

A Parent's Right to Inherit Intestate from a Child

A. The Statute

When a person dies without a will, the person dies intestate and the person's property is distributed in accordance with the Intestate Succession Act (the "Act") found in [Chapter 29](#) of the North Carolina General Statutes. The Act states that if a person dies intestate without a spouse or lineal descendants (meaning children, grandchildren, etc.), the person's parents are entitled to take equal shares of the person's estate if both parents are alive. [G.S. 29-2\(4\)](#); [G.S. 29-15\(3\)](#). If only one parent is alive, then that surviving parent takes the entirety of the intestate estate. [G.S. 29-15\(3\)](#).

The parental right to inherit via intestate succession from a child is not an unqualified right. Under [G.S. 31A-2](#), a parent who willfully abandons the care and maintenance of his or her child *shall* lose all rights to intestate succession in any part of the child's estate. This bar includes any recovery from a wrongful death action because, pursuant to [G.S. 28A-18-2\(a\)](#), wrongful death proceeds are disposed of as provided in the Act, even though such assets pass outside of the estate.

Although a parent may have willfully abandoned a child, the parent may still inherit from a child if the parent is able to show an exception to the bar applies. The two exceptions listed in the statute are if the abandoning parent:

1. Resumed care and maintenance at least one year prior to the death of the child and continued the same until the child's death; or
2. Was 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. [G.S. 31A-2\(1\)](#) and (2).

B. The Case Law*

There are a handful of decisions from North Carolina courts where the court applied [G.S. 31A-2](#). The following includes some of the holdings from those decisions.

1. **[G.S. 31A-2](#) applies regardless of the child's age at death.**

It does not matter if a child dies at the age of five or fifty. If a child of any age dies intestate, [G.S. 31A-2](#) applies to a surviving parent who seeks to inherit from the child. This holding comes from a North Carolina Supreme Court case, [McKinney v. Richitelli](#), 357 N.C. 483 (2003). The parties in the case disputed whether the word "child" in the statute included only minor children. *Id.* at 487. After reviewing the legislative history of [G.S. 31A-2](#), the court found that the purpose of [G.S. 31A-2](#) is to both discourage parents from shirking their responsibility of support to their children and to

prevent an abandoning parent from reaping an undeserved award. *Id.* at 490. The court stated that it would run opposite to the statute's purpose to hold that the statute has no application once the child reaches the age of majority. *Id.* Therefore, the court held that G.S. 31A-2 applies to adult as well as minor children. *Id.*

2. Abandonment must be willful.

Willful intent is an integral part of abandonment and willfulness is a question of fact to be determined from the evidence. See *In re Estate of Lunsford*, 359 N.C. 382, 387 (2005) (citing *Pratt v. Bishop*, 257 N.C. 486, 501 (1962)). Abandonment under G.S. 31A-2, which is a conclusion of law to be made by the court based on the findings of fact, has been defined as the "willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *McKinney*, 357 N.C. at 489 (citing *Pratt*, 257 N.C. at 501). It does not require continuous absence or utter lack of concern. *Pratt*, 257 N.C. at 503.

Abandonment also includes the "willful neglect and refusal to perform the nature and legal obligations of parental care and support." *McKinney*, 357 N.C. at 489. "Care" under G.S. 31A-2 pertains primarily to love and concern for the child. *Id.* at 491. In contrast, support or "maintenance" is the financial support of the child during minority. *Id.* These parental duties are interrelated components of a parent's overall responsibilities for his or her minor children. *Lunsford*, 359 N.C. at 389. See also *Hixon v. Krebs*, 136 N.C. App. 183 (1999) (finding a question of material fact existed regarding abandonment where parent made infrequent and short visits with the child and refused to support the child financially); *Lessard v. Lessard*, 77 N.C. App. 97 (1985) (finding a genuine issue of fact existed regarding abandonment where the evidence tended to show that the parent (i) made few, if any, attempts to manifest any love and concern for, or interest in, the child, (ii) refused to let the child live in the parent's home, which the court noted is a natural obligation of parental care, and (iii) did not comply with a court order for support).

3. Abandonment must initially occur when the child is a minor.

G.S. 31A-2 does not generally apply to actions where a parent is alleged to have initially abandoned a child after the child turned eighteen. *McKinney*, 357 N.C. at 492 (fn. 2). The abandonment must commence while the parent is legally responsible for the child, which ceases in most cases when the child turns eighteen or is emancipated. *Id.* The court in *McKinney* stated that abandonment cannot occur when the parent no longer has further responsibility for the child, but also acknowledged that a parent may have support obligations beyond when the child turns eighteen, such as when the child is still in school under *G.S. 50-13.4(c)(2)*. *Id.* at 491. The case did not squarely address whether abandonment could initially occur after the child turns eighteen in those limited instances.

