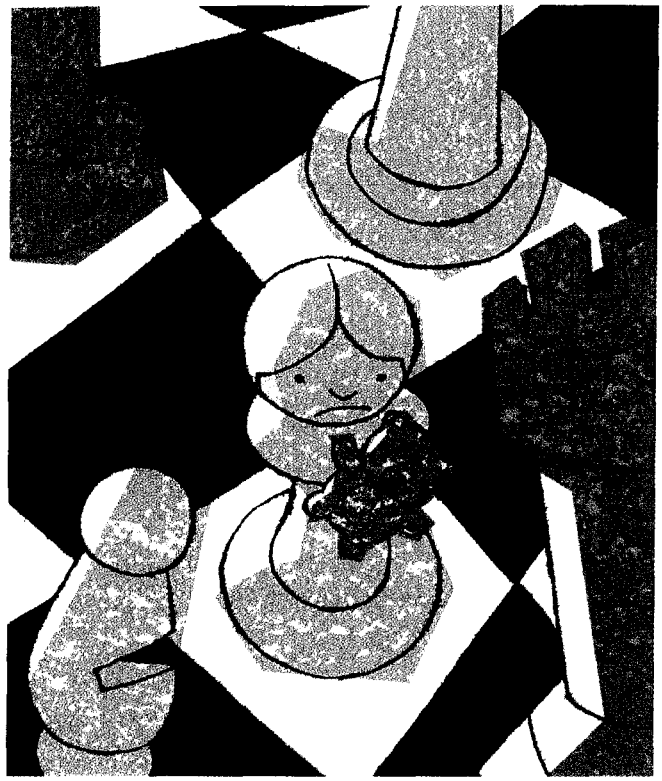

Proposed Amendment to EPTL 4-1.4

Expand Grounds for Parental Disqualification

By Ilene S. Cooper and Staci A. Graber

A parent is disqualified from inheriting as a distributee of the estate of a deceased child when the parent has failed to support or has abandoned the child, according to the current provisions of section 4-1.4 of New York's Estates, Powers and Trusts Law (EPTL).[1] The statute is silent, however, where a parent is found to have permanently neglected or abused a child. Indeed, while such circumstances may result in criminal prosecution or the termination of parental rights pursuant to Social Services Law § 384-b,[2] they have no impact upon the post-mortem right of a parent to inherit as a distributee of a child's estate.

The matter is undoubtedly one of legislative oversight rather than intent, and requires rectification. Given the growing number of reported cases of abuse, children today are in need of every additional protection the law can provide.

Toward this end, in 2002, the Executive Committee of the Trusts and Estates Law Section of the New York State Bar Association voted in support of a proposed amendment to EPTL 4-1.4(a) to include a finding of abuse pursuant to Social Services Law § 384-b as a separate and distinct ground for disqualification of a parent as an intestate distributee of a child's estate. Upon consideration of this proposal, the New York State Bar Association's House of Delegates expanded its terms to encompass any of the instances where parental rights are terminated pursuant to § 384-b of the Social Services Law. That proposal, which was passed by the New York State Senate (2005 Sen. Bill #43), and is now before the New York State Assembly reads as follows:

> Section 1. Section 4-1.4 of the estates, powers and trust law is REPEALED and a new section 4-1.4 is added to read as follows:
>
> Section 4-1.4. Disqualification of parent to take intestate share.
>
> (a) No distributive share in the estate of a deceased child shall be allowed to a parent if a parent, while such child is under the age of twenty-one years:
>
> (1) has failed or refused to provide for the child or has abandoned such 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; or
>
> (2) has been the subject of a proceeding pursuant to Section 384-b of the Social Services Law which:
>
> (A) resulted in an order terminating parental rights, or
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> (B) resulted in an order suspending judgment, in which event the Surrogate's Court may make a deter-

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mination disqualifying the parent on the grounds adjudicated by the Family Court, if the Surrogate's Court finds, by a preponderance of the evidence, that the parent, during the period of suspension, failed to comply with the Family Court order to restore the parent-child relationship.

