

**COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION**

No. 1288 DE of 2011

Control No. 113048

Estate Of Jahira Smith, Deceased

O P I N I O N

O'Keefe, J.

February 7, 2013

The Petitioner is Elizabeth Harvey; she is the mother of the decedent and the Administrator of the Estate of Jahira Smith, deceased. On November 7, 2011, the mother filed a Petition for Approval and Allocation of Settlement Proceeds in a Wrongful Death Action. In the Petition, the mother requested that some of the funds be placed in escrow pending the outcome of a parental claim dispute. Presently before this Court is that dispute.

Facts and Procedural History

The decedent is Jahira Smith. Jahira was fourteen years old when she died. She suffered from asthma and was taking a drug manufactured by GlaxoSmith Kline, LLC. The mother believed that the drug caused and/or contributed to Jahira's death and retained counsel to litigate the claim. Jahira died intestate, survived only by her mother and father. Prior to the filing of a

lawsuit, the parties settled for the gross sum of \$350,000.00. The mother then filed the Petition to approve the settlement.

The instant dispute involves whether Jahira's father, the Respondent Lawrence Smith, is entitled to receive wrongful death benefits under the Wrongful Death Act, 42 Pa.C.S.A. §8301(b), or, as the mother asserts, is ineligible due to forfeiture under 20 Pa.C.S.A. §2106(b). Under the Wrongful Death Act, both parents are entitled to take equal shares of the wrongful death benefits. 42 Pa.C.S.A. §8301(b). The mother asserts that the father statutorily forfeited his share of Jahira's estate because he both failed to perform his duty to support his daughter and deserted her. A hearing was held on September 18, 2012, to hear evidence on this claim.

Duty to Support

The relevant portion of the forfeiture statute reads as follows:

(b) Parent's share. Any parent who, for one year or upwards previous to the death of the parent's minor or dependent child, has:

(1) failed to perform the duty to support the minor or dependent child or who, for one year, has 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.¹

¹ It must be noted that in the father's Reply Brief, he relies on the previously required elements of forfeiture posited by In Re: Teaschenko, 393 Pa.Super. 355, 574 A.2d 649. This case was decided prior to a 2000 Legislative Amendment to the statute that removed the requirements that a parent must fail to perform **any** duty of support and that the failure be **willful**.

20 Pa.C.S.A. §2106(b). This statute is in place to prevent someone who has failed to live up to his or her responsibilities as a parent from gaining a “windfall” from the child’s death. In re: Kistner, 2004 Pa.Super. 352, 858 A.2d. 1226, 1229.

Therefore, in order to successfully prove forfeiture, the child must be a minor or dependent child and the potentially forfeiting parent, in the last year of the child’s life, must have either failed to perform the duty to support the child or deserted the child. Jahira, just fourteen years old when she tragically died, was a minor.

Duty To Support

At the hearing, the mother testified that in the entirety of Jahira’s life, the father only provided one outfit, one pair of sneakers, one necklace and a pair of earrings. (N.T. 09-18-12, 11). She further testified that the father never provided any financial support for Jahira. (N.T. 09-18-12, 11). The father’s response was to admit that he had absolutely no proof that he ever provided any financial support to Jahira. (N.T. 09-18-12, 34). During his deposition, the father similarly replied that he had no receipts or cancelled checks for any of the support that he claimed to have provided to Jahira and could not even provide an estimate of the amount of money he gave to Jahira. (Smith Dep. 17:21-19:1). These arguments are basically moot however, because the statute focuses only on the last 12 months of a Jahira’s life.

In the last 12 months of her life, her father was incarcerated for the first six months and Jahira was comatose for the remaining six months. There exists no precedent for this factual situation leaving this Court with two options: either include the time the father was incarcerated in that last year or extend the statute back in time to the six months prior to his incarceration. It

seems unlikely that the Pennsylvania Legislature intended a tolling of the statute while a parent is incarcerated. This seems especially true given that the forfeiture statute includes a list of criminal convictions that constitute an automatic forfeiture. It appears that the Legislature considered the criminal actions of a potentially forfeiting parent and the absence of any mention of a parent that is currently incarcerated convinces this Court that incarceration should not toll the forfeiture statute to potentially provide a financial benefit to the incarcerated parent.

In March, 2008, the father was released from prison after being incarcerated for 18 months. (N.T. 09-18-12, 39). The father was incarcerated for a probation violation. (N.T. 09-18-12, 40-41) The father was on probation for shooting a man three times who the father claims assaulted him in his sleep. *Id.* At the time of his release, Jahira was already in a coma where she would remain for the next six months until her death.

The duty to support in the context of forfeiture means a duty to support financially “...in the circumstances of the parent’s ability to do so.” *In re: Moyer*, 2000 Pa.Super. 227, 758 A.2d. 206, 211. The father testified that he was constantly employed throughout Jahira’s life, (N.T. 09-18-12, 34-35), but that he did not get a job until six to eight months after his release from prison. (N.T. 09-18-12, 42, 57). At no point did the father rebut the mother’s claim that he provided absolutely no support throughout the entirety of Jahira’s life, (N.T. 09-18-12, 11), rather, the father testified only that he visited Jahira in the hospital “many times a week.” (N.T. 09-18-12, 43). This type of non-financial support may be applicable under the desertion portion of the forfeiture statute but does not apply in the duty to support. *Moyer*, *supra*. The only monetary contribution claimed by the father was a headstone that he promised to buy. (N.T. 09-18-12, 58). Four years after Jahira’s death, the father has yet to make this purchase because, he reminds us,

he has nine children, not just one. Id. This Court finds by clear and convincing evidence that the father failed to perform his duty to support Jahira for one year prior to her death.

Desertion

By definition, desertion must include an awareness of someone else's presence. The father testified that, after his release, he visited the now comatose Jahira in the hospital "[m]any times a week." (N.T. 09-18-12, 43). The father claims that during these visits he talked and sang to Jahira and rubbed her arm. (N.T. 09-18-12, 44-45). Again, as there is no precedent for this factual situation, this Court is without guidance regarding a comatose child's awareness of a parent's presence. What is known is that Jahira fell into a coma having not seen her father for over a year due to his incarceration.

This Court is not equipped to make the medical, scientific or even spiritual leaps to establish that Jahira was aware of the father's presence while she was in a coma and must view the circumstances through that dispassionate lens. What this Court can determine, however, is that when Jahira was last conscious, her father was incarcerated and she had not seen him for over a year. This Court finds by clear and convincing evidence that the father deserted Jahira for one year prior to her death.

Conclusion

Therefore, because a failure to perform either one of the statutory elements of forfeiture would be enough to eliminate the father's right to collect wrongful death benefits and because, in

this case, the father failed to perform both, this Court holds that the father, Lawrence Smith, has forfeited his rights and interests in Jahira's estate. An appropriate Order will be entered.

O'KEEFE, ADMIN J.