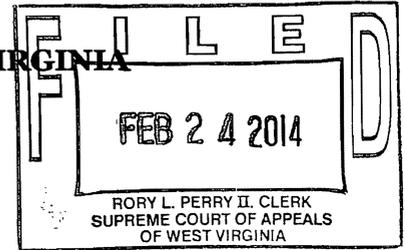


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-1244



**PATRICK GRAHAM, AS  
EXECUTOR OF THE ESTATE OF  
HELEN GRAHAM, YOLANDA  
GRAHAM, JUDY MCNAIR,  
BEVERLY RILING, BARBARA  
LAXTON, AND FRANCES  
MIKLES, JOINTLY AS  
DAUGHTERS/BENEFICIARIES  
OF HELEN GRAHAM,**

Appeal from a final order  
of the Circuit Court of Raleigh  
County (Civil Action No. 10-C-879)

Petitioners,

v.

**ROBERT ASBURY,**

Respondents.

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**Petitioners' Brief**

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**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
Docket No. 13-1244**

**PATRICK GRAHAM, et al.**

**PETITIONER**

**vs**

**Appeal from a final Order of  
the Circuit Court of Raleigh  
County (Civil Action 10-C-879)**

**ROBERT ASBURY,**

**RESPONDENT**

---

**PETITIONER'S BRIEF**

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**I.**

**ASSIGNMENTS OF ERROR**

1. (a) The trial court erred in awarding Robert Asbury as Administrator of the Estate of Betty Asbury a portion of the wrongful death settlement proceeds in that the Estate of Betty Asbury was not a beneficiary of the Estate of Helen Graham as defined in W.Va. Code § 55-7-6(b).  
  
(b) This Court should address this issue because there is a dispute over the meaning of the statute regarding distributions to “surviving children” Petitioner contends that the term “surviving children” should be defined as those children surviving at the time of distribution and not those who simply survived the decedent. Petitioner is aware of no West Virginia decision that addresses this specific issue.

2. (a) The trial court erred in awarding Robert Asbury as Administrator of the Estate of Betty Asbury a portion of the proceeds from the Estate of Helen Graham's wrongful death settlement in that the Estate of Betty Asbury did not have standing to intervene or share in the distribution because the Estate of Betty Asbury had been closed prior to settlement approval and distribution.  
  
(b) This Court should address this issue because standing is a basic and fundamental prerequisite of any action or interest in this matter.
3. (a) The trial court erred in awarding Robert Asbury as Administrator of the Estate of Betty Asbury a full or equal share of the proceeds from the Estate of Helen Graham's wrongful death settlement.  
  
(b) This Court should address this issue because the case law, although scarce and undeveloped in connection with the West Virginia death statute, indicates that the distribution of wrongful death settlement proceeds, if any, should have been limited to actual pecuniary damages suffered by the deceased potential beneficiary.

## II.

### STATEMENT OF THE CASE

#### A. *Proceedings in the Court below*

The present proceeding is an appeal to this Court of an Order Regarding Distribution of Wrongful Death Settlement Proceeds ("Order II") entered by the Circuit Court of Raleigh County, West Virginia on October 21, 2013. A settlement of the underlying lawsuit was approved by the trial court and the net proceeds were distributed to Mrs. Graham's six surviving children in equal shares (Order Regarding Distribution of Wrongful Death Settlement Proceeds ["Order II"], Findings of Fact No. 1). App. pp.1-2.

Robert Asbury, the administrator of the estate of Betty Asbury, on behalf of one of Mrs. Graham's children, filed a Motion to Set Aside Settlement as Invalid or in the Alternative Motion

Seeking Court Ordered Distribution of Wrongful Death Proceeds Pursuant to West Virginia Code § 55-7-6 (“the Motion”), on September 28, 2012. App. pp. 13-20. Defendant Raleigh General Hospital, LLC (“the Hospital”), filed a Response to the Motion on October 1, 2012. Patrick Graham, as Executor of the Estate of Helen Graham (“Mr. Graham”), filed his Response on February 18, 2013 (Order II, Findings of Fact No. 2). App. p. 2 and pp. 21-23.