(b) Subject to the provisions of subdivision eight of two hundred thirteen of the civil practice law and rules, the provisions of subdivision (a)(1) of this section shall not apply to a biological parent who places the child for adoption based upon (1) a fraudulent promise, not kept, to arrange for and complete the adoption of such child, or (2) other fraud or deceit by the person or agency where before the death of the child, the person or agency fails to arrange for the adoptive placement or petition for the adoption of the child, and fails to comply timely with conditions imposed by the court for the adoption to proceed.

(c) In the event that a parent or spouse is disqualified from taking a distributive share in the estate of a decedent under this section of 5-1.2, the estate of such decedent shall be distributed in accordance with 4-1.1 as though such spouse or parent had predeceased the decedent.

Historical Perspective

The concept of disqualification originated in 1929 pursuant to § 87 of the Decedent's Estate Law (DEL), and initially affected only a spouse's right to inherit. Thereafter, the statute was amended several times, resulting in the addition of subdivision (e), which enumerated not only grounds for the disqualification of a spouse, but also the forfeiture of a parent to share in the estate of his or her child. Subdivision (e) provided, in part, that no distributive share in the estate of a child would be allowed to a parent who has neglected or refused to provide for the child during infancy or who has abandoned the child during infancy. The intent of the amendment was twofold: to deprive a parent of a distributive share, and to prevent a parent from profiting from his or her own wrong, according to the 1889 decision in *Riggs v. Palmer*.[3] In such cases, disqualification resulted in the distribution of the child's estate as though the parent predeceased the child.

No definitions were provided in DEL § 87 for the terms "neglect" or "abandonment." The terms were, however, defined in DEL § 133(4)(c), currently EPTL 5-4.4, as a "voluntary breach or neglect of duty to care for and train the child and a duty to supervise and guide his growth and development."[4] Early cases further interpreted abandonment to include "neglect and refusal to perform natural and legal obligations to care and support, withholding his presence, his care, opportunity to display voluntary affection, and neglect to lend support and maintenance."[5] Under both DEL §§ 87 and 133, neglect, refusal to support, and abandonment are separate and distinct grounds for disqualification. Although the separate ground of neglect was omitted from the recodification of DEL § 87 to EPTL 4-1.4, decisions continue to find neglect a ground for disqualification under EPTL 4-1.4(a), relying upon public policy and the principles established in *Riggs*.[6]

In *Riggs*, a beneficiary under a will was convicted of murdering the testator so that he could accelerate the distribution of the estate for his benefit. At the time of the decision, no specific statute was in place to provide guidance to the court regarding disqualification; only general laws of devolution of property existed. Notwithstanding the lack of statutory specificity, the court held that "it could not have been the intention of the legislature in the general laws passed for the devolution of property by will or descent, that they should operate in favor of one who murdered his ancestor in order to come into possession of his estate." The court was not concerned with the general language contained in the existing laws but rather with public policy.[7]

In *Riggs*, a beneficiary under a will was convicted of murdering the testator so that he could accelerate the distribution of the estate for his benefit.

Since the opinion in *Riggs*, courts have created a distinction between those persons who act with intent to cause harm and those who commit acts that are accidental, involuntary, or performed in self-defense. The rationale for these decisions is that one who acts under the latter circumstances does not do so with the requisite intent to cause harm to another.[8] The same result arises where a defendant-beneficiary is determined to be incompetent or insane. Such person is not considered to act with the intent to profit from a legal wrong, and thus, the principles of *Riggs* are inapplicable.

