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MCKINNEY V. RICHITELLI: ABANDONING PARENTS AND PRESUMPTIVE PENALTIES

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I. INTRODUCTION

The tired adage "bad facts make bad law" is given new life in a recent decision by the North Carolina Supreme Court. While the court's logic in deciding *McKinney v. Richitelli* is sound when viewed on its face, problems arise when that same logic is applied in other cases. The problem in *McKinney* occurs because the Supreme Court interprets law, but cannot make factual judgments. Therefore, the court crafts its decision to create an outcome dictated by the facts, instead of an outcome based on proper legal analysis.

II. BACKGROUND

This case involves the interpretation of North Carolina General Statute Section 31A-2, "Acts barring rights of parents." This statute provides:

> Any parent who has willfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except —
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.[1]

Here, this statute was applied in a wrongful death action brought by the mother of a decedent who had been abandoned by his father. However, the decedent child had reconciled with his father after attaining the age of majority. North Carolina's wrongful death statute provides that:

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1. N.C. Gen. Stat. § 31A-2 (2001).

> The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding four thousand five hundred dollars ($ 4,500) incident to the injury resulting in death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees, but *shall be disposed of as provided in the Intestate Succession Act.*[2] (emphasis added).

Recoveries from wrongful death actions are disposed of as provided by the Intestate Succession Act. Therefore, a parent may be barred from taking the recovery pursuant to N.C. Gen. Stat. § 31A-2.

These same issues were recently discussed in *In re Estate of Lunsford.*[3] In *Lunsford*, Candice Leigh Lunsford died at the age of eighteen in an automobile accident. Ms. Lunsford's father was an alcoholic and her parents divorced when she was three years old.[4] Ms. Lunsford's mother was granted "sole custody, care, and control" of Candice, although the divorce judgment did not bar her father "from participating in [Candice's] care and maintenance, nor did it operate to terminate his parental rights."[5] However, her father paid "no more than $100.00" in support of Candice, though he maintained that "he offered to pay more, but that [Candice's mother] repeatedly refused his offers of financial support."[6] Candice's father visited her less than a dozen times from the time her parents separated in 1982 until her death in 1999.[7] When Candice Lunsford died, her mother filed suit and it was determined that Candice's father "willfully abandoned [Candice] Lunsford and was therefore barred from inheriting from her estate."[8] Ms. Lunsford's father appealed, "arguing that the trial court erred by (I) finding that he willfully abandoned his daughter; [and] (II) determining that exception (2) to N.C. Gen. Stat. § 31A-2 does not apply to this case. . .."[9]

The Court of Appeals held that it was bound by the conclusion of the trial court that Ms. Lunsford had been abandoned by her father, as supported by the evidence of record.[10] In addition, the court held that the divorce judgment did not order Candice's father to visit her, "however, parents have a duty to support their children until they

2. N.C. Gen. Stat. § 28A-18-2(a) (2003).
3. *In re Estate of Lunsford*, 547 S.E.2d 483, 484 (N.C. App. 2001).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 486.

reach the age of majority. Pursuant to N.C. Gen. Stat. § 31A-2, parents have a duty to provide 'care and maintenance' for their children until they reach the age of majority."[11] Therefore,

> because the divorce judgment did not deprive respondent of custody of [Candice], N.C. Gen. Stat. § 31A-2(2) does not apply. Respondent remains under the provisions of N.C. Gen. Stat. § 31A-2, and the trial court has already found that respondent abandoned Candi Lunsford. No exceptions to this conclusion exist, and respondent cannot inherit from his daughter's estate.[12]

However, this holding was quickly vacated by the Supreme Court of North Carolina, which remanded the case back to the Court of Appeals for

> further remand to the trial court for additional findings of fact as to (1) whether respondent Randy Lunsford abandoned Candice Leigh Lunsford; (2) if so, whether respondent Randy Lunsford resumed care and maintenance of Candice Leigh Lunsford at least one year prior to her death and continued the same until her death; and (3) whether respondent Randy Lunsford "substantially complied" with all orders of the trial court requiring contribution to the support of the child.[13]

