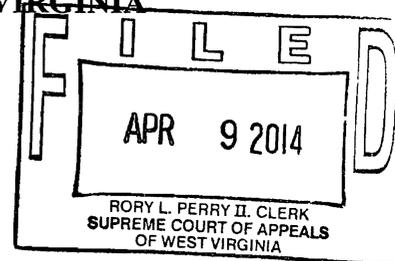


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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,**

Petitioners,

v.

ROBERT ASBURY,

Respondent.

RESPONDENT ROBERT ASBURY'S BRIEF

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I.

SUMMARY OF ARGUMENT

Betty Asbury was alive at the time of her mother's death and so was "surviving" as required by the statute and, thus, a legal devisee of her mother, Helen Graham. As such, she was a beneficiary of the settlement of Mrs. Graham's wrongful death action. Betty Asbury passed away subsequent to the death of her mother but prior to the distribution of the wrongful death settlement proceeds. Therefore, Robert Asbury, as Administrator of Betty Asbury's estate, had a lawful right to notice and to Mrs. Asbury's portion of the settlement proceeds. Because Petitioner and his counsel failed to give notice of the pending wrongful death lawsuit to Respondent, Respondent settled Mrs. Asbury's estate. West Virginia law clearly provides that a closed estate may be reopened due to assets discovered subsequently. The beneficiaries of the estate of Helen Graham showed no evidence of any pecuniary loss, and, therefore, the Estate of Betty Asbury's share of the proceeds should not be limited to actual pecuniary loss.

II.

ARGUMENT

A. INTRODUCTION

The questions before this Court are whether the rights of a distributee vest at the time of the decedent's death or at the time of the distribution, and, if the distributee's rights vest at the time of the decedent's death, what portion of wrongful death settlement proceeds is the estate of a deceased distributee entitled. West Virginia case law is very clear that the rights of a distributee vest at the time of the decedent's death.

West Virginia law is also clear on what portion of wrongful death settlement proceeds the estate of a deceased distributee is entitled. While there are a few cases addressing both issues, It is the Respondent's assertion that the trial court was correct in its October 21, 2013 Order (Order II), when it directed that the net proceeds be divided into seven equal shares to the seven children who survived Mrs. Graham at the time of her death.

B. THE TRIAL COURT WAS CORRECT 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 an enforceable claim to a share of Mrs. Graham's wrongful death proceeds.

W.Va. Code § 55-7-6(b) provides, in pertinent part:

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.

Respondent agrees with Petitioner's contention that the important facts here are that Mrs. Asbury was alive when her mother died and when the wrongful death action commenced. The fact that Mrs. Asbury died prior to the distribution of the net proceeds of that settlement is of no consequence. *Adams v. Sparacio*, 156 W.Va. 678, 196 S.E.2d 647 (1973) states, in part that, "[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." There is a plethora of

West Virginia case law that clearly establishes that, in a wrongful death case, the interest of the distributees vests upon the death of the decedent. *See Farmers and Merchants Bank v. Haden*, 154 W.Va. 292, 175 S.E.2d 167 (1970), and *City of Wheeling v. Zane*, 154 W.Va. 34, 173 S.E.2d 158 (1970).

Therefore, Mrs. Asbury *did* survive the decedent, Helen Graham, and, thus, met the requirements of receiving a distribution of the settlement proceeds. Mrs. Asbury was a *surviving* beneficiary of her mother, as she was alive at the time of Mrs. Graham's death, and she remained alive for several months thereafter. In fact, Petitioner's attorney was retained, and Mrs. Asbury was alive at the time the underlying action was instituted. The West Virginia statute is clear that survival of the decedent is the only requirement, and other states' interpretations of exceedingly different statutes offer absolutely no assistance or instruction in interpreting the clear, unambiguous West Virginia statute.

None of the distributees suffered a pecuniary loss as a result of Mrs. Graham's death, and it is ludicrous to claim that Mrs. Asbury should have been required to do so. Respondent found no West Virginia cases with similar facts in which none of the beneficiaries suffered any type of pecuniary loss. *Adams*, *supra*, did limit the pecuniary loss "from the time of the death of the injured party to the time of the beneficiary's death." However, the question before that Court was "whether, upon the death of Edith Garrettson, the only dependent distributee, any recovery should be allowed on the basis of her pecuniary loss and if such recovery is allowed, should it be limited to the period of time which elapsed between the date of Garrettson's death and the date of death of his widow." That is not the issue before this Court. It is inconceivable that the Petitioner would argue that only one distributee out of seven would have to show a pecuniary loss.

Numerous West Virginia cases address wrongful death settlements in which there are no pecuniary losses. Even though none of the beneficiaries were deceased at the time of distribution, *Walker v. Walker*, 177 W.Va. 35, 350 S.E.2d 547 (1986) found that, “[w]here the award itself is for sorrow, companionship, guidance, loss of income or services, and the like, it is more than reasonable for a judge to consider the relationships between the decedent and the potential beneficiaries, differing degrees of companionship and guidance lost, and who suffered losses of income or services.” In the case before this Court, all of the distributees were children of Helen Graham. None of them were financially dependent upon the decedent, and the award was for sorrow, companionship and guidance, not pecuniary loss. Therefore, the estate of Betty Asbury does not have to have suffered pecuniary loss to share in said award.