Nevertheless, the basis for disqualification has been extended to include those persons who act with reckless disregard for the life of another. For example, in *In re Wells*,[9] the defendant-beneficiary was convicted of manslaughter in the second degree, a non-intentional felony. The court found that the defendant was not entitled to share in the decedent's estate, concluding that while the crime was not considered an intentional felony, it involved a "reckless and conscious disregard for the life of another."[10] Section 15.05(3) of the New York Penal Code defines recklessness as conduct by a person who "is aware of and consciously disregards a substantial and unjustifiable risk that a result will occur and that such cir-

cumstance exists." Because the defendant in *Wells* was consciously aware of the risk and possible result of her actions, her conviction of second-degree manslaughter barred her from inheriting from the decedent's estate despite the lack of intent.[11]

In a similar case, *In re Estate of Grant*,[12] a man was convicted of second-degree manslaughter in the death of his wife and was barred from receiving both his distributive share in his wife's estate and the proceeds of a life insurance policy on her life. The court explained that although the second-degree manslaughter conviction did not automatically bar inheritance because it is not an intentional crime, public policy dictates that the principle of disqualification be applied to prohibit a beneficiary from profiting from such reckless conduct which caused another's death.

It is clear that the trend in case law sustains the settled principle that prohibits one from profiting from wrongful conduct, whether intentional or reckless, at the expense of an innocent victim's estate, and, perhaps more important in this context, expands the application of this rule when the interests of justice and public policy so require.

> less than eighteen years of age whose parent or persons legally responsible for his care inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates substantial risk of death, or . . . protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ.[15]

The court opined that there is no specific requirement of the use of force in the definition of an abused child and that it is the actual or potential impact on the child as opposed to the per se seriousness of the injury that forms the predicate for abuse. In view of the purpose of the Family Court Act to protect children from injury or mistreatment, physically, mentally, and emotionally, the court terminated the father's parental rights. Significantly, the court terminated the mother's parental rights as well due to a failure on her part to protect her son from the abuse of his father.[16]

In *Mark G. ex rel. Jones v. Sabol*,[17] the court disqualified both parents from inheriting from the child's estate, albeit the father and not the mother was found guilty of manslaughter in the child's death. As to the mother, the court concluded that she had "contributed significantly to the child's death" in that she had previously inflicted physical abuse upon him during his lifetime and had stood by and took no affirmative steps to protect her child from the abusive conduct of his father that resulted in his death. The result was largely influenced by the court's sense of morality, as it held: "While the instant situation may not be exactly what the drafters [of EPTL 4-1.4] had in mind, it clearly fits within the ambit of the statute in wording and in spirit . . . as a matter of case and statutory law, *morality and common sense*."[18]

A parent whose parental rights are terminated should be disqualified as a distributee of the child's estate.

To this extent, both statute and evolving judicial precedent support the conclusion that a parent whose parental rights are terminated on the grounds of permanent neglect or abuse of a child should be disqualified as a distributee of the child's estate on the grounds that such conduct evinces a reckless disregard for the child's life.[13]

Disqualification should apply as equally to the parent who actually abuses or neglects a child as to the parent who remains idle and allows the abuse and neglect to occur. Both parents have a duty to care for and protect their child; both have intentionally or recklessly failed to fulfill that role.

A number of cases speak to this issue. For example, in *In re Shane T.*,[14] the Commissioner of Social Services filed a petition against the natural parents of Shane T., who was 14, seeking an adjudication that the boy was an abused child. The child was continually called "fag," "faggot," and "queer" by his father both at home and in public, and his mother ignored the boy's pleas to intervene. The continual humiliations and accusations caused the child considerable stomach pain and other physical and emotional illnesses that would likely require years of psychiatric care.

In the decision, the court referenced the Family Court Act's definition of abuse, which states that an abused child is one

The proposed EPTL statute formally legislates the foregoing views by accommodating statutory and judicial precedent supporting disqualification on the grounds of intentional or reckless conduct, as well as moral and public sentiment to ensure the well-being of society's children. Additionally, it preserves the constitutional concerns of due process by relying upon the procedural safeguards requisite to a termination of parental rights pursuant to Social Services Law § 384-b.

