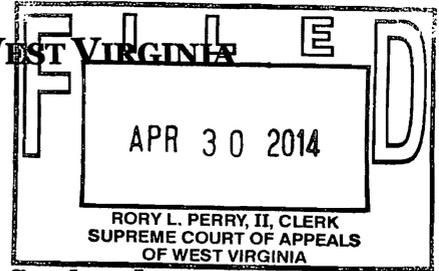


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

Petitioners' Reply Brief

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I) STATEMENT OF ORAL ARGUMENT AND DECISION

Mr. Graham requests that the Court schedule an oral argument in this case. Mr. Graham requests argument pursuant to Rule 20(a)(2) of the West Virginia Rules of Appellate Procedure in that this issue is a question of first impression and oral argument will aid the Court in the deliberative process.

II) ARGUMENT

A) INTRODUCTION

The statute at issue is plain and unambiguous and should be accorded the intent expressed therein. The use of the word “surviving” expresses an intent that the beneficiary be alive at the time of the distribution. Respondent’s brief also highlights Respondent’s lack of standing through its admission of the past and ongoing failure to reopen Mrs. Asbury’s Estate.

B) **RESPONDENT’S CONTENTION THAT MRS. ASBURY’S ESTATE WAS ENTITLED TO A DISTRIBUTIVE SHARE IS WITHOUT MERIT AND NOT SUPPORTED BY ANY PREVIOUS HOLDINGS OF THIS COURT OR THE PLAIN LANGUAGE OF WEST VIRGINIA CODE §55-7-6(b).**

Respondent erroneously claims that West Virginia case law establishes that, in a wrongful death case, the interest of the potential distributees vests upon the death of the decedent. Respondent relies upon two cases that are distinguishable from the present case. In *City of Wheeling v. Zane*, 154 W.Va. 34, 173 S.E.2d 158 (1970) this Court addressed the right of an heir’s retained right of re-entry in a conveyance of land. In *Farmers and Merchants Bank v. Haden*, 154 W.Va. 292, 175 S.E.2d 167 (1970) the Court addressed the issue of property and assets of an estate transferred at the time of death and their exemption from taxation pursuant to West Virginia Code §11-11-5. Each of the above cases deals with the passing of an interest either through a will or intestacy. Neither relies upon or construes a statute that is remotely

similar to the statute presently at issue. Moreover, while Respondent states there are numerous case addressing the issues raised by Petitioner, Petitioner can find no cases addressing these issues. Petitioner believes this is an issue of first impression, while Respondent argues that there are a number of cases supporting its position. A cursory review of the cases cited by Respondent demonstrates their inapplicability. The referenced cases set forth no facts or legal precedent applicable to the current case before this Court. All of the cases cited are either factually distinguishable or support Petitioner's position.

Respondent's contention that Mrs. Asbury died prior to the wrongful death settlement and distribution is, "of no consequence" fails to consider the language set forth in the West Virginia Wrongful Death Statute. Respondent's Brief p. 2. That statute sets forth that the court may award damages to the "surviving" beneficiaries as enumerated by the statute. It goes on to state that "If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will..." See W.Va. Code §55-7-6(b). Respondent's brief also ignores the statute's requirement that the proceeds be distributed to "surviving" beneficiaries. Because the language of the statute is plain and unambiguous, it should be accorded the intent expressed therein.

Respondent relies upon the case of *Adams v. Sparacio*, 156 W.Va. 678, 196 S.E.2d 647 (1973) for the proposition that when a beneficiary entitled to damages for wrongful death dies, the beneficiary's estate may recover those damages. Respondent selectively quotes *Adams* as follows: "[i]t 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...". *Id.* at 656. However, Respondent fails to quote the language in its

entirety, the remainder which contradicts the very position Respondent attempts to assert. The Court in *Adams* held that when compensating the widow for pecuniary loss:

“...the measure of damages to which the estate is entitled is the loss from [156 W.Va. 693] 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; *Odlikav. 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.