In cases that were previously before the Circuit Court of Raleigh County, West Virginia, *Crouch v. Lewis, et al.*, Civil Action Number: 03-C-123-H, this lower Court found that there was an emotional loss, sorrow and loss of companionship. Judge Robert A. Burnside, Jr. was clear in his November 5, 2012 Order regarding the distribution of settlement proceeds that “The statute (*W.Va. Code* §55-7-6(b)) identifies two general categories of distributee: (1) persons in a specific family relationship irrespective of financial dependence and (2) persons who were (a) financially dependent or (b) “otherwise...equitably entitled to share...” The statute does not prioritize these categories for distribution. A child of a decedent stands on equal statutory footing as an unrelated person who was financially dependent. The statute directs the court to determine the distribution. That determination is necessarily driven by the facts of each case.” As a daughter of the decedent, Mrs. Asbury is, without a doubt, a statutory distributee.

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

Mrs. Asbury's estate was closed on June 22, 2011. West Virginia law provides that an estate may be reopened after it has been closed to allow a personal representative whose authority has arguably terminated to pursue a wrongful death action. *Richardson v. Kennedy*, 197 W.Va. 326, 475 S.E.2d 418 (W.Va. 1996) has facts similar to the instant action. In *Richardson*, the trial court dismissed a wrongful death action brought in the name of the personal representative whose authority had arguably terminated at the time the action was filed. The Court found that, "[w]hen the ground for dismissal in a case is that the real party in interest did not institute the civil action, the trial court should stay the dismissal of the complaint and establish a reasonable period of time to allow someone to properly qualify as the real party in interest." *Id.* at 425. The Court goes on: "If the estate was closed, then reopen it..." *Id.*

As not only the Administrator of the estate of Mrs. Asbury but also the sole heir under Mrs. Asbury's Last Will and Testament, there is no question that Robert Asbury is the real party in interest in the instant case. As such, as in the *Richardson* case, Mrs. Asbury's estate can be reopened to allow Mr. Asbury to pursue a share of Helen Graham's wrongful death award.

Finally, Petitioner's contention that Mr. Asbury was not entitled to notice of the upcoming distribution because the Asbury Estate had closed and no longer existed and that Mr. Asbury was no longer an administrator but a merely a private citizen is without merit for the reasons stated above. Counsel for Petitioner knew that Mrs. Asbury was alive at the time of her mother, Helen Graham's death *and* she continued to be alive at the time the civil wrongful death action was instituted on behalf of Helen Graham's estate.

Petitioner, in fact, represented Mrs. Asbury for at least nine months prior to her death. Regardless of the fact that Petitioner and his counsel undeniably knew that Betty Asbury survived her mother, Helen Graham, and was, thus, a statutory distributee of Mrs. Graham's estate, both Petitioner and his counsel made a conscious and erroneous decision to not provide notice of the settlement of the wrongful death case brought by the Estate of Mrs. Asbury and the subsequent distribution hearing. Had Mr. Asbury received notice as required by the statute, he would have been able to reopen Mrs. Asbury's estate with that newly discovered evidence.

There are numerous cases that set forth that any beneficiary of an estate should be provided notice of a settlement hearing. *See Lauderdale v. Neal*, 212 W.Va. 184, 569 S.E.2d 431 (2002). Notice is absolute and required absent consent or waiver by the beneficiaries as set forth in W.Va Code §55-7-6.

III.

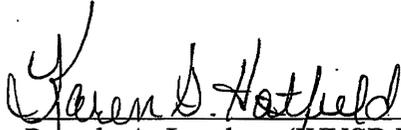
CONCLUSION

For the reasons set forth herein, Respondent Robert Asbury prays that this Honorable Court will deny Petitioner Patrick Graham's Petition to set aside Order II as issued by the trial court. Respondent further prays that the Court will grant him all additional or cumulative relief to which it finds him entitled.

Respectfully submitted,

ROBERT ASBURY,

By Counsel



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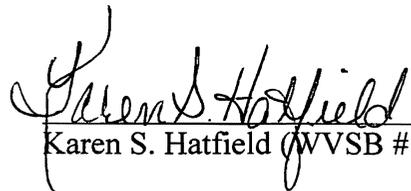
CERTIFICATE OF SERVICE

I, Karen S. Hatfield, counsel for Respondent Robert Asbury, do hereby certify that a true and exact copy of the foregoing **Respondent Robert Asbury's Brief** was this day transmitted to the following addresses by first class mail, postage prepaid:

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on this, the 8th day of April, 2014.



Karen S. Hatfield (WVSB #12217)