Termination of Parental Rights

Once a child is placed in foster care after complaints of abuse or neglect are brought before the court,[19] an authorized agency, such as the Administration for Children's Services (ACS) or the Department of Social Services (DSS), will evaluate the home situation and make a rec-

ommendation to the court as to necessary steps to be taken by the parent to strengthen the parental relationship. The agency will recommend the specific requirements of the parent in order to regain custody of the child. Additionally, the parent is required to partake in one or more of the following, among others: parenting skill sessions, domestic violence classes, and substance abuse classes. Section 384-b requires that a parent be given a minimum of one year to comply before it can be determined that the parent has failed to comply with the court's requirements to plan for the child's future and safe return to the home.

If the detrimental circumstances have gone unchanged, to the extent that it would not be in the best interests of the child to return to the parent, a petition, which specifically states the agency's recommendations and the diligent efforts made to cure the household conditions, is filed with the family court, which begins the proceeding for the commitment of the guardianship and custody of the child.

Once the parent is served with a summons, an attorney may be assigned for those parents who cannot afford private counsel. A fact-finding hearing then takes place to determine whether the allegations made in the petition are supported by clear and convincing evidence.

Once the cause of action is established, the law requires that there be a dispositional hearing, at which termination is based upon abuse or permanent neglect. A dispositional hearing is not required, but may be had, in the case of termination based upon abandonment or mental illness or retardation.[20] Generally, in the latter circumstances, once a cause of action for termination is established, the child is freed for adoption. The quantum of proof at the dispositional hearing is clear and convincing evidence.

At the conclusion of the dispositional hearing, the court may dismiss the petition if the allegations are not established; enter a suspended judgment[21] for a period of no more than one year, unless exceptional circumstances are found; or commit the guardianship and custody of the child, which terminates the parents' rights and frees the child for adoption.

In the event that a suspended judgment is entered, the parent must take steps as directed by the court to reestablish the parent-child relationship. At the conclusion of its terms, however, the judgment is not self-executing, and steps must be taken by the agency to either extend the judgment or move to have it "violated."[22] If the agency fails to do anything, the proceeding is dismissed and the agency must institute a new proceeding for termination of parental rights. If the agency acts, it, and not the parent, must establish by a preponderance of the evidence that the parent failed to comply with the requirements of the suspended judgment.[23] If the agency succeeds in its proof, termination of parental rights, as previously adjudicated, will be effected.

Disqualification should apply equally to the parent who remains idle and allows the abuse and neglect to occur.

A Case for Amending EPTL 4-1.4

Disqualification of a parent whose parental rights have been terminated is supported by case law and public policy. Indeed, in a parent-child relationship the argument for disqualification is stronger than that in the spousal relationship given the duty of the parent to care for and protect the child, and the likelihood of serious harm or death to a child who is victimized and lacks the wherewithal to leave home or seek help. The proposed amendment to EPTL 4-1.4 would serve as a deterrent to parental conduct that endangers the welfare of a child.

As a general rule, the family court would adjudicate the issue of abuse, to which the surrogate's court would defer as being the court with the greater expertise to make such findings. This would guarantee that no undue burdens would be placed on the surrogate's court to make these determinations on its own.

Where a finding is made to commit the guardianship and custody of a child and to free the child for adoption, disqualification, under the proposed amendment, would automatically occur. In those cases where a child dies during a period of suspended judgment, the proposed amendment provides that the surrogate's court conclude the proceeding and render a determination based on the record developed by the family court and any additional evidence – such as the number of parental attempts during the period to fulfill the conditions of the family court order – needed to render a just decision limited solely to the issue of whether a parent should be disqualified on the grounds of abuse.