Here the Court clearly concluded that the death of a beneficiary is of consequence and limits the damages a potential beneficiary may receive.¹ There were no damages awarded or available for distribution at the time Mrs. Asbury passed. Because there were no monies available, any potential interest could not have vested because it did not exist. The statute, when read in its entirety, clearly anticipates the beneficiary being alive at the time of distribution. The legislature could have used “survived” instead of “surviving.” This would have indicated the legislature’s interest that the beneficiary need only to survive the decedent.

The second flaw in Respondent’s argument is that the Court’s holding solely addressed damages for pecuniary loss and stated that the widow/beneficiary could only be compensated for actual pecuniary loss up to the moment of her death. Respondent has failed to demonstrate any pecuniary loss suffered by Mrs. Asbury during the period from her mother’s death until her own death nine months later. Under the holding in *Adams*, if applicable, the Estate of Betty Asbury is

¹ Petitioner is also aware that the language of the statute under consideration in this matter is different from the language considered in *Adams*. Petitioner has addressed this case in Petitioner’s Brief and this Reply because it appears to be the main legal precedent relied upon by Respondent.

entitled to no recovery because no pecuniary loss was incurred during the nine months that Mrs. Asbury outlived Mrs. Graham.

Respondent further contends that “it is inconceivable that the Petitioner would argue that only one distributee out of seven would have to show a pecuniary loss”. Respondent’s Brief p. 3. Respondent fails to recognize the key difference between Mrs. Asbury and her siblings. Mrs. Asbury predeceased the settlement and is the only deceased potential beneficiary attempting to collect from the wrongful death settlement. The other potential beneficiaries meet the requirements of the statute, whereas, Mrs. Asbury did not because she was not surviving at the time the settlement was reached or at the time the proceeds were disbursed. Respondent writes that “numerous” West Virginia cases address wrongful death settlements in which there are no pecuniary losses. Respondent’s Brief p. 4. What Respondent again fails to recognize is that these cases do not address the distribution of proceeds to a potential beneficiary that predeceased the settlement or verdict. Petitioner agrees with the Respondent and this Court’s ruling in *Walker v. Walker*, 177 W.Va. 35, 350 S.E. 2d 547 (1986), that beneficiaries can be awarded for sorrow, companionship, guidance, loss of income or services, and the like. However, Petitioner emphasizes that only the potential beneficiaries as designated in the wrongful death statute are entitled to recover for these types of losses. The statute unequivocally states that such damages, “shall be distributed to the *surviving* spouse and children...” (emphasis added) W.Va. Code §55-7-6(b).

The Respondent recognizes in its own brief that in previous cases “...none of the beneficiaries were deceased at the time of distribution” but still attempts to rely on these cases as support for the Estate’s argument. Respondent’s Brief p. 4. The case law cited by Respondent is

actually favorable to the argument of Petitioner and demonstrates that it should be the practice of courts to reward the surviving statutory beneficiaries of the deceased for all damages recoverable. There is absolutely no legal support or precedent for awarding non-pecuniary damages to the estate of a deceased potential beneficiary.

C) NEITHER MRS. ASBURY'S ESTATE NOR MR. ASBURY HAD OR HAS STANDING TO PURSUE THIS CLAIM.

Respondent concedes that the Estate of Betty Asbury was closed at the time of filing the Motion to Set Aside Settlement as Invalid or in Alternative Motion Seeking Court Ordered Distribution of Wrongful Death Proceeds Pursuant to West Virginia Code §55-7-6. Respondent's Brief p. 5. Respondent's brief concedes that the Estate of Betty Asbury had been closed for more than a year at the time the wrongful death settlement was held. Respondent further concedes that Mr. Asbury was the former Administrator of Betty Asbury's Estate. Respondent argues that Mrs. Asbury's Estate could have been reopened. This may be true, however Respondent failed to reopen the Estate prior to filing the Motion or in the 9 months subsequent to the filing of that motion and the lower Court's ruling in September of 2013.