A Hearing on the Motion was held on February 22, 2013. The trial court then issued Order II on May 17, 2013. A hearing was held on June 18, 2013 with respect to the adjusted distribution of the wrongful death settlement proceeds (Order II, Findings of Fact No. 3). The hearing was then continued until and concluded on August 19, 2013 (Order II, Findings of Fact No. 4). App. p. 2.

In the wake of Order II, Mr. Graham timely filed his Notice of Appeal on or about November 18, 2014. He now submits his Petitioner’s Brief in support of that appeal.

*B. Statement of Facts*

The facts of this case are essentially undisputed. The appeal therefore involves, in Mr. Graham’s view, the effect of unsettled law upon settled facts.

Helen Graham, the decedent whose estate was the focus of this case (“Mrs. Graham”), died on March 19, 2010 (Order II, Conclusions of Law No. 2). App. p. 3. An estate was formed and the Hospital and the Doe defendants were then sued for their alleged “negligent and/or reckless conduct,” which led, according to Mr. Graham, to Mrs. Graham’s death (Order II, Findings of Fact No. 1). App. p. 1-2. The wrongful death litigation was then settled, approved by the trial court and Order I was issued on July 23, 2012. Order I divided the net proceeds into six equal shares,

which were then distributed to Mrs. Graham's then-surviving children (Order II, Findings of Fact No 1). App. pp. 1-2.

Betty Asbury ("Mrs. Asbury"), was also a daughter of Mrs. Graham. Mrs. Asbury died on December 11, 2010, which date is roughly nine months *after* the death of her mother, Mrs. Graham, on March 19, 2010 (Order II, Findings of Fact No. 5). App. p. 3. Thus, Mrs. Asbury survived her mother and died *after* the wrongful death action was filed (Order II, Findings of Fact Nos. 1, 5). App. pp. 1-3. On the other hand, Mrs. Asbury died *before* the wrongful death action was settled, *before* the issuance of Order I, and *before* the wrongful death proceeds were distributed to the six children of Mrs. Graham who were alive at the time of the distribution of those funds (Order II, Findings of Fact No 1). App. pp. 1-2. Finally, Mrs. Asbury's own estate had been administered and closed prior to the distribution of the wrongful death settlement proceeds under Order I, which was entered on July 23, 2012 (Order II, Findings of Fact No. 6) App. p. 3.

The trial court found that Mr. Asbury as the administrator of his wife's estate "was entitled to notice of his right to appear and make a claim for a portion of the wrongful death settlement proceeds" (Order II, Conclusions of Law No. 3). App. p. 4. The trial court also found that Mr. Asbury received no such notice (Order II, Findings of Fact No. 5). App. p. 3. Ultimately, the trial Court also determined that the Estate of Betty Asbury was entitled to an equal share of the net settlement proceeds.

### **III.**

#### **SUMMARY OF ARGUMENT**

Because Mrs. Asbury died before the settlement of her mother's wrongful death action, and indeed before the distribution of the proceeds of that settlement, Mr. Asbury as Administrator of Betty Asbury's estate had no right under law to any portion of that settlement for the benefit of Mrs. Asbury's estate. That is, Mrs. Asbury was not "surviving" as the statute requires. Even if, arguendo only, such a right did exist, Mr. Asbury had no standing to pursue it since the estate was closed well over a year before the issuance of that distribution order. Finally, if Betty Asbury's Estate is legally entitled to any interest in the wrongful death proceeds, that interest would be limited to actual pecuniary loss, of which there was none.

### **IV.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Mr. Graham requests that the Court schedule an oral argument in this case. Mr. Graham believes that such an oral argument will aid the Court in the deliberative process.

V.

**ARGUMENT**

**A. INTRODUCTION.**

The nature and disposition of wrongful death recovery proceeds are well settled under West Virginia law:

"Money recovered in an action by an administrator . . . for causing the death of his decedent by wrongful act, neglect, or default, does not constitute general assets of the estate of such decedent in the hands of the administrator to be administered. . . . *Such money belongs to the particular persons who by law are entitled thereto.*" Syl. Pt. 4, in part, *Thompson & Lively v. Mann*, 65 W.Va. 648, 64 S.E. 920 (1909).

