

[Cite as *In re Estate of Werts*, 2009-Ohio-3120.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

IN THE MATTER OF: :

THE ESTATE OF RONALD R. WERTS : C.A. CASE NO. 22824

: T.C. CASE NO. 05EST349

: (Civil Appeal from
Common Pleas Court
Probate Division)

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O P I N I O N

Rendered on the 26th day of June, 2009.

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GRADY, J.:

{¶ 1} Ronald R. Werts, II, appeals from a judgment and
order of the probate court distributing the proceeds of an
award for the wrongful death of Appellant's father, Ronald R.
Werts.

{¶ 2} Ronald R. Werts died of complications relating to

asbestosis. A wrongful death action was filed by the Executor of his estate, Betty L. Werts, the surviving spouse. That action was settled. Thereafter, the Executor applied to the probate court for an order approving distribution of the net proceeds of \$51,627.23 from the settlement.

{¶ 3} The probate court conducted a hearing on the application. On June 11, 2008, the court approved and ordered distribution of the net proceeds in three equal amounts of \$17,209.09 to Ronald R. Werts, II, the decedent's son, and Ronald R. Werts, III, and Robert W. Werts, the decedent's grandsons. The court also filed a written decision on that same date setting out the findings and conclusions on which its order was based.

{¶ 4} Ronald R. Werts, II filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT'S ENTRY AND DECISION OF WRONGFUL DEATH DISTRIBUTION FINDING THAT RONALD WERTS, II, DECEDENT'S SON, RONALD WERTS, III AND ROBERT WERTS, DECEDENT'S GRANDSONS, SHOULD SHARE EQUALLY IN THE NET WRONGFUL DEATH PROCEEDS WAS AN ABUSE OF DISCRETION."

{¶ 6} R.C. 2125.02(B) provides that compensatory damages may be awarded in a civil action for wrongful death, and may include:

{¶ 7} "(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

{¶ 8} "* * *

{¶ 9} "(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent."

{¶ 10} R.C. 2125.03 (A) (1) states, in pertinent part:

{¶ 11} "The amount received by a personal representative in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code, whether by settlement or otherwise, shall be distributed to the beneficiaries or any one or more of them. The court that appointed the personal representative, except when all of the beneficiaries are on equal degree of consanguinity to the deceased person, shall adjust the share of each beneficiary in a manner that is equitable, having due regard for the injury and loss to each beneficiary resulting from the death and for the age and condition of the beneficiaries."

{¶ 12} The decedent's surviving spouse, parents, and children are rebuttably presumed to have suffered damages by

reason of the wrongful death. R.C. 2125.02(A)(1). Included in the class of "next of kin," who are not rebuttably presumed to have suffered damages, are the decedent's brothers, sisters, grandparents, and grandchildren. *Buchert, Executor v. Newman* (1993), 90 Ohio App.3d 382.

{¶ 13} R.C. 2125.03(A)(1) confers discretion on the probate court to distribute the proceeds of a wrongful death among the beneficiaries equitably. When a court acts within the bounds of discretion the law confers, we may reverse only for an abuse of discretion.

{¶ 14} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 15} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." AAAA

Enterprises, Inc. v. River Place Community Redevelopment (1990), 50 Ohio St.3d 157, 161.

{¶ 16} Ronald R. Werts, II argues that the trial court abused its discretion in the distribution it ordered because the decedent, Ronald W. Werts, had established a trust in which Ronald W. Werts, II was entitled to fifty percent of the benefits and his two grandsons, Ronald W. Werts, III and Robert Werts, were each entitled to only twenty-five percent of the benefits of the trust. Ronald W. Werts, II also points to the testimony of his mother, Betty Werts, the decedent's surviving spouse, that the relationship between the decedent and Ronald W. Werts, III was "fragile" and "off and on," and that her grandson was not saddened by his grandfather's death.

Betty Werts also testified that Robert Werts had a "user" relationship with the decedent and would call every day wanting money.

{¶ 17} R.C. 2125.03(A)(1) provides that in distributing the proceeds of a wrongful death benefit between the statutory beneficiaries, the probate court shall "adjust the share of each beneficiary in a manner that is equitable, having due regard for the injury or loss to each beneficiary resulting from the death and for the age and condition of the beneficiaries." Those injuries and losses are of the kind

identified by R.C. 2125.02(B)(3) and (5). In relation to that standard, the decedent's manifestation of his care and concern for these three beneficiaries through the trust he established is of little, if any, relevance to the injury and loss each beneficiary suffered by reason of his death.

{¶ 18} The testimony of Betty Werts is relevant to the standard that R.C. 2125.03(A)(1) requires the court to apply, but the court was not required to credit that evidence. And, from the decision the court filed, and the findings and conclusions therein, it is clear that the court rejected the evidence that Betty Werts offered. Instead, citing numerous instances, the court's findings portray a close and loving relationship between the deceased and his two grandsons, Ronald W. Werts, III, and Robert Werts, which their own father, Ronald W. Werts, II, could not or would not provide them. Their injury and loss from the death of their grandfather is palpable in relation to his role in their lives, and substantial. Ronald W. Werts, II, does not dispute any findings of fact that the probate court made.

{¶ 19} Appellant's argument that the court abused its discretion in the conclusion of law it reached is, in essence, a manifest weight of the evidence contention. Judgments supported by some competent, credible evidence will not be

reversed on appeal as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. The weight to be given the evidence and credibility of the witnesses are matters primarily for the trier of facts, the trial court in this instance, to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 20} On this record, we find no abuse of discretion in the distribution the trial court ordered. The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 21} "THE TRIAL COURT'S ENTRY AND DECISION OF WRONGFUL DEATH DISTRIBUTION FINDING THAT RONALD WERTS, II, DECEDENT'S SON, RONALD WERTS, III AND ROBERT WERTS, DECEDENT'S GRANDSONS, SHOULD SHARE EQUALLY IN THE NET WRONGFUL DEATH PROCEEDS WAS CONTRARY TO LAW."

{¶ 22} Robert W. Werts, II, argues that R.C. 2125.02(A)(1)

should not be read to permit an award to a decedent's "next of kin" for loss of society and mental anguish where there is a spouse, children, and/or parents of the deceased surviving. Ronald W. Werts, II is the decedent's child, while Ronald W. Werts, III, and Roberts, are "next of kin." Ronald W. Werts, II asks us to overrule the contrary holding of The Supreme Court of Ohio in *Ramage v. Central Ohio Emergency Serv. Inc.* (1992), 64 Ohio St.3d 97, in order to sustain the error he assigns.

{¶ 23} As a court inferior to The Supreme Court of Ohio, we are obliged to follow and apply the rules of law that court announces in its decisions. We may not vary from them, much less overrule them, an exercise which is employing a current colloquialism, "above our pay grade."

{¶ 24} The second assignment of error is overruled. The judgment of the probate court will be affirmed.

DONOVAN, P.J. And FROELICH, J., concur.

Copies mailed to:

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Hon. Alice O. McCollum