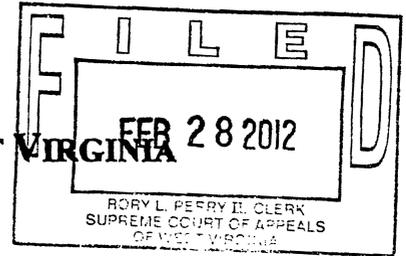


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-0090



CONNIE ELLIS,
Intervenor Respondent Below,
Petitioner,

Appeal from a Final Order
of the Circuit Court of Randolph
County (11-C-94)

v.

LINDA SWISHER, as Administratrix of the
Estate of Thomas R. Swisher, deceased,
Petitioner Below,
Respondent.

**APPELLANT'S PETITION FOR
APPEAL**

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ASSIGNMENTS OF ERROR

On this appeal the Respondent Connie Ellis raises one issue. Under the West Virginia Code §55-7-1 *et seq.*, as interpreted through the relevant case law, the Circuit Court erred in holding that a former spouse receiving regular payments toward a child support arrearage was not financially dependent on the decedent or otherwise equitably entitled to share in the proceeds of a wrongful death settlement.

STATEMENT OF THE CASE

The essential facts of this case are not in dispute. Connie Ellis was the ex-wife of the decedent Thomas R. Swisher. Thomas R. Swisher died in an automobile accident and his claim was settled for \$300,000.00. A summary proceeding followed. [See Petition to Settle Wrongful Death Claim, Appendix pages 3-5.] Decedent was survived by his current wife, and a total of five children, two of whom were born to Connie Ellis during their prior marriage. [See Order Directing Distribution, Appendix pages 9-10.] Connie Ellis was granted leave to intervene in the summary proceeding. For a number of years prior to his death, Decedent had been paying Connie Ellis \$125.00 per month against his child support arrearage, which, at the time of his death, was \$58,286.66, pursuant to a Family Court Order. His two children with Connie Ellis were emancipated adults at the time of Decedent's death. [See Order Directing Distribution, Appendix page 9.]

At the hearing held on September 27, 2011 to determine the appropriate distribution of the proceeds of the settlement, evidence was presented that Connie Ellis had been receiving \$125.00 per month from the Decedent as payment against his child support arrearage. There was no dispute concerning those facts. The Court entered an order distributing the proceeds of the sale to the Decedent's widow and five children, but ruled that Connie Ellis was not eligible to

receive any portion of the proceeds of the wrongful death settlement as a matter of law because she was not financially dependent upon the decedent under W. Va. Code §55-7-1 *et seq.*

The factual finding that formed the basis of the Court's conclusion was that Connie Ellis testified that when she would receive the payments from the decedent, she would give the money to her and Decedent's children.

SUMMARY OF ARGUMENT

Decedent's ex-wife, receiving regular payments against a child support arrearage for children who are emancipated, should be entitled to make a claim against a settlement in a wrongful death action for two reasons. First, the wrongful death statute is always liberally interpreted. Under the prevailing case law, a person is financially dependent upon a decedent when such person had been receiving some benefit from the decedent. Connie Ellis was receiving some benefit from the Decedent at the time of his death. It is not necessary to show legal dependence. Second, Connie Ellis should be considered a person who would be equitably entitled to share in the proceeds of the wrongful death settlement. The Circuit Court erred in finding Connie Ellis was not dependent on the Decedent as a matter of law, and should have given consideration to her claim in determining whether some of the settlement proceeds should be distributed to Connie Ellis.

STATEMENT REGARDING ORAL ARGUMENT

Appellant request an opportunity to present oral argument and believes Rules 20(a)(1) and (2), of the West Virginia Rules of Appellate Procedure apply.

ARGUMENT

ISSUE

On this appeal, the Respondent Connie Ellis raises one issue. Under West Virginia Code §55-7-1 *et seq.*, as interpreted through the relevant case law, the Circuit Court erred in holding that a former spouse receiving regular payments toward a child support arrearage was not financially dependent on the decedent, or otherwise equitably entitled to share in the proceeds of a wrongful death settlement.

STANDARD OF REVIEW

“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 Com'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). (Numerous additional citations omitted.)]

DISCUSSION

The current case law instructs that our wrongful death statute is to be interpreted liberally. “Not only has the Legislature liberalized the wrongful death recovery statute through the years, but this Court has adopted a liberal construction of the statute from our earliest cases.” [Syllabus point 1, *Bond v. City of Huntington*, 166 W.Va. 581, 276 S.E.2d 539. Quoted in Syllabus pt. 3., *Martin v. Smith*, 190 W.Va. 286, 438 S.E.2d 318 (W.Va., 1993).] “Because the wrongful death act alleviates the harshness of the common law, it is to be given a liberal construction to achieve its beneficent purposes.” [Syllabus Point 6, *Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E.2d 681 (2001).] The Appellant simply asks the Court to review the facts of

this case in the requisite light, and rule that a former spouse receiving payments against a child support arrearage is financially dependent on the decedent in this case or otherwise equitably entitled to receive a share of a settlement in a wrongful death action.

Under W. Va. Code § 55-7-6 (b), 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. [W. Va. Code 55-7-6 (b).]