On remand, the trial court once again found that "Mr. Lunsford had willfully abandoned his daughter within the meaning of N.C. Gen. Stat. § 31A-2 and that neither of the exceptions contained within the statute applied."[14] However, the North Carolina Court of Appeals held that the exception contained in N.C. Gen. Stat. § 31A-2(2) states that "if a court takes away custody of a child and decides the specifics of support, then a parent should not be denied the right to participate in intestate succession if he limits his role in his child's life to the parameters set out by a court."[15] The original divorce degree awarded "care, custody and control of Candice to her mother and did not include any requirement that Mr. Lunsford pay child support."[16] Therefore, the trial court erred when it concluded that "exception (2) of N.C. Gen. Stat. § 31A-2 does not apply if a court has decided not to order a parent to pay child support in effect allows a subsequent court to revisit the issue of support and decide, contrary to the earlier decision, that a parent should have done more."[17] This series of appeals and re-hearings was the only real examination of N.C. Gen. Stat. § 31A-2 prior to *McKinney*. However, when the Court of Appeals decided *McKinney v. Richitelli* based on the holding in *In re Lunsford*,

11. *Id.* at 488.
12. *Id.*
13. *In re Estate of Lunsford*, 556 S.E.2d 292 (N.C. 2001).
14. *In re Estate of Lunsford*, 585 S.E.2d 245, 248 (N.C. App. 2003).
15. *Id.* at 251 (N.C. App. 2003)
16. *Id.*
17. *Id.*

the Supreme Court of North Carolina decided to step in and address the interpretation of section 31A-2.

III. THE CASE

Plaintiff, Karen McKinney, and defendant, James Richitelli, were married in 1976 and their son, Michael Richitelli, was born on July 30, 1977.[18] In 1981, Karen McKinney and James Richitelli were divorced in Wake County District Court, and Karen was granted primary custody of Michael, while James retained visitation rights.[19] The district court also ordered James to pay child support in the amount of $240.00 per month, beginning on October 1, 1980.[20] James failed to make any of the court-ordered child support payments from January 1, 1981 through July 30, 1995 – Michael's 18th birthday – for a total of approximately $42,000.[21] James had no contact with Michael from 1981 until March 1997.[22] During this time, James was rarely employed and spent a significant amount of time in prison.[23]

After the divorce, James' life quickly disintegrated into a cycle of drinking, drug use, and crime. In July 1980, James was arrested in Wake County. After making bail he traveled west working odd jobs, ending up in Odessa, Texas in the spring of 1981 where he worked as an oil-field day laborer.[24] In June 1981, James was arrested for theft and sentenced a to five year prison term.[25] He was paroled to a halfway house in February 1983, but his parole was revoked that summer due to his continued drinking and drug use.[26] In August 1985, James was again released to a halfway house and subsequently moved to Vermont to live with his parents.[27] While in Vermont, James was able to secure employment as a cafeteria cook during the ski season, but once again, James started drinking and using drugs.[28] In March 1986, James moved to California with his alcoholic girlfriend and began traveling around the country, "committing crimes, shooting cocaine with a needle and drinking heavily."[29] In March of 1987, James robbed three banks in Salt Lake City, Utah to support his cocaine

18. McKinney v. Richitelli, 586 S.E.2d 258, 260 (N.C. 2003).
19. *Id.* at 250.
20. *Id.*
21. *Id.* at 264.
22. *Id.* at 260.
23. *Id.* at 264.
24. Record on Appeal at 67, *McKinney v. Richitelli*, 2002 N.C. App. LEXIS 1876 (N.C. App. April 16 2002) (No. COA01-727).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Record on Appeal at 68, *McKinney* (No. COA01-727).

