification on the ground of abandonment is not at issue in this proceeding, and no question is raised here regarding respondent's affection for his child or his

circumstances, the child's having died at age 14 while at boarding school, as it is alleged, by the child's own hand. Petitioner Deanna Jane Lee, who was divorced from respondent in 2004 and who was the custodial parent, previously obtained Letters of Administration for decedent's estate. Caraballo did not appear or contest that appointment, but he has opposed the disqualification petition and the instant summary judgment motion. He does so on the ground that he was unable to pay more support than he did.

There is no doubt that a parent's ability to pay support is an essential consideration when that parent's disqualification is sought under EPTL 4-1.4(a)(1) (*see Matter of Emiro*, 5 Misc 3d 1002[A], at *6, 2004 NY Slip Op 51149[U] [Sur Ct, Westchester County 2004]). As a ground for disqualification, the failure to support must arise from an unwillingness, rather than an inability, to pay (*see id.*, *citing Matter of Zounek*, 143 Misc 827 [Sur Ct, Queens County 1932]). On this issue, however, movant has established, sufficiently to satisfy her burden on summary judgment,[2] that such issue was fully and fairly addressed in support hearings in Family Court (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [all setting forth the standards for summary judgment]; *see also Matter of Arroyo*, 273 AD2d 820 [4th Dept 2000]).

Movant has established facts requiring the application of the doctrine of res judicata based on this 2008 Family Court decision and order (*see Gramatan Home Investors Corp. v*

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desire to participate in his child's life.

[2]Although movant failed to provide all the pleadings, specifically respondent's answer, as required by CPLR 3212(b), on her motion, respondent did not oppose the motion on that basis, and he therefore is deemed to have waived the defect (*Mew Equity, LLC v Sutton Land Services LLC*, 144 AD3d 874 [2d Dept 2016]).

Lopez, 46 NY2d 481, 485 [1979]). This doctrine provides that a party's having had a full and fair opportunity to litigate a particular issue resulting in a final determination later precludes that party from having another court address and determine that same issue or those which should have been raised (*id.*).[3]

Here, it is uncontroverted that, after a hearing on May 30, 2008, at which the same parties currently before this court had the opportunity to present their evidence and testify, a Family Court Support Magistrate issued a twenty-five-page decision, dated June 30, 2008, determining respondent's support obligations; this decision explicitly addressed respondent's ability to meet such obligations (*Lee v Caraballo*, No. 30-F-05973-06/07C; 30-F-05973-06/08E, June 30, 2008, Fam Ct, NY County, Sup. Magistrate Nicholas J. Palos). That decision, after reviewing the evidence, held that respondent had willfully failed to satisfy his support obligations and that no downward modification of those obligations was warranted. The decision fixed back child support payments due in the amount of $23,650 and implemented certain remedies on the basis of respondent's willful violation of his duty to support.

On her motion, petitioner further relies on statements from the Office of Child Support Enforcement, as of May 11, 2016, some two months after decedent's death in March 2016. The

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3 As explained in *Paramount Pictures Corp. v Allianz Risk Transfer AG* (31 NY3d 64, 72 [2018]):

> "The preclusive effect of a judgment is determined by two related but distinct concepts—issue preclusion and claim preclusion—which collectively comprise the doctrine of 'res judicata' . . . . Issue preclusion, also known as collateral estoppel, bars the relitigation of 'an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment' (*New Hampshire v Maine*, 532 US 742, 748–749 [2001]; *see also* Restatement [Second] of Judgments § 27). . . .
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> "While issue preclusion applies only to issues *actually* litigated, claim preclusion (sometimes used interchangeably with 'res judicata') more broadly bars the parties or their privies from relitigating issues that were or *could have* been raised in that action (*Cromwell v County of Sac*, 94 US 351, 352 [1877])"

Both issue preclusion and claim preclusion are at issue here.

statements show a total amount of $74,294.49 in child support and interest due from respondent, and they further show payments of only $3,955 during the "relevant review period" (listed as April 25, 2011 to May 11, 2016), resulting in a total of child support arrears of $70,339.49.

EPTL 4-1.4 provides: "a) No distributive share in the estate of a deceased child shall be allowed to a parent if the parent, while such child is under the age of twenty-one years: (1) has failed or refused to provide for the child . . . 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." Courts interpreting this statutory provision have found it appropriate to reference support obligations as determined under Family Court Act section 413 (also known as the Child Support Standards Act or CSSA) (*Matter of Ball*, 24 AD3d 1062 [3d Dept 2005]; *Matter of Zakiya Kennedy*, NYLJ, June 21, 2011, at 26, col 6 [Sur Ct, NY County]).

Such reference, however, is not conclusive of the disqualification issue here in that this EPTL section further requires the court to examine whether the parent resumed payment of support to the extent of his ability prior to the child's death (EPTL 4-1.4[a][1]; *see Matter of Musczak*, 196 Misc 364, 366 [Sur Ct, NY County 1949]). But, on this point, movant has also established entitlement to judgment as a matter of law by providing proof of only sporadic, partial payments by respondent, well below the established support obligation and below his means (*see Matter of Wright*, 271 AD2d 201 [1st Dept 2000]; *Matter of Baecher*, 198 AD2d 221 [2d Dept 1993]; *Matter of Zakiya Kennedy*, NYLJ, June 21, 2011, at 26, col 6, *supra*).

In opposition, respondent seeks primarily to reargue and have this court re-determine the issues decided in the prior decision of the Family Court. That effort is insufficient to raise a question of material fact on the proper amount of support and his ability to pay it (*see Matter of*

O'Hara, 85 AD2d 669, 671 [2d Dept 1981]).

