

LEGAL ISSUES

- I. Whether Under The South Dakota Wrongful Death Statutes, Michael Howe, The Personal Representative Of The Estate Of Edna Jane Howe May Bring A Wrongful Death Action For His Individual Benefit To The Exclusion Of Randolph Howe, A Beneficiary By Statute?

The trial court found that the legal pleadings filed by Michael Howe only sought damages for himself and not for Randolph Howe or any other person. The trial court specifically concluded that the underlying legal wrongful death action was brought for the pecuniary loss of Michael Howe and was not brought for the benefit of Randolph Howe.

- II. Whether The Trial Court Erred When It Held that Randolph Howe Was Barred From Recovery As A Beneficiary In The Wrongful Death Action Due To His Failure To Intervene Or Otherwise Participate In The Wrongful Death And Survival Actions?

The trial court concluded that by failing to object to the settlement of the underlying action; by failing to take action to intervene or to otherwise participate by deposition or legal assistance; and by failure to object to the prior distribution of damages recovered in the underlying action to Michael Howe only, Randolph Howe is barred by the doctrine of waiver and estopped from making any claim to the proceeds of said legal action.

- III. Whether The Trial Court Was Clearly Erroneous When It Found That Randolph Howe Suffered No Pecuniary Damages By The Loss Of His Mother And Held That He Was Not A Beneficiary Under The Wrongful Death Statutes Of South Dakota?

- A. Whether the amount of pecuniary damage suffered by the statutory beneficiaries was determined by settlement and was not an issue before the court.
- B. Whether the trial court was clearly erroneous when it held that pecuniary injury was a factor for consideration when apportioning proceeds of a wrongful death action between statutory beneficiaries and whether the trial court failed to apply the standard of fair and equitable with reference to the age and condition of the beneficiaries.

- C. Whether proper application of SDCL § 21-5-5 and SDCL § 21-5-8 requires an equal apportionment of the wrongful death proceeds collected from both the manufacturer and the nursing home.
- D. Whether South Dakota law supports the trial court's conclusion that by his actions, Randolph disqualified himself as a statutory beneficiary.

The trial court concluded that since Randolph Howe had no pecuniary loss, he does not qualify as a "beneficiary" in the underlying legal action as suggested by SDCL § 21-5-8. The trial court further concluded that even if Randolph Howe had so qualified, his abandonment of his mother justified the court's decision.

- IV. Whether The Trial Court Erred By Allocating Twenty Percent (20%) Of The Proceeds To The Survival Action When The Petition For Distribution Filed By The Personal Representative Proposed Approximately Three Percent (3%) Of The Proceeds Be Allocated To The Survival Action?

The trial court ordered 20% of the entire settlement amount be allocated to the survival action and allocated the balance of the recovery as wrongful death damages.

STATEMENT OF LEGAL ISSUES

1. Can the child of a predeceased child be considered a beneficiary, pursuant to SDCL 21-5-8 and SDCL 21-5-5, in a wrongful death action, and so potentially receive a portion of the proceeds received by the estate in the settlement of that wrongful death action?

The circuit court answered this question in the negative.

2. When a settlement of a wrongful death action is reached before trial, so that no jury is involved in awarding damages, are the proceeds of such settlement to be apportioned among the beneficiaries under the standard of what is "fair and equitable", pursuant to SDCL 21-5-8, rather than in accordance with the pecuniary injury suffered by the beneficiaries, pursuant to SDCL 21-5-7?

The circuit court answered this question in the negative.

3. Under the facts and circumstances of this case, does the doctrine of equitable estoppel apply to estop Michael Howe from denying the claim of Lance Howe to a portion of the proceeds received in the settlement of the wrongful death action?

The circuit court answered this question in the negative.

LEGAL ISSUE

WHETHER THE TRIAL COURT ERRED BY ORDERING RANDOLPH HOWE TO POST A SUPPERCEDEAS BOND IN THE TOTAL AMOUNT OF TWO MILLION TWO HUNDRED FIFTY-FIVE THOUSAND DOLLARS (\$2,255,000.00) WITH TWO MILLION FIFTY THOUSAND DOLLARS (\$2,050,000.00) BEING A DEFAULT BOND PAYABLE TO THE ESTATE OF EDNA JANE HOWE AND TWO HUNDRED AND FIVE THOUSAND DOLLARS (\$205,000.00) BEING A SUPERSEDEAS BOND PAYABLE TO MICHAEL M. HOWE WITHIN THIRTY (30) DAYS OF THE DATE OF HEARING IN ORDER TO STAY THE DISTRIBUTION OF THE FUNDS REMAINING IN THE GUNDERSON, PALMER, GOODSSELL, & NELSON, LLP, EDNA JANE HOWE PROBATE ESTATE TRUST ACCOUNT TO MICHAEL HOWE AS SET FORTH IN THE TRIAL COURT'S ORDER OF MAY 6, 2003.

The trial court ordered Randolph Howe to post a supersedeas bond in the total amount of Two Million Two Hundred Fifty-Five Thousand Dollars (\$2,255,000.00) with Two Million Fifty Thousand Dollars (\$2,050,000.00) being a default bond payable to the Estate of Edna Jane Howe and Two Hundred and Five Thousand Dollars (\$205,000.00) being a supersedeas bond payable to Michael M. Howe within thirty (30) days of the date of hearing in order to stay the distribution of the funds remaining in the Gunderson, Palmer, Goodsell, & Nelson, LLP., Edna Jane Howe Probate Estate Trust Account to Michael Howe as set forth in the trial court's order of May 6, 2003.

STATEMENT OF LEGAL ISSUES

1. Can an appellant be required to post a "default bond" in order to stay execution of a Judgment and Order on appeal when a "default bond " is not authorized by SDCL 15-26A?

The circuit court answered this question in the affirmative.

2. Can an interested party appealing an order for distribution of the assets of an estate be required to post a supersedeas bond when all of such assets remain in the possession and control of the estate and none are in possession or control of the appellant?

The circuit court answered this question in the affirmative.