Respondent relies upon *Richardson v. Kennedy*, 197 W.Va. 326, 475 S.E. 2d 418 (1996), wherein the Supreme Court of Appeals of West Virginia overturned a Circuit Court's dismissal of a wrongful death action when the Estate had been previously closed. The Court held that an action should not be dismissed until the real party in interest has a reasonable opportunity to allow someone to qualify as the real party in interest. The facts set forth in *Richardson* are not applicable to this matter. At no time was the Estate of Betty Adams denied the opportunity to reopen the Estate and present a claim. However, it is apparent that the Estate, or Mr. Asbury on its behalf, consciously and intentionally failed to do so. The Court in *Richardson* also opined

that prosecution of a wrongful death is “not an asset of the estate.” Id. at 425. It follows that the Asbury Estate’s claim, if any, would not transfer to Mr. Asbury at the time of Mrs. Asbury’s death. Betty Asbury’s potential claim under a wrongful death statute, should she have been alive, cannot apply to Mr. Asbury as administrator of her closed Estate. Clearly there is no legal standing for either Mr. Asbury or the closed Estate of Mrs. Asbury pursue a claim as a statutory beneficiary.

Respondent also argues that Mr. Asbury is the real party in interest. Under this argument, Mr. Asbury is not entitled to any proceeds from Mrs. Graham’s Estate. Mr. Asbury, as a son-in-law, is not listed in the wrongful death statute as a potential beneficiary. A son-in-law of deceased children is not entitled to proceeds from a wrongful death settlement. Without some showing of financial dependency or pecuniary loss, Mr. Asbury is clearly not entitled to share in the wrongful death proceeds.

Furthermore, if Respondent claims that Mr. Asbury is the real party in interest, the case of *Richardson* establishes that Mr. Asbury has failed to properly pursue this action. The Estate of Betty Asbury filed its “Motion to Set Aside Settlement as Invalid or in Alternative Motion Seeking Court Ordered Distribution of Wrongful Death Proceeds Pursuant to West Virginia Code §55-7-6” in September of 2012. The Estate was represented by counsel who knew or should have known that the Estate had to be reopened to proceed with this motion. The Petitioner raised the issue of standing prior to the hearing on the motion to set aside settlement in February of 2013. Despite being placed on notice that standing was an issue, the Estate took no action towards reopening the Estate.

The Final Order regarding distribution was entered in October of 2013. An additional eight months had passed from the time of the initial hearing to the time of the court's ruling without the Estate taking any action. Over a year passed from the time the Motion was initially filed. Assuming, arguendo only, that the Estate of Betty Asbury had the right to be reopened, *Richardson* at 426 states that,

“If, however, at the expiration of the reasonable time period..., the appellant has not used [his] best efforts to qualify as the personal representative of the...estate, then this action should be dismissed.” *Id.* at 426.

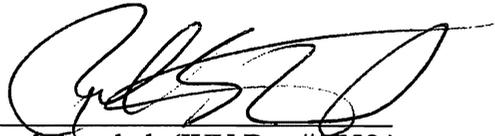
Respondent and Mr. Asbury have had ample time since the filing of their Motion in September of 2012 to reopen the Estate of Betty Asbury, yet they have failed to take the necessary steps to achieve this requirement. Because the Estate failed to make any effort to comply with Rule 17(a) of the West Virginia Rules of Civil Procedure, the motion by Respondent should have been dismissed and the original Order regarding distribution should have not been disturbed.²

Respondent claims that Petitioner represented Mrs. Asbury for nine months prior to her death. This is factually incorrect. Petitioner represented Patrick Graham, who was the Executor of the Estate of Helen Graham. At no time did Stroebel & Johnson, PLLC represent Betty Asbury. In fact, all surviving potential beneficiaries, as identified by the Estate of Helen Graham, were notified that they could have an attorney present to argue on their individual behalf at the wrongful death summary proceeding.

² Rule 17(a) of the West Virginia Rules of Civil Procedure provides in pertinent part that:...”No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action, by or joinder or substitution of, the real party in interest...”

III) CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the lower Court's Order (Order II) be overturned and the Order I be reinstated.

Signed: 

Paul Stroebel (WV Bar #5758)
Counsel of Record for Petitioner

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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 Reply Brief*" was this day transmitted to the following addresses by first class mail, postage prepaid:

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