addiction.[30] He traveled to Denver, Colorado that April where he robbed another bank to support his cocaine addiction.[31] When his partner was arrested in June 1987, he left Denver and moved to New Haven, Connecticut, where he was arrested for robbing yet another bank.[32] In June 1987, James pled guilty in federal court to bank robbery and was sentenced to six years in prison.[33] James was released to a halfway house in Hartford, Connecticut in July 1993, but was immediately returned to prison when he arrived at the halfway house intoxicated and high on cocaine.[34] In October 1993, James was released from prison and moved into a homeless shelter in New Haven, Connecticut, where he began receiving welfare assistance in the amount of $75.00 per week.[35] James moved out of the homeless shelter in February 1994 and began working day-labor construction jobs.[36] He continued to drink and use drugs heavily.[37] In September 1994, James entered an inpatient drug treatment program, but was kicked out three weeks later and arrested for assault.[38] James' drug use and criminal activity continued through 1995, even though he completed a 30-day inpatient drug treatment program.[39] In July 1995, James entered a one-year treatment program for drug use, only to be kicked out in January of 1996 at which point he began attending Narcotics Anonymous meetings.[40] Finally, in February 1997, James was able to kick his habit through his Narcotics Anonymous support system and began a renewal of his life through his newly found religious faith.[41]

Once James had overcome his drug and alcohol habit, he contacted Michael in an attempt to re-establish their father-son relationship. In March 1997, when Michael was 19 years old, James wrote to him, and in June of that year, Michael visited James for a week.[42] At this time, Michael had been diagnosed with cancer.[43] That October, and again in March 1998, James traveled to North Carolina to visit Michael for a week.[44] James also sent Michael several checks between October

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. Record on Appeal at 68-69, *McKinney* (No. COA01-727).
35. Record on Appeal at 69, *McKinney* (No. COA01-727).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. Record on Appeal at 70, *McKinney* (No. COA01-727).
42. *Id.*
43. *McKinney*, 586 S.E.2d at 260.
44. Record on Appeal at 70, *McKinney* (No. COA01-727).

1997 and December 1998, totaling $3,150.[45] During this time, James and Michael spoke weekly on the telephone, and James met Michael's friends.[46] Michael had forgiven his father for the past.[47] James again traveled to North Carolina to visit with his son for a week in February 1999, and Michael passed away the night James left.[48]

When Michael was sixteen years old, he changed his name from Michael Edward Richitelli to Michael Edward McKinney.[49] In his application to change his name, Michael stated that he desired the change because "he [did] not want to use his father's name, Richitelli, as his last name now, in that he has not seen or heard from his father since 1980."[50] Michael also stated that his "father abandoned [him] by failing to perform the natural and legal obligations of parental care and support for [him] continuously at least since around 1980."[51] After August 1996, Michael "became physically incapacitated and was unable to work or support himself."[52] He was subsequently diagnosed with cancer and later filed "a medical malpractice action in which he alleged that a radiologist caused his illness."[53] Michael died of cancer in February 1999.[54]

After Michael's death, his mother, Karen McKinney, was appointed the personal representative of Michael's estate.[55] She amended the medical-malpractice suit to add a wrongful death action on behalf of Michael's estate.[56] In July 2000, Karen filed a declatory judgment against James, "seeking a judicial determination of [James'] rights to any potential award resulting from the wrongful death suit."[57] She subsequently filed a motion for summary judgment, which was granted by the Superior Court of Wake County on March 14, 2001.[58] James appealed and the North Carolina Court of Appeals reversed the trial court's judgment, concluding that a "genuine issue of material fact existed as to whether [James] had resumed a relationship with Michael sufficient to invoke the exception set out in N.C. Gen. Stat.

45. *McKinney*, 586 S.E.2d at 261.
46. Defendant-Appellee's New Brief at 2, *McKinney v. Richitelli*, 586 S.E.2d 258 (N.C. 2003) (No. 203PA02).
47. Defendant-Appellee's New Brief at 3, *McKinney* (No. 203PA02).
48. Record on Appeal at 70, *McKinney* (No. COA01-727).
49. Plaintiff-Appellant's New Brief at 3, *McKinney* (No. 203PA02).
50. Record on Appeal at 31, *McKinney* (No. COA01-727).
51. *Id.* at 32.
52. *Id.* at 61.
53. *McKinney*, 586 S.E.2d at 260.
54. *Id.* at 261.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