4. Despite a finding of abandonment, the parent may still inherit if the parent resumed

care and maintenance of the child at least one year before the child turned eighteen.

Although a parent may have willfully abandoned a child, G.S. 31A-2(1) provides one possible way for the parent to redeem his or her past behavior. If the parent resumes care and maintenance of the child at least one year prior to the death of the child and continues the same until the child's death, the parent may still inherit via intestate succession. G.S. 31A-2(1). However, because the parent generally no longer has legal obligations to the child after the child turns eighteen, the North Carolina Supreme Court held that a parent must renew such care and maintenance at least one year before the child reaches the age of eighteen. McKinney, 357 N.C. at 491. In McKinney, the parent did not attempt to resume the relationship with the child until the child was nineteen years old. *Id.* As a result, the court held that the exception under G.S. 31A-2 related to parents who have resumed care and maintenance did not apply. *Id.*

G.S. 31A-2(1) requires that when the parent resumes care and maintenance of the child, both must continue until the child's death. As noted by the court in McKinney and discussed in section three above, there is generally no legal obligation to support a child after the age of eighteen (or the child's emancipation). Absent a court order requiring support after the age of eighteen, it is unclear what type of care and support must continue by the parent after the age of eighteen until the child's death for this exception to apply.

5. Despite having abandoned a child, a parent may still inherit from the child if the court “confiscated” custody from the parent through an order and the parent substantially complied with orders for support.

An abandoning parent may still inherit from a child if the reason the parent's abandonment occurred is because the parent complied with a court order depriving the parent of custody. G.S. 31A-2(2). However, the parent must have *substantially complied* with any financial support order. *Id.* This exception is intended to protect a parent who limits his or her role in a child's life to the parameters set out by the court from a finding that he or she shirked his or her responsibility to the child. Lunsford, 359 N.C. at 393.

The court in Lunsford stated that this exception does not apply to those parents who were never ordered to contribute to a child's support or a parent who voluntarily limits their care or support of a child. *Id.* For example, the exception does not apply to a parent who voluntarily gives full custody to the other parent as part of a separation agreement incorporated into a divorce judgment. Hixon, 136 N.C. App. at 190 (1999). In Hixon, the court stated that a court order must take away or confiscate custody from the parent. *Id.* Where the parent agrees to the custodial arrangement giving that parent limited visitation as part of a separation agreement, the court held this second exception does not apply to revive the parent's intestate succession rights because the court did not deprive the parent of custody. *Id.*

C. The Proceeding before the Court

G.S. 31A-2 does not specify what type of proceeding must be filed to determine whether a parent has willfully abandoned a child. The clerk of superior court may have jurisdiction to decide the issue of abandonment. The clerk, as the ex officio judge of probate, has original jurisdiction over estate proceedings. [G.S. 28A-2-4\(a\)](#). Estate proceedings are defined broadly as matters initiated by petition related to the administration, distribution, or settlement of an estate, other than special proceedings, and include specifically proceedings to ascertain heirs. [G.S. 28A-1-1\(1b\)](#); [G.S. 28A-2-4\(a\)\(4\)](#). A determination of the right to inherit via intestate succession and as part of that abandonment under G.S. 31A-2 would seem to fall under this jurisdictional authority, particularly given that the statute is intended to be construed as part of the Intestate Succession Act. Willford v. Willford, 288 N.C. 506, 509 (1975). If the matter is initiated as an estate proceeding before the clerk under G.S. 28A-2-4(a)(4), any party or the clerk may file a notice of transfer of the matter to superior court.

In Lunsford, the original determination of abandonment was made by the clerk as part of a proceeding to determine whether a parent was entitled to share in an intestate estate. 359 N.C. at 384. This case preceded the 2012 statutory amendments to Chapter 28A, which establish the current definition of estate proceeding and the subject matter jurisdiction of the clerk, but serves as some evidence that the clerk does have jurisdiction to decide the question. It is notable though, after the 2012 statutory amendments, if a party decides to initiate the matter as an estate proceeding and the clerk enters an order, the clerk's order would be appealable to superior court on the record pursuant to [G.S. 1-301.3](#) (which is different than the appeal in Lunsford which was *de novo*).

A party could also file an action for declaratory judgment in superior court. G.S. 28A-2-4(b) provides that nothing in the section establishing the subject matter jurisdiction of the clerk in estate proceedings shall affect the right of a person to file for declaratory relief in superior court. An action for a declaratory judgment is how the issue came before the court in McKinney and may be the party's chosen course of action where there are wrongful death proceeds to be disposed of given that such proceeds pass outside of the estate, particularly where the decedent has little or no estate assets.

** This post does not address the effect of a finding of abandonment by another court of competent jurisdiction in an abuse, neglect, or dependency proceeding on a subsequent proceeding involving the application of G.S. 31A-2.*