Respondent's opposition focuses on three essential points: one, that the Family Court finding was incorrect, in view of his income or the lack thereof, and that he paid what he could during difficult economic times and after having spent several years in an Afghani prison (from which he was released in May of 2006), during which time he could not work or earn income; two, that petitioner waged a vigorous campaign of seeking to alienate him from decedent; and three, that the prior court was biased against him as a gay man, a fact that petitioner knew, he states, when they entered into a relationship that led to the birth of decedent.

As discussed above, respondent cannot have this court re-visit the issues as to the amount of support to be paid or his ability to pay the amounts as ordered, when he had a full and fair opportunity to litigate the issues in Family Court (*see Pierce v Pierce*, 291 AD2d 251 [1st Dept 2002]). Respondent provides nothing to demonstrate that the issues in Family Court were different from those which he asks this court to now determine again, nor that the standard of proof in this court varies materially from the standard applied in the prior action (*see Ginezra Assoc. LLC v Ifantopoulos*, 70 AD3d 427, 429 [1st Dept 2010]). Indeed, much of his opposition is directed solely to arguing that the Family Court's determination was incorrect. Such argument is insufficient to avoid application of collateral estoppel to prevent re-litigation of the same issues that were necessarily determined in Family Court (*Casson v Casson*, 107 AD2d 342, 344 [1st Dept 1985]).

This is not to say that the analysis of the applicability of res judicata, generally, lacks flexibility. Indeed, the court may examine a variety of non-exclusive factors to determine the preclusive effect, if any, of a prior judgment (*see Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 [1988]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 72

[1969]). A change in applicable law may serve as such a factor (*John P. v Whalen*, 54 NY2d 89 [1981]; *Schwartz v Public Adm'r of Bronx County*, 24 NY2d at 72; Restatement [Second] of Judgments, section 28[2]), and the court has taken note of a significant change in the law since the Family Court decision was issued.

In 2010, the legislature superseded the decision of the Court of Appeals in *Knights v Knights*, (71 NY2d 865 [1988]), by amending Family Court Act section 451(3)(a) to read in part: "Incarceration shall not be considered voluntary unemployment and shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment" (*see* L 2010, ch 182, § 6). In its 2008 decision, *Knights* and its progeny had required the Family Court to hold that respondent's imprisonment in Afghanistan – for reasons wholly unrelated to the petitioner or decedent – provided no grounds on which to modify respondent's support obligations, despite the legislative policy expressed in the CSSA that support obligations were to be based on means and ability to pay and despite respondent's de facto inability to earn income while imprisoned.

The 2010 amendment of the Family Court Act (FCA), the courts have determined, should be applied prospectively only (*Baltes v Smith*, 111 AD3d 1072 [3d Dept 2013]). But at least as relevant for present purposes is the first subsection of Family Court Act 451. That subsection provides that support modifications can be made retroactively only to the date of filing of the petition to modify (FCA 451[1]; *see Zaid S. v Yolanda N.A.A.*, 24 AD3d 118 [1st Dept 2005] ["Under Family Court Act § 451, the court has no discretion to cancel, reduce or otherwise modify child support arrears accrued prior to the making of an application for such relief."]; *Schiffer v Schiffer*, 16 AD3d 662 [2d Dept 2005]). Although respondent, prior to decedent's

death, filed petitions to modify the 2008 support determinations, he never followed through, and they were dismissed. Consequently, this court has no ability to re-visit and modify the support arrears as determined by the Family Court in 2008, despite the intervening change of law. In other words, the change in the law regarding incarceration,[4] in this instance, provides no basis for this court, constrained by FCA 451(1) and precedent determining that statute's applicability, to conclude that res judicata should not apply here.

Respondent's remaining arguments fare no better. The claim that the Family Court was biased against him based on his sexual orientation or that his support obligations should have been reduced in view of petitioner's alienation of decedent against him should have been raised in Family Court or in an appeal of that court's order, rather than first raised here to attack the validity of the 2008 determination (*Berg v Berg*, 166 AD3d 763, 765 [2d Dept 2018] [party claiming court bias should preserve an objection and move for the court to recuse itself]; *Matter of Sullivan v Plotnick*, 145 AD3d 1018, 1021 [2d Dept 2016] [parental alienation as basis to modify support cognizable in Family Court]; *see John Street Leasehold v Brunjes*, 234 AD2d 26, 26 [1st Dept 1996]). Consequently, these claims are precluded from being litigated here because they could have been raised incident to the prior determination (*see Paramount Pictures Corp.*, 31 NY3d at 72).

Additionally, the cases determining that ability to pay must be resolved only after a hearing are distinguishable from this case in that, in those cases, there had been no prior

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4 Parental support obligations during imprisonment have been the subject of much analysis. *See, e.g.*, Daniel L. Hatcher, *Forgotten Fathers*, 93 BUL Rev 897 (2013); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. Gender Race & Just. 617 (2012); Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 Geo. J. on Poverty L. & Pol'y 127 (2011); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. Davis L. Rev. 991 (2006).

adjudication of that issue (*see Matter of Martirano*, 172 AD3d 1610 [3d Dept 2019]; *Eddy v Eddy*, 175 AD3d 1726 [3d Dept 2019]). Finally, to the extent that respondent suggests that decedent was well taken care of because petitioner had adequate resources to do so, such a circumstance provides no defense against his support obligations (*Matter of Brennan*, 169 AD2d 1000 [3d Dept 1991]).

Accordingly, petitioner's motion for summary judgment is granted, and respondent Edward Caraballo is disqualified from taking an intestate share of decedent's estate pursuant to EPTL 4-1.4(a)(1).

This decision constitutes the order of the court.

Clerk to notify.

Dated: March 31, 2021

Rita Mella F.

SURROGATE