Today, with cases of child abuse and neglect frequently in the news, we recoil at the thought of innocent children suffering, either physically or emotionally, at the hands of a friend, family member or, worse, a parent. Despite offering no tolerance for such abuse, New York law inexplicably stops short of providing safeguards post-mortem. The proposed amendment would remedy this situation by providing a framework by which a court may disqualify a parent whose parental rights are terminated. Unfortunately, until this promising legislation is passed, such parents may continue to inherit from their child's estate. ■

1. EPTL 4-1.4(a) provides, in pertinent part, that "[n]o 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 such child is under

the age of twenty-one years, . . . unless the parental relationship and duties are subsequently resumed and continue until the death of the child."

2. Social Services Law § 384-b authorizes termination of parental rights based upon a finding of abandonment, permanent neglect, parental mental illness or retardation, and severe or repeated abuse. Although the proposed amendment to EPTL 4-1.4(a), as passed by the House of Delegates and New York State Senate (*see infra*), would require disqualification whenever parental rights are terminated pursuant to Social Services Law § 384-b, it had its genesis with case law regarding forfeiture and the notion that one may not profit from intentional or reckless harm caused to another, as in the case of parental abuse and permanent neglect.

3. 115 N.Y. 506 (1889).

4. DEL § 133; *see also In re Herbster's Estate*, 121 N.Y.S.2d 360 (Sur. Ct. 1953).

5. *Id.*

6. 115 N.Y. 506; *see also In re Loud's Estate*, 70 Misc. 2d 1026, 334 N.Y.S.2d 969 (Sur. Ct., Kings Co. 1972).

7. The principle in *Riggs* has been codified to a limited extent in EPTL 4-1.6 which provides that a joint tenant convicted of murder in the first degree or second degree as defined in Penal Law §§ 125.27, 125.25, respectively, shall not be entitled to the distribution of any moneys associated with that tenancy except for the moneys contributed by the convicted joint tenant.

8. *See, e.g., In re Fitzsimmons' Estate*, 64 Misc. 2d 622, 315 N.Y.S.2d 590 (Sur. Ct., Erie Co. 1970).

9. 76 Misc. 2d 458, 350 N.Y.S.2d 114 (Sur. Ct., Nassau Co. 1973).

10. *See also In re Savage*, 175 Misc. 2d 880, 670 N.Y.S.2d 716 (Sur. Ct., Rockland Co. 1998).

11. 5 Warren's Heaton on Surrogate's Courts, § 74.13[1], at p. 74-42; *see also Savage*, 175 Misc. 2d 880.

12. *In re Estate of Grant*, N.Y.L.J., Apr. 12, 1984, p. 12 (Sur. Ct., Bronx Co.).

13. *See* Social Services Law § 384-b(8)(a) defining a "severely abused" child as one who is abused "as a result of the reckless or intentional acts of the parent."

14. 115 Misc. 2d 161, 453 N.Y.S.2d 590 (Fam. Ct., Richmond Co. 1982).

15. Family Court Act § 1012(e)(i).

16. *See also In re Custody & Guardianship of Marino S., Jr.*, 181 Misc. 2d 264, 274, 693 N.Y.S.2d 822 (Fam. Ct., N.Y. Co. 1999), *aff'd*, 293 A.D.2d 223, 741 N.Y.S.2d 207 (1st Dep't 2002); *Mark G. ex rel. Jones v. Sabol*, 180 Misc. 2d 855, 694 N.Y.S.2d 290 (Sup. Ct., N.Y. Co. 1999).

17. 180 Misc. 2d 855.

18. *Id.* at 860.

19. *See* Family Court Act art. 10.

20. Anne Crick & Gerald Lebovits, *Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights*, N.Y. St. B.J., May 2001, at p. 46.

21. In a case where a judgment is suspended, the court has entered a judgment terminating parental rights but has suspended the effect of the judgment pending parental attempts to restore the parent-child relationship. *See In re Grace Q.*, 200 A.D.2d 894, 607 N.Y.S.2d 457 (3d Dep't 1994).

22. *Id.*

23. *Id.*