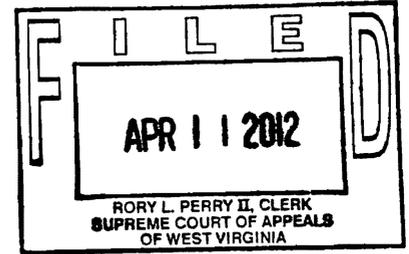


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CONNIE ELLIS,  
Intervenor, Respondent Below,  
Petitioner,



v.

Docket No. 12-0090

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

**BRIEF OF RESPONDENT**

David H. Wilmoth  
Counsel for Respondent  
W. Va. State Bar No. 5942  
P.O. Box 933  
427 Kerens Ave.  
Elkins, WV 26241  
(304) 636-9425

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ASSIGNMENT OF ERROR ..... 1

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 3

STATEMENT REGARDING ORAL ARGUMENT ..... 3

ARGUMENT ..... 3

    A. Standard of Review ..... 3

    B. I. Petitioner as judgment creditor of the deceased is not entitled  
        to share in the distribution of the wrongful death proceeds ..... 4

        II. The lower court’s exercise of discretion regarding distribution  
            of the wrongful death proceeds was not clearly erroneous ..... 5

CONCLUSION ..... 8

CERTIFICATE OF SERVICE ..... 9

**TABLE OF AUTHORITIES**

**CASES**

*Walker v. West Virginia Ethics Commission*  
492 S.E. 2d 167, 201 W.Va. 108 (1997) ..... 3

*Thompson and Lively v. Mann*  
65 W.Va. 648, 64 S.E. 920 (1909) ..... 4

*Trail v. Hawley*  
163 W.Va. 626, 259 S.E. 2d 423 (1979) ..... 4

*McClure v. McClure*  
184 W.Va. 649, 403 S.E. 2d 197 (1991) ..... 4

*Lauderdale v. Neal*  
569 S.E.2d 431, 212 W.Va. 184 (2002, see footnote 6) ..... 4

*Bond v. City of Huntington*  
166 W.Va. 581, 276 S.E.2d 539 (1981) ..... 6

*Walker v. Walker*  
350 S.E.2d 547, 177 W.Va. 35 (1986) ..... 6, 7

**STATUTES**

*W.Va. Code 55-7-6* (1985) ..... 4, 6

**RULES**

*Rev. R.A.P. 18(a)* ..... 3

*Rev. R.A.P. 19 (a)(2)* ..... 3

### **ASSIGNMENTS OF ERROR**

1. Whether petitioner, as a judgment creditor of decedent Thomas R. Swisher, is entitled to share in the distribution of proceeds of a wrongful death settlement.
2. Whether the lower court erred when determining it was neither unfair nor unjust to deny petitioner, as the ex-wife of decedent, a portion of the wrongful death proceeds in light of the number of other claimants, their degree of dependency upon the decedent, and the total amount of proceeds available for distribution.

### **STATEMENT OF THE CASE**

Thomas R. Swisher died intestate on July 5, 2010, as a result of a motor vehicle accident wherein he was operating a motorcycle on Route 72 in Preston County, West Virginia, and was struck head-on by a 2007 Chevrolet Tahoe driven by Hillary D. Strawser. Ms. Strawser had a policy of insurance through Nationwide Insurance Company, with policy limits of \$250,000.00 per accident. In addition, Mr. Swisher had under-insured coverage through his policy of insurance with Progressive Insurance Company, with policy limits of \$50,000.00.

At the time of his death, Mr. Swisher was married to the respondent named herein, and they had three children from that relationship, two of whom are college students who remain in the home, and the third, a minor child, attending a local middle school. Petitioner was formerly married to Mr. Swisher, although they had been divorced for approximately 25 years at the time of his death. There were two children from that prior marriage, namely Marshall Swisher age 30, and Danielle Richards, age 29. Each of the children from the decedent's marriage to Petitioner are adults, employed and living independently, and raising families of their own. There was little

or no contact between the children and Mr. Swisher from the time of the divorce until the time of his death. Another child, namely Paige Barrick, age 20, was the daughter of Mr. Swisher. Ms. Barrick's mother and Mr. Swisher were never married, and the mother of Ms. Barrick predeceased Mr. Swisher.

Petitioner remarried after her divorce from Mr. Swisher and remains married to the same husband. There is joint income in appellant's household of approximately \$40,000.00 annually. Shortly before the hearing in this matter, petitioner quit her most recent employment, and had not begun pursuing other jobs.

A settlement was negotiated by counsel for respondent wherein each insurer was to pay policy limits for the accident, resulting in a total settlement of \$300,000.00. Thereafter, a Petition was filed by appellee for approval of the settlement and distribution of the proceeds to the heirs and beneficiaries of the Estate of Thomas R. Swisher. Notice of this Petition and hearing was served upon the adult children of Mr. Swisher. Petitioner sought to intervene in this matter, and that motion was granted. At the hearing, Petitioner testified as to her claim of financial dependency upon Mr. Swisher, based upon her receipt of payments against the judgment in the amount of \$125.00 per month for a period of approximately 8 years. At the hearing, Appellant testified that the monthly payments she received were distributed equally to her children.