Syl. Pt. 2, *Ellis v. Swisher*, 230 W.Va. 646, 741 S.E.2d 871 (2013)(emphasis supplied). Of course, it is the identity of those "particular persons" that is the question before the Court. Who is entitled to the wrongful death proceeds in this case? As framed by the Court in *Ellis*, its formulation does little more than beg the question. Mr. Graham thinks it is clear that the trial court got it right in its Order I, when it awarded the net proceeds in six equal shares to the six children who survived Mrs. Graham at the time of the distribution. Mrs. Asbury was not one of "the particular persons who by law are entitled thereto," *id*, and so the Estate of Mrs. Asbury had no valid claim to a share of the distribution.

**B. STANDARD OF REVIEW**

The standards for a review of circuit court wrongful death reviews decisions are well defined in this Court, as follows:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 SE.2d 167 (1997).

Syl. Pt. 1, Syl. Pt. 2, *Ellis v. Swisher, supra* (wrongful death case). *See also* Syl. Pt. 1, *Estate of Postlewait v. Ohio Valley Medical Center, Inc.*, 214 W.Va. 668, 591 S.E.2d 226 (2003).

**C. THE TRIAL COURT ERRED IN FINDING THAT MRS. ASBURY'S ESTATE WAS ENTITLED TO A DISTRIBUTIVE SHARE OF THE NET PROCEEDS OF HER MOTHER'S WRONGFUL DEATH SETTLEMENT.**

***1. Mrs. Asbury's estate had no enforceable claim to a share of Mrs. Graham's wrongful death proceeds.***

The statutory focus of this action is upon W.Va. Code § 55-7-6(b), which governs the distribution of wrong death litigation proceeds, as follows:

In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the *surviving* spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of descent and distribution as set forth in chapter forty-two of this code. If the jury renders only a general verdict on damages and does not provide for the distribution thereof, the court shall distribute the damages in accordance with the provisions of this subsection.

(Emphasis supplied).

Here, the important facts are that Mrs. Asbury was alive when her mother died and when the wrongful death action was commenced. Mrs. Asbury had died, however, before the settlement of that action was reached and before the net proceeds of that settlement were distributed. Moreover, she has shown no pecuniary loss. Under those circumstances, Mr. Graham maintains Mrs. Asbury's Estate was entitled to no share of her mother's wrongful death settlement

The trial court's rationale for awarding Mr. Asbury on behalf of Betty's Estate an equal share of Mrs. Graham's estate, was as follows:

[T]his Court is aware of no West Virginia law which would require an heir to survive to the date of resolution of outside claims against the decedent's estate in order to receive a share of those damages.

(Order II, Conclusions of Law No. 2). App. p. 3. This rationale obviously turns the law on its head, since the statute makes survival a condition of receiving a distribution. Moreover, it could hardly be clearer that it is the burden of a claimant to establish his entitlement to share in a distribution of wrongful death proceeds than for the estate to be under a burden to prove that he does not. By not requiring Mr. Asbury affirmatively to establish his right to the share of the wrongful death proceeds awarded, the trial court misapplied the burden of proof in this matter. Thus, Mr. Graham contends that the distribution to the six surviving beneficiaries was fair and that because Mrs. Asbury had died prior to the settlement and distribution and had suffered no pecuniary loss, Mr. Asbury through the Estate, simply was not entitled to a share of those proceeds. *See* Order II, Findings of Fact No. 6. App. p. 3.

As noted above, the plain words of the statute disentitle the Estate of Mrs. Asbury to any share of the wrongful death benefits. As the statutory language mandates, “the damages shall be *distributed* to the *surviving* spouse and children.” W.Va. Code § 55-7-6(b)(emphasis supplied). Mrs. Asbury is not a *surviving* beneficiary of her mother; nor was she one at the time of distribution. The statute links the acts of survival and distribution in the same clause, separated by only two words. Hence, one must survive to the distribution date to receive a share of the proceeds. Mrs. Asbury did not survive until that date. Thus, Mr. Asbury has no entitlement to a share of those damages.