“Dependent” has never been interpreted to mean that the claimant has to be a legal dependent of the decedent; rather, the Court has only required that the claimant be receiving some financial assistance, or if not financial assistance, some services that have value. West Virginia's wrongful death statute is remedial, and is liberally construed to affect the Legislature's intent. [*Martin v. Smith*, 190 W.Va. 286, 438 S.E.2d 318 (W.Va., 1993), quoting, See *Baldwin v. Butcher*, 155 W.Va. 151, 184 S.E.2d 428 (1971).] We have consistently given “more than lip service to this rule of liberal construction.” [*Bond v. City of Huntington*, 166 W.Va. 581, 276 S.E.2d 539 (1981).] Accordingly, the word “dependent” in our wrongful death statute has been read very broadly: West Virginia does not “require that the surviving dependent be legally dependent on the deceased for the support but only that, in fact, they were receiving some money or services from the deceased.” [*Bond*, 166 W.Va. at 589, 276 S.E.2d at 547 (1981).]

In *Martin v. Smith*, decedent committed suicide and a wrongful death action proceeded against Smith, Martin's psychiatrist. At trial, Martin's mother was awarded damages because her adult son had helped his mother, worked odd jobs as a student and contributed to household expenses. He also purchased his own clothes and furniture for his mother's home and helped his mother to the full extent of his capabilities. These facts were held sufficient to support the court's finding that Mrs. Martin was entitled to a distributive share of the damages assessed in this case. [*Martin v. Smith*, 190 W.Va. 286, 438 S.E.2d 318 (W.Va., 1993).]

In *Bond v. City of Huntington*, the evidence was that:

"Decedent assisted with the cooking, dishwashing, laundry, housekeeping including cleaning and dusting, yard work, garden work, canning, running errands for family members, nursing sick family members, making clothes for herself and for other members of her family, looking after younger children, receiving phone calls relating to her parents' business, chauffeuring family members, participated in home repairs and maintenance including painting and other tasks and otherwise performed many other services which were of financial and pecuniary value." *Id.* At 542.

In *Bond*, the parents of the decedent were receiving not a financial contribution, but help around the house from their daughter. Logically, the parents could have washed their own dishes and cleaned their own house. There was no mention that the adult daughter was required to provide services. Quite simply, it was just the nature of the relationship between the parents and their daughter. This is helpful in the case at bar because it illustrates the proper interpretation of the term "dependent".

Appellant Connie Ellis was regularly receiving monthly payments against a child support arrearage. The Court erred in not finding that Connie Ellis had met the dependency requirement. The Court below required a dependency standard similar to the tax standard on legal dependants, as oppose to the liberal standard under the wrongful death statute. The rule is that a claimant in a wrongful action need only show the receipt of some services. Connie Ellis' receipt of money

from the Decedent on a monthly basis against his child support arrearage satisfies the dependency requirement.

The other element that the Court should give consideration in this case is the provision in the wrongful death statute that "would otherwise be equitably entitled to share in such distribution". [W.Va. Code § 55-7-6 (b).] Connie Ellis raised the decedent's children. For her, it wasn't an option. She endured alone and finally, after the children were emancipated, started regularly receiving \$125.00 per month against the Decedent's \$58,286.66 child support arrearage. The Court below did not consider Connie Ellis as a person equitably entitled to receive a portion of the settlement.

There isn't a case on point that defines or even addresses the issue of who may be equitably entitled to receive a portion of the proceeds of a settlement in a wrongful death action. The debt the Decedent owed was not a contractual debt. It is a parental obligation. It's a legal obligation as well as a moral obligation. The Court below should have also considered principles of equity in determining, under the totality of the circumstances, whether Connie Ellis should receive some portion of the proceeds of this wrongful death settlement and not ruled as a matter of law that Connie Ellis was not a person equitably entitled to receive a portion of the proceeds.

Black' Law defines Equity as:

A system of jurisprudence collateral to, and in some respects independent of, "law"; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it, or to give it with effect, or by exercising certain branches of jurisdiction independently of them. [Black's Law Dictionary, Sixth Edition, p. 540.]

When the legislature added " and those persons equitably entitled" to the wrongful death statute, it must have intended to include an additional class of claimants, because equity demands, for whom it is fair and just, to include as a claimant in wrongful death actions. It

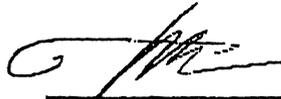
would be equitable, fair and just to permit Connie Ellis to share in the proceeds of the settlement in the wrongful death of Thomas Swisher.

CONCLUSION

The case should be remanded to the Circuit Court to reconsider the distribution of the proceeds of the wrongful death settlement, with instructions that Decedent's former spouse, who for years was receiving regular monthly payments against a substantial child support arrearage, is a person that was financially dependent upon the Decedent or otherwise equitably entitled to share in the proceeds of a wrongful death settlement as a matter of law.

Respectfully Submitted,

Connie Ellis,
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By Counsel



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CERTIFICATE OF SERVICE

I, Frank P. Bush, Jr., counsel of record for the Petitioner, Intervenor Respondent Below, do hereby certify that a true copy of the "*Appellant's Petition for Appeal*" has been served upon the following parties of record by facsimile and by depositing a true copy of the same in the United States mail, addressed as follows:

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Dated this 28th day of February, 2012.



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