Based *inter alia*, upon this testimony, the lower court determined that petitioner was not financially dependant upon Mr. Swisher at the time of his death, as required by the applicable statute, and awarded her no portion of the proceeds of the wrongful death settlement. The lower court did award the sum of \$5,000.00 to each of the adult children of appellant and the other

adult minor child. In addition, the lower court approved the remaining distribution submitted to the court in the petition filed by the surviving spouse. As a result, Petitioner has filed this appeal.

### **SUMMARY OF ARGUMENT**

Petitioner, as a judgment creditor, is not identified in the applicable statute as a proper recipient of proceeds of a wrongful death settlement.

The lower court did not abuse its discretion in denying petitioner a share of the wrongful death proceeds, as she as the ex-wife of decedent was not equitably entitled to a share of the proceeds when the court properly considered the situation of the surviving spouse, the three dependant children, and the adult children of the decedent.

### **STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to *Rev. R. A. P. 18 (a)*, Respondent believes that oral argument is appropriately found under *Rev. R. A. P. 19 (a) (2)*, as this appeal questions the exercise of discretion of the lower court when the law governing that discretion is settled. Respondent believes that this case is appropriate for memorandum decision.

### **ARGUMENT**

#### **Standard of Review**

This Court reviews the lower court's exercise of discretion and the ultimate disposition under an abuse of discretion standard (See *Walker v. West Virginia Ethics Commission* 492 S. E. 2d 167, 201 W. Va. 108, (1997)).

**I. Petitioner as judgment creditor of the deceased is not entitled to share in the distribution of the wrongful death proceeds.**

Petitioner is merely a judgment creditor of Thomas R. Swisher, and being such, is not entitled to share in the proceeds of the wrongful death settlement. The proceeds of the wrongful death settlement are not assets of the Estate of the decedent, but are acquired by the fiduciary of the estate on behalf of the surviving beneficiaries. Nevertheless, shortly following Mr. Swisher's death, a claim was filed against the Estate seeking payment of a judgment in favor of petitioner, as identified by petitioner during her testimony at the hearing in this matter (Tr. p. 11 line 11-16).

It has been the law in this state for over one hundred years that the proceeds of a wrongful death action are not paid to the estate, nor subject to the claims of creditors of the estate, but rather belong to the heirs of the deceased ( See *Thompson and Lively v. Mann*, 65 W. Va. 648, 64 S. E. 920 (1909). This premise has repeatedly been upheld and recognized by this Court. (See *Trail v. Hawley* 163 W. Va. 626, 259 S. E. 2d 423 (1979)). More recently, in *McClure v. McClure* 184 W. Va. 649, 403 S. E. 2d 197 (1991), this Court again reiterated that principal, saying in syllabus point 4:

“Under W. Va. Code, 55-7-6 (1985), our wrongful death statute, the personal representative has a fiduciary obligation to the beneficiaries of the deceased because the personal representative is merely a nominal party and any recovery passes to the beneficiaries designated in the wrongful death statute and not to the decedent's estate.”

Subsequently, this Court in a *per curiam* opinion, again recognized this long standing principal when in *Lauderdale v. Neal* 569 S. E. 2d 431, 212 W. Va. 184 (2002, see footnote 6), it opined that the proceeds of a wrongful death settlement are to be distributed to the recipients identified in *W. Va. Code* §55-7-6.

As a judgment creditor of the Estate of Thomas R. Swisher, petitioner clearly has no claim to share in the distribution of the proceeds of the wrongful death settlement obtained as a result of the motorcycle accident which claim Mr. Swisher's life.

Having established that petitioner's claim cannot survive as a judgment creditor, we must determine whether the lower court's decision was clearly erroneous under the factual scenario this case presents. In doing so, it is clear that a fair and just distribution would not include petitioner as a distributee of the proceeds.

**II. The lower court's exercise of discretion regarding distribution of the wrongful death proceeds was not clearly erroneous.**

Petitioner is the former spouse of the decedent who had been divorced from Mr. Swisher for over 25 years at the time of his death (Tr. p. 5 line 22 - p. 6 line 14). During that time period, there is no evidence or indication that alimony or separate maintenance had been paid, nor ordered by the Court granting the divorce. Moreover, petitioner had re-married, and is currently unemployed, although her current husband is employed full time. The petitioner and her current husband own a home with equity in the amount of approximately \$35,000.00 (Tr. p. 20 line 1-10). The annual household income for petitioner was over \$40,000.00 (Tr. p. 19 line 9). Petitioner testified that she had recently quit her latest employment, (Tr. p. 17 line 3-9; p. 22 line 15), and was not seeking new employment, preferring to perform volunteer services and care for her mother, (Tr. p. 22 line 2- p. 23 line 2), and any proceeds she obtained as payment for the judgment in her favor was paid to her children (Tr. p. 14 line 4 - p. 15 line 3).