Mr. Graham has found no cases in West Virginia that precisely track facts like those of the case at hand. Nonetheless, where, as here, a potential beneficiary dies after the wrongful death action had been commenced but her death preceded the distribution of those proceeds, the cases nationally are split on the proper result. Annot., *Effect of Death of Beneficiary upon Right of Action Under Death Statute*, 13 A.L.R.4<sup>th</sup> 1060, § 3 at 1066-1071 (1982 & Supp. 2013). See also 1 Stuart M. Speiser, *Recovery for Wrongful Death* § 8:17 at 760-764 (2<sup>nd</sup> ed. 1975).

Mr. Graham contends that under the language of the West Virginia statute, a restriction to the six *surviving* beneficiaries is most faithful to the statutory language. A case from a Texas federal wrongful death decision explains:

A determination of who may properly assert claims is dependent upon an analysis of the wrongful death and survival statutes of state law. See *Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992); *Grandstaff v. City of Borger, Texas*, 767 F.2d 161 (5th Cir. 1985); 28 U.S.C. § 1346(b). Sections 71.004 and 71.021 of the Texas Civil Practice and Remedies Code establish the requirements for wrongful death and survival actions. Claims arising under the statutes are "derivative actions, and condition the plaintiff's ability to recover upon the decedent's theoretical ability to have brought an action had the decedent lived." *Schaefer v. Gulf Coast Regional Blood Center*, 10 F.3d 327 (5th Cir. 1994).

*Section 71.004 provides that a wrongful death action for damages is for the exclusive benefit of the deceased's surviving spouse, children, and parents. Shepherd v. Ledford, 962 S.W.2d 28, 31 (Tex. 1998). Therefore, those wrongful death claims brought by any relative other than the foregoing are dismissed. Further, a cause of action for wrongful death ceases to exist upon the death of the named beneficiary. See Johnson v. City of Houston, 813 S.W.2d 227 (Tex.App.--Houston [14th Dist.] 1991). Therefore, the wrongful death claims brought by Solomon Malcolm, Jr., as heir to the Estate of Solomon Malcolm, Sr. for the wrongful death of Livingston Alexander Malcolm, and by Gladys Williams, as heir to the Estate of Agatha Myrtle Williams for the wrongful death of Yvette Williams Fagan, are dismissed.*

*Andrade v. Chojnacki, 65 F. Supp. 2d 431, 448 (W.D.Tex. 1999)(emphasis supplied), aff'd, 338 F.3d 448 (5<sup>th</sup> Cir. 2003).* (It should be noted that the statutory wrongful death language in *Andrade* is substantially different from the West Virginia statute applicable to this matter.)

As the Court will note, the underscored language from the statute construed in *Andrade* entails that the deceased beneficiary's estate cannot share in the proceeds. That holding is instructive to this Court's review and application of the language found in W.Va. Code § 55-7-6(b). Hence an identical result, namely, that "a cause of action for wrongful death ceases to exist upon the death of the named beneficiary," *Andrade v. Chojnacki, supra*, 65 F. Supp. 2d at 448, should be applied in this case as well. The fact that the words "surviving" and "distribution are linked in the same clause only two words apart offers compelling authority for the conclusion.

Under certain circumstances under West Virginia law, a deceased beneficiary could still have an interest of sorts in wrongful death benefits in the context of pecuniary loss. In *Adams v. Sparacio, 156 W.Va. 678, 196 S.E.2d 647 (1973)*, for example, a man was killed in an automobile accident. He had a dependent wife, who died during the pendency of the wrongful

death action. As above, in the context of a very different wrongful death statute, this Court held that:

Inasmuch as the instant action is one to compensate the widow for pecuniary loss caused by the negligent killing of her husband, we are of the opinion that her death does not abate the action but that the administrator may continue it for the recovery of her loss up to the moment of her death, though not for anything thereafter.

*Id.*, 196 S.E.2d at 656, It is important to underscore, however, that the action was for pecuniary loss only, that the deceased widow was the sole beneficiary<sup>1</sup> and that the recovery of her estate was severely limited, as follows:

It has been widely held and we are in agreement with the proposition that where, upon the death of the beneficiary entitled to damages for wrongful death, the action survives to such beneficiary's estate, the measure of damages to which the estate is entitled is the loss from the time of the death of the injured party to the time of the beneficiary's death. *Van Beeck v. Sabine Towing Co.*, *supra*; *Sider v. General Electric Co.*, 238 N.Y. 64, 143 N.E. 792; *Odlivak v. Elliott*, 82 F. Supp. 607; Annotation, 43 A.L.R. 2d 1291. See Speiser, Recovery for Wrongful Death, Section 8:21 and the cases cited in the footnotes thereto.