§ 31A-2(1)."[59] Karen then petitioned the Supreme Court of North Carolina for discretionary review pursuant to N.C. Gen. Stat. § 7A-31, and the petition was accepted on June 27, 2002.[60] The Supreme Court of North Carolina undertook a three-fold inquiry into the case. First, the court looked into whether N.C. Gen. Stat. § 31A-2 applied after a child has reached his or her majority, in order to prevent an abandoning parent from recovering through an offspring that was abandoned while a minor. Second, the court considered whether James abandoned Michael such that section 31A-2 precluded him from taking under intestate succession. Finally, the court determined "whether a parent who has abandoned his or her minor child may thereafter resume a parent-child relationship with the now-adult child and, by so doing, come under the exception set out in N.C. Gen. Stat. § 31A-2(1)."[61] The Supreme Court held that N.C. Gen. Stat. § 31A-2(1) applies to any "abandoned child dying intestate regardless of the child's age at death;" that James abandoned Michael as contemplated by N.C. Gen. Stat. § 31A-2; and that in order to benefit from N.C. Gen. Stat. § 31A-2(1), "a parent must renew . . . care and maintenance at least one year before the child reaches the age of eighteen."[62] Thus, the court determined that summary judgment in favor of Karen was appropriate and reversed the decision of the Court of Appeals, leaving James unable to take part in any settlement reached as a result of the wrongful death action.

IV. ANALYSIS

The Supreme Court of North Carolina held that N.C. Gen. Stat. § 31A-2(1) is ambiguous because "nowhere in chapter 31A of the General Statutes is the term 'child' defined, nor is the meaning of the term clear from its context." The court then reiterates the rules of statutory construction when such ambiguities exist, stating that "the primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention. . ."[63] After reviewing the North Carolina jurisprudence and legislative history of inheritance by parents that had abandoned their children, the court concludes that the "legislative intent behind N.C.G.S. § 31A-2 was both to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza."[64] The court writes that if it had held that Sec-

59. *Id.* (citing McKinney v. Richitelli, 563 S.E.2d 100 (2002)).
60. McKinney v. Richitelli, 565 S.E.2d 669 (N.C. 2002).
61. *McKinney*, 586 S.E.2d at 262.
62. *Id.* at 263, 264.
63. *Id.* at 262.
64. *Id.* at 263.

tion 31A-2 did not apply once a child reached the age of majority, such an interpretation would "frustrate the statute's purpose and effectively forgive the abandoning parent's dereliction. [T]herefore, . . . [Section] 31A-2 applies to any abandoned child dying intestate regardless of the child's age at death."[65]

Next, the court quickly determined that James abandoned his son Michael. Abandonment is defined as "willful neglect and refusal to perform the natural and legal obligations of parental care and support."[66] Maintenance, or support, is defined as "a parent's financial obligation to provide support during the child's minority."[67] Applying these concepts, the court found that because James did not attempt to modify the child support order, visit Michael, or otherwise establish communication from 1981 through 1997, he demonstrated "willful or intentional conduct . . . which evinces a settled purpose to forgo all parental duties."[68]

Finally, the court determined that James was not entitled to the exception provided in N.C. Gen. Stat. § 31A-2(1). The court held that the exception requires both the care *and* maintenance of the child, and that the maintenance of the child refers solely to the financial support of a child during minority.[69] However, the court appears to be ignoring part of its holding in *Wells v. Wells*, where it defined "maintenance." In *Wells*, the court holds that "ordinarily the law presumes that when a child reaches the age of [eighteen] years he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates. But where this presumption is rebutted by the fact of mental or physical incapacity, it no longer obtains, and the obligation of the father continues."[70] This establishes an exception to the 'maintenance ends at majority' rule that the court is so keen to strictly adhere to, yet the court does not examine the impact of this exception on Section 31A-2. If Michael had been afflicted by some form of mental or physical incapacity before reaching eighteen years of age, then according to *Wells*, James would still have had an obligation to maintain and support Michael. However, according to the court's holding, James would still be barred from inheriting through the intestacy pursuant to Section 31A-2.

