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In re Est. of Bennett, 2013 MT 230

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Torts / Probate Law.

In re Est. of Bennett, 2013 MT 230, 371 Mont. 275, 308 P.3d 63

Wrongful death damages and survival damages arise from distinct claims that must be pursued by a decedent's personal representative in one action. Survival damages belong to the estate and may only be claimed by the decedent's heirs. Wrongful death damages belong to the decedent's survivors and are not restricted to his or her heirs.

The Montana Supreme Court clarified the distinction between wrongful death claims and survival claims on a Writ of Supervisory Control in *In re Est. of Bennett*. The need for clarification arose from inconsistencies in prior rulings concerning who may receive wrongful death damages from an intestate decedent.

Jeremiah Bennett died from injuries sustained in a motor vehicle accident caused by another driver. Jeremiah died intestate. His survivors included his parents, Abel Robert Bennett and Judy Bennett (the Bennetts), and two minor children with former spouse, Sabrina Bennett. Jeremiah's two children were his only heirs. Sabrina was the court-appointed guardian and conservator for the children.

In a separate contested matter, the district court removed Abel as personal representative and appointed Sabrina in his stead, concluding that she could exercise the right of personal representative in the children's stead under Montana Code Annotated § 72-3-505. Abel opposed Sabrina's appointment as personal representative because: (1) Montana law allows only a single action to recover for a person's death; (2) the action must be maintained by the estate's personal representative; and (3) Abel believed Sabrina, as personal representative, intended to exclude the Bennetts from any monetary recovery for Jeremiah's death. Nonetheless, the Montana Supreme Court upheld the district court's appointment because nothing in the Montana statutes forbids a former spouse from serving as a personal representative. *In re Est. of Bennett*, 2013 WL 4080732 (Mont. 2013). In his concurrence, Justice Rice noted the oddity of prohibiting a former spouse from "taking property" from the estate, yet permitting the same spouse to pay herself to

administer the estate. Justice Rice recommended the legislature amend the language of Montana Code Annotated § 72-3-501 if such duplicity was not their intent.

As Abel expected, Sabrina sought to exclude the Bennetts' claim for wrongful death damages by petitioning the district court for a "declaration that the Bennetts had no standing to claim wrongful death damages as a result of Jeremiah's death." Sabrina based her argument on Montana precedent, which suggested that only "heirs" may claim wrongful death damages. The Bennetts concurrently filed a motion to intervene and cited the same Montana precedent, but focused instead on instances where the "heirs" were parents of an adult child. After the district court granted Sabrina's petition and denied the Bennetts' motion, the Bennetts petitioned the Montana Supreme Court for supervisory control. The Court granted the petition, wishing to clarify when and to whom wrongful death damages may be awarded.

In the Writ of Supervisory Control, the Court distinguished between a survival action and a wrongful death action. A survival action is "personal to the decedent"; the damages belong wholly to the decedent's estate. The decedent's heirs are the only parties entitled to survival damages. A wrongful death action, on the other hand, is personal to the survivor; the damages "are paid without regard to the intestate succession statutes and are not controlled by the intestate succession statutes." Wrongful death damages "pertain to the *personal* loss of the *survivors*" and do not become part of the decedent's estate; they are held by the personal representative as "*trustee* of the moneys for the person entitled." The Court noted that although it had used the terms "heir" and "survivor" interchangeably in prior cases, survival actions dealt only with "heirs" and wrongful death actions with "survivors."

Montana practitioners should be aware that survival claims and wrongful death claims are distinct actions that the personal representative must bring simultaneously. Survival claims relate only to the decedent, with damages awarded to the decedent's heirs. Wrongful death claims

pertain to the decedent's survivors, with damages awarded to the survivor for the grief, sorrow, and mental anguish experienced by him or her.

Honorable C.B. McNeil, Twentieth Judicial District Court Judge

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