*Id.* Thus, in *Adams*, it was only the pecuniary loss that was deemed not to be abated. As applied to the case at hand, that would mean that Mrs. Asbury's claim could only be for her pecuniary losses for the nine months between the date of her mother's death and her own. It is to be noted that there is no evidence in the record of any such pecuniary loss. Moreover, it is undisputed that Mrs. Asbury suffered no pecuniary loss.

*Adams* was followed in a North Dakota case, in which the court observed:

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<sup>1</sup> The couple's daughter sought pecuniary loss damages as well but was denied any such recovery because "she did not even meet the requirements of partial dependency." *Id.*, 196 S.E.2d at 655.

A special issue arises when the beneficiary dies prior to the trial of the action for death by wrongful act and the legal representative of the beneficiary's estate brings the action for the benefit of the beneficiary's estate pursuant to § 32-21-05, N.D.C.C. In such an instance, the element of speculation regarding the joint life expectancies of the decedent and the beneficiary is removed and damages may be awarded based on the period by which the beneficiary actually survived the decedent. From our perusal of the cases, annotations, and treatises addressing the question before this court, we conclude that under our death by wrongful act law, a beneficiary's recovery is limited to the beneficiary's actual period of survival under such circumstances. *Adams v. Sparacio*, 156 W.Va. 678, 196 S.E.2d 647 (W.Va.1973); *Wakefield v. Government Employees Insurance Co.*, 253 So.2d 667 (La.App.1971), writ denied 260 La. 286, 255 So. 2d 771 (1972); Annot., 43 A.L.R.2d 1291 (1955); Annot., 13 A.L.R. 225 (1921); 1 Stuart M. Speiser, *Recovery for Wrongful Death*, § 8.21 (2d ed. 1975). *Schneider v. Baisch*, 256 N.W.2d 370, 372 (1977)

*Schneider v. Baisch*, 256 N.W.2d 370, 372 (N.D. 1977)

Even in those cases in which a claim of an entity like Mrs. Asbury's claim is deemed to survive, the recovery allowed is only the amount of pecuniary loss that can be proven. By no means should the Estate have been granted a full share of the net proceeds of the wrongful death settlement, especially when there is no evidence in the record that Mrs. Asbury suffered any pecuniary loss at all on account of her mother's death.

This case is not a pecuniary loss case. Nor is there any evidence that Mrs. Asbury suffered any such loss. Because of that fact and because the current statute is radically different, the holding in *Adams*, should be confined to its facts. In addition, the extremely limited recovery allowed to the deceased beneficiary in *Adams* suggests strongly that West Virginia would join the camp of states that either abate the right to share in the proceeds upon the beneficiary's death or severely limit it as it did in the *Adams* case. For that reason, Order II as entered below is flawed and should be reversed.

**2. Mr. Asbury as former administrator of Mrs. Asbury's estate lacked standing to pursue a share of Mrs. Graham's wrongful death award.**

Mr. Asbury moved to gain a share of Mrs. Graham's wrongful death settlement in his role as administrator of Mrs. Asbury's estate. It is uncontested, however, that Mrs. Asbury's estate was closed on June 22, 2011. That date is well over a year prior to Order I, which made the initial distribution of the proceeds to the six beneficiaries on September 23, 2012 (Order II, Findings of Fact No. 6). Because the estate was closed, Mr. Asbury is now no more than a private citizen who lacked standing to prosecute his Motion. It is hornbook law that a party pursuing a motion like the one at hand cannot proceed unless he has such standing as a party of interest of some kind. *See Latimer v. Mechling*, 171 W.Va. 729, 301 S.E.2d 819 (1983).

Clearly, Mr. Asbury should have taken some steps, if available, to regain the standing he would have enjoyed as administrator of the estate when it was still open and being administered. Whether such an opportunity for a reopening is available under West Virginia law is not clear. *Richardson v. Kennedy*, 107 W.Va. 326, 475 S.E.2d 418, 421 (1995)(administratrix denied right to reopen estate). What is clear from the record is the absence of any evidence that Mr. Asbury sought, let alone was granted, a reopening of Mrs. Asbury's estate. Accordingly, Mr. Asbury had no basis upon which to file his Motion.