The court's decision creates several other problems for parents that reconcile with their children. The court's interpretation of N.C. Gen. Stat. § 31A-2(1) requires that a parent must reconcile with their aban-

65. *Id.*
66. *Id.*
67. *Id.* at 264 (citations omitted).
68. *Id* (citing Pratt v. Bishop, 126 S.E.2d 597 (N.C. 1962)).
69. *Id.* (citing Wells v. Wells, 44 S.E.2d 31 (N.C. 1947)).
70. *Wells*, 44 S.E.2d at 35.

doned child and resume care and maintenance of that child before the child's 17th birthday. The parent must also resume the care and maintenance of that child for at least one year before the child reaches the age of majority.[71] The problem with this requirement is shown by the following examples:

> Example #1
> "John abandoned his daughter when she was one day beyond her 17th birthday. Two months later he realized what he had done and reconciled with his daughter. He provided care and maintenance for his daughter until she was killed in an automobile accident at age 18½. On these facts, John would lose any right to share in his daughter's intestate estate or any wrongful death proceeds paid into her estate even though he reconciled with his daughter when she was a *minor*."[72]
> Example #2
> "Paul and his wife had one daughter. Paul abandoned his daughter when she was 17. At age 17½ Paul resumed his care and maintenance of his daughter. At age 18, John's wife left her daughter and Paul. Paul and his daughter had a very close relationship for the time of his resumption of care and maintenance (when the daughter was 17½) until Paul's daughter, who at age 28 was killed in an automobile accident. Paul's daughter has not heard from her mother since the mother abandoned her at age 18. The daughter had a will leaving everything she owned to her father and specifically disinheriting her mother. On these facts, all wrongful death proceeds received by a daughter's estate would go to her mother."[73]

Both of the preceding examples suppose a reconciliation of an abandoning parent before their child's attainment of majority. However, similar problems exist if the reconciliation occurs after the child has reached the age of 18. Section 31A-2 places a bar on intestate succession, and should therefore be interpreted according to the principles behind the enactment of the North Carolina Intestate Succession Act (N.C. Gen. Stat. §§ 29-1 to 29-30). The North Carolina Supreme Court has previously held that "[t]aken as a whole, the Act conveys an intent by the Legislature to write a reasonable will for those residents who have not done so."[74] Where there is evidence that an abandoned child had reconciled with the abandoning parent, there should not be a forced loss of inheritance rights by that parent because of the previous abandonment. The legislative intent of the Intestate Succession Act is to provide a reasonable will to those who have not written their own. Eliminating the inheritance rights of a parent whose prior actions a child has forgiven is not a reasonable act. It is not reasonable

71. *McKinney*, 586 S.E.2d at 264.
72. Defendant-Appellee's New Brief at 10, *McKinney* (No. 203PA02).
73. *Id.* at 11.
74. Newlin v. Gill, 237 S.E.2d 819, 822 (N.C. 1977).

to interpret section 31A-2 so that "adult children would be statutorily prohibited from forgiving an abandoning parent and restoring the rights of inheritance to the parent even if this is the desire of the adult child."[75]

V. CONCLUSION

In *McKinley v. Richitelli*, the North Carolina Supreme Court establishes that "an abandoning parent who seeks to come under the exception in N.C. Gen. Stat. § 31A-2(1) must renew both the care and the maintenance of the child . . . at least one year before the child reaches the age of eighteen."[76] The court bases its holding on "historical and textual analysis" and their understanding of the legislative intent behind the act.[77] The court states that the "larger principle that the abandoned child has the power to prevent a reconciled parent from being excluded from the child's estate informs our analysis."[78] But that power is nullified by the court's determination that the "General Assembly has adequately demonstrated an unwillingness to allow an abandoning parent to take from an abandoned adult child as the result of a mechanical application of the rules of intestate succession."[79] Yet, the court establishes a mechanical application of section 31A-2 and ignores the General Assembly's intent in passing the Intestate Succession Act. The simple ruling that section 31A-2 establishes a rebuttable presumption that an abandoning parent may not inherit a share of his child's estate would have preserved the General Assembly's intent in passing both the Intestate Succession Act and section 31A-2, as well as a child's power to prevent a reconciled parent from being excluded from the child's estate.[80]

75. Defendant-Appellee's New Brief at 11, *McKinney* (No. 203PA02).
76. *McKinney*, 586 S.E.2d at 264.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*