The statute applicable to this matter requires a court or jury to determine in a fair and just manner in what proportion the damages should be distributed to "...surviving spouse and

children, including adopted children and step children, brothers, sisters, parents, and any persons who were financially dependant upon the decedent at the time of his or her death, or who would otherwise be equitably entitled to share in such distribution...” (See *W. Va. Code* §55-7-6). Petitioner asserts that she, as a recipient of monthly payments towards an outstanding judgment, was financially dependant upon Mr. Swisher at the time of his death. Petitioner takes this position based upon her interpretation of the decision in *Bond v. City of Huntington* 166 W. Va. 581, 276 S. E. 2d 539 (1981). Assuming that the *Bond* decision would give petitioner’s argument merit, that alone however, is not the sole factor the statute requires the lower tribunal to consider.

This court has previously approved a lower court’s decision to deny a share of the wrongful death proceeds to at least 10 adult children in favor of the lone minor child of the deceased. In *Walker v. Walker* 350 S. E. 2d 547, 177 W. Va. 35 (1986), this Court affirmed the decision of the lower Court which awarded the entire net settlement of \$65,000.00 to an eleven year old son of the decedent. The lower court ruled in that manner after considering the circumstances of the youngest child, the future needs of the child, and the limited funds available for distribution, which if divided among all 11 children, would in effect benefit no one. In affirming that decision, this Court recognized that the lower court should base the ruling upon the fairness, justness and equity of awarding the proceeds based upon the dependency level of the various claimants.

In the present case, the lower court awarded what amounted to a token portion of the proceeds to the two adult children from a previous marriage, and an adult illegitimate child. The majority of the proceeds were distributed to the surviving spouse and three children from the

decedent's then current marriage. Of the three children, one is a minor and the other two are adult college students, living at home, and under the age of 22 years. Additionally, the testimony of the surviving spouse revealed her income and her current position as a teacher's aid in the local school system.

Conversely, Petitioner, having been afforded the opportunity to intervene in this matter, presented to the lower court her argument concerning a claim to a portion of the proceeds. Her position was based solely upon the fact that she received approximately \$125.00 per month toward the outstanding judgment. However petitioner also testified that she divided that payment equally among her adult children (who were recipients of a portion of the proceeds which is the subject of this appeal). Clearly then, petitioner, although receiving a sum of money from the decedent, was not truly financially dependent upon Mr. Swisher at the time of his death, nor did she require these funds to live a modestly comfortable life.

The *Walker v. Walker* Court also rejected the argument advanced by petitioner in her brief, that being essentially that an award of a portion of the proceeds makes amends for the circumstances she was forced to endure while her children were minors. In *Walker v. Walker*, this Court approved of the lower court's decision to award all of the settlement to the lone minor child, in spite of the "...unfortunate circumstances of ten children who all grew up in poverty,..." *Walker v. Walker* at page 548.

Considering the full factual circumstances presented by this case, it is clear that the lower court did not abuse its discretion by distributing the wrongful death proceeds in such a manner. The total award was not extensive in light of the current economy, the cost of living, post-secondary education for the minor child, the need for a home, and the number of potential

beneficiaries. A division of the proceeds which compensated every individual who could arguably have a claim according to the statute would in effect deny the ones most dependent on Mr. Swisher at the time of his death of the support he would have otherwise been able to provide would he have survived.

### CONCLUSION

In light of the foregoing facts, authority and argument, respondent requests that this Court deny the relief requested in petitioner's brief, that this Court find that the lower Court did not err in the distribution of the wrongful death proceeds, that a fair, just and equitable division was made of the proceeds, and that petitioner is not entitled to a share of the proceeds in this matter.

Respectfully submitted,

LINDA SWISHER,  
Administratrix of the Estate of  
Thomas R. Swisher, deceased,

Respondent,  
By Counsel



David H. Wilmoth  
Counsel for Respondent  
W. Va. State Bar No. 5942  
P.O. Box 933  
427 Kerens Ave.  
Elkins, WV 26241  
(304) 636-9425

**CERTIFICATE OF SERVICE**

I, David H. Wilmoth, counsel for Respondent, do hereby certify that on this date I served a true copy of the foregoing ***BRIEF OF RESPONDENT*** upon Heather M. Weese, Esquire, guardian ad litem; Charles Steele, Esquire; and Frank P. Bush, Jr., Esquire, by depositing a true copy of same in the United States mail, postage prepaid, addressed to said counsel as follows:

Heather M. Weese, Esquire  
Law Office of Heather M. Weese, PLLC  
600 South Randolph Avenue, Suite 1  
Elkins, WV 26241

Charles R. Steele, Esquire  
Steele Law Offices  
P. O. Box 1494  
Clarksburg, WV 26302-1494

Frank P. Bush, Jr., Esquire  
214 Davis Avenue  
P. O. Box 1008  
Elkins, WV 26241

Dated this 10 day of April, 2012.

  
\_\_\_\_\_  
DAVID H. WILMOTH  
W.Va. State Bar No. 5942  
Counsel for Respondent  
Post Office Box 933  
427 Kerens Avenue, Suite 3  
Elkins, WV 26241  
(304) 636-9425