The contours of an administrator's duties under West Virginia law were well described, as follows:

Appellant contends that her obligation to bring this appeal is founded on her fiduciary duty as administratrix of the estate. Indeed, we expressly recognized the fiduciary duty of a personal representative of an estate in syllabus point one of *Latimer v. Mechling*, 171 W.Va. 729, 301 S.E.2d 819 (1983) ("The personal representative of the estate of a deceased acts in a fiduciary capacity. His duty is

to manage the estate under his control to the advantage of those interested in it and to act on their behalf."). Even so, this Court had previously recognized that this duty is not without boundaries. As we stated in *Tyler v. Reynolds*, 121 W.Va. 475, 7 S.E.2d 22 (1939):

We hold that the right of a personal representative to prosecute litigation, with regard to the estate in his charge, must be limited to those matters which affect the estate as a whole, necessarily excluding the rights of those who may be individually interested through distribution of the estate or otherwise; the rights of heirs or devisees flowing from the estate, and which accrue to them completely after the estate is settled, should be asserted and protected by them individually.

*Id.* at 477, 7 S.E.2d at 23. Consequently, rights which do not affect the estate as a whole do not require the protection of Appellant in her capacity of administratrix. In this case, the rights of the heirs whose property interests were affected by the bills of sale and the quitclaim deed were individual rights not accruing to the estate and for which Appellant as administratrix was under no duty to protect.

*McConaha v. Rust*, 219 W.Va. 112, 652 S.E.2d 52. 57-58 (2006). Here, none of those justifications for actions by administrators is present here because the estate has been closed for over a year and, consequently, Mr. Asbury is no longer an administrator at all. For that reason his Motion should have been overruled. Because it was not, Order II as issued by the trial court should be disapproved and reversed.

Finally, the trial court adopted the argument that Mr. Asbury had received no notice of the upcoming distribution (Order II, Findings of Fact No. 5; Conclusions of Law No. 3). App. pp. 3-4. This portion of the holding is unavailing on several grounds. First, the Asbury Estate had closed; hence it was not entitled to notice because it no longer existed. Second, Mr. Asbury was not entitled to notice because he was no longer an administrator but merely a private citizen without standing.

VI.

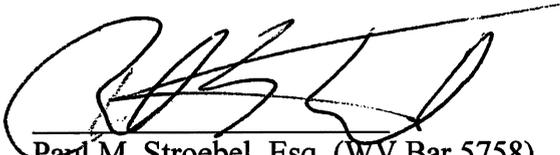
**CONCLUSION**

For the reasons set out above, Petitioner Patrick Graham, as Executor of the Estate of Helen Graham, respectfully asks the Court to grant his Petition to set aside Order II as issued by the trial court and to reinstate Order I as initially filed in that court. Mr. Graham also respectfully asks the Court to grant him all additional or cumulative relief to which it finds him entitled.

Respectfully submitted,

THE ESTATE OF HELEN GRAHAM  
By EXECUTOR PATRICK GRAHAM,

By Counsel



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 13-1244

**PATRICK GRAHAM, AS EXECUTOR  
OF THE ESTATE OF HELEN GRAHAM,  
YOLANDA GRAHAM, JUDY  
MCNAIR, BEVERLY RILING,  
BARBARA LAXTON, AND FRANCES  
MIKLES, JOINTLY AS  
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(Civil Action No. 10-C-879)

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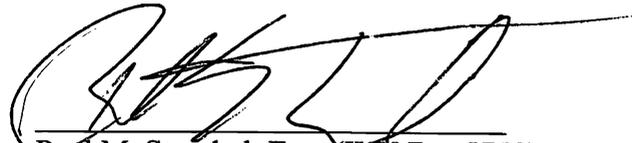
**CERTIFICATE OF SERVICE**

I, Paul M. Stroebel, counsel for petitioner the Estate of Helen Graham by Executor Patrick Graham, do hereby certify that a true and exact copy of the foregoing Petitioner's Brief and Appendix was this day transmitted to the following addresses by first class mail, postage prepaid:

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