

1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: February 9, 2016

4 **NO. 34,343**

5 **MARTIN BODLEY, as Personal Representative**  
6 **of the Estate of Carl D. Bodley, deceased, KEVIN**  
7 **BODLEY, and LONA GEARHART,**

8           Plaintiffs/Counter-Defendants/Appellants,

9 v.

10 **CHRISTOPHER DEREK GOLDMAN, f/k/a**  
11 **CHRISTOPHER BODLEY, and THERESA**  
12 **LINN BODLEY,**

13           Defendants/Counter-Plaintiffs/Appellees.

14 **APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY**  
15 **James Sanchez, District Judge**

16 Michael Schwarz  
17 Santa Fe, NM

18 Gilbert Arrazolo  
19 Albuquerque, NM

20 for Appellants

1 Law Office of Daymon B. Ely

2 Daymon B. Ely

3 Albuquerque, NM

4 Jaramillo | Touchet, LLC

5 David J. Jaramillo

6 Maria E. Touchet

7 Albuquerque, NM

8 for Appellees

1 **OPINION**

2 **BUSTAMANTE, Judge.**

3 {1} This case presents a dispute over the distribution of the proceeds of an action  
4 brought under the Wrongful Death Act, NMSA 1978, §§ 41-2-1 to -4 (1882, as  
5 amended through 2001). The decedent’s brother—who acted as the personal  
6 representative for purposes of the wrongful death action—argues that the decedent’s  
7 children are not entitled to any of the proceeds because they “abandoned” their father.  
8 The district court disagreed and granted summary judgment in favor of decedent’s  
9 children. On appeal, the personal representative argues that disputed issues of  
10 material fact preclude summary judgment. We disagree and affirm.

11 **BACKGROUND**

12 {2} Carl Bodley (Carl) was killed in a single-car rollover accident in 2010. At the  
13 time of his death, Carl was unmarried, having been divorced in 2003 after thirty-four  
14 years of marriage. He had two adult children from the marriage, Christopher Goldman  
15 (Christopher) and Theresa Bodley (Theresa) (collectively, Children). He was also  
16 survived by his siblings Martin Bodley (Martin), Kevin Bodley (Kevin), and Lona  
17 Gearhart (Lona) (collectively, Appellants).

18 {3} Christopher was appointed the administrator under the Uniform Probate Code  
19 of his father’s estate in January 2011. *See* NMSA 1978, §§ 45-1-101 to -404 (1975,  
20 as amended through 2011). In December 2011—in an entirely separate

1 proceeding—Martin was appointed the personal representative of Carl’s estate for the  
2 purpose of pursuing a wrongful death claim under the Wrongful Death Act. The same  
3 month, Martin’s attorneys, Gilbert Arrazolo and James B. Ragan, filed suit against  
4 Ford Motor Company for Carl’s death. The suit was settled in January 2013. After  
5 subtracting their fees and expenses, the attorneys deposited the balance of the  
6 settlement funds in a trust account. Children assert that they were not notified of the  
7 filing or settlement of the wrongful death action when they occurred.

8 {4} Over a year later, Arrazolo met with Theresa and presented her with a written  
9 agreement providing that, in exchange for twenty percent of the settlement amount,  
10 Theresa would agree “that [the agreement] is a full and final settlement of the  
11 proceeds in this case and hereby settles all her potential claims against Ford Motor  
12 Company, Martin Bodley, Gilbert Arrazolo and James Ragan.” The agreement also  
13 stated that Arrazolo did not represent Theresa, that Theresa could obtain independent  
14 counsel, and that “technical[ly]” the Wrongful Death Act entitled Theresa to fifty  
15 percent of the settlement amount. However, it also stated that “case[ ]law suggests  
16 adjustments and/or disqualifications for abandonment/estrangement.” Attached to the  
17 agreement were several New Mexico cases addressing recovery under the Wrongful  
18 Death Act. Theresa asserts that she first learned of the wrongful death claim and  
19 settlement with Ford at this meeting. The following week, Arrazolo presented the

1 same agreement and material to Christopher. Neither Theresa nor Christopher signed  
2 the agreement.

3 {s} In April 2014, Appellants filed a complaint for declaratory judgment seeking  
4 to “determine the rights of statutory beneficiaries under the Wrongful Death [Act].”  
5 The premise of the complaint was that Christopher and Theresa had “abandoned the  
6 child-parent relationship and [were] not entitled to recover under the Wrongful Death  
7 Act” or that, alternatively, the settlement funds should be distributed in equal shares  
8 to Christopher, Theresa, and each of Carl’s three siblings. As a factual basis for the  
9 complaint, Appellants alleged, inter alia, that (1) Christopher and Theresa did not  
10 visit their father in the decade prior to his death, (2) neither Christopher nor Theresa  
11 attended Carl’s funeral service, (3) Christopher told his father to “fuck off” after Carl  
12 indicated he wanted to have a relationship with Christopher, and (4) Christopher  
13 changed his last name and that of his son from Bodley to Goldman shortly after his  
14 parents’ divorce, which “shows that not only did he never want anything to do with  
15 his father[, h]e also didn’t want future generations to have anything to do with his  
16 father.”

17 {s} Children filed an answer, as well as a counterclaim against Martin and the other  
18 siblings for malicious abuse of process and prima facie tort, and a third-party  
19 complaint against the siblings’ counsel for disgorgement, breach of fiduciary duty,

1 malicious abuse of process, and prima facie tort.<sup>1</sup> Children then moved for summary  
2 judgment on the declaratory judgment action, arguing that the Wrongful Death Act  
3 provides a clear structure for disbursement to beneficiaries that does not depend on  
4 whether the named beneficiaries were or were not estranged from the decedent. They  
5 maintained that, under the Wrongful Death Act, Appellants were entitled to the  
6 wrongful death proceeds only “if there is no . . . child or grandchild” of the decedent.  
7 *See* § 41-2-3(C), (E).

8 {6} The district court granted Childrens’ motion for summary judgment and entered  
9 orders to the effect that Appellants were not entitled to any of the proceeds of the  
10 settlement with Ford and that Children were entitled to the settlement funds  
11 remaining in the trust account. Appellants timely appealed.

## 12 **DISCUSSION**

13 {7} Summary judgment is appropriate where there “is no genuine issue as to any  
14 material fact and the moving party is entitled to a judgment as a matter of law.” Rule  
15 1-056(C) NMRA. “[It] is a drastic remedy to be used with great caution.” *Pharmaseal*  
16 *Labs., Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 90 N.M. 753, 568 P.2d 589. “[S]ummary  
17 judgment is improper, if, after resolving all reasonable doubts in favor of the  
18 opponent, the evidence adduced by the pleadings, depositions, answers to

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19 <sup>1</sup>The counterclaim and third-party claims were later dismissed.

1 interrogatories, admissions on file, and affidavits shows that there was a genuine  
2 issue as to any material fact.” *Id.* The substantive law governing the dispute  
3 determines which facts are material. *Farmington Police Officers Ass’n Commc’n*  
4 *Workers of Am. Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 17, 139 N.M.  
5 750, 137 P.3d 1204. “An issue of fact is ‘material’ if the existence (or non-existence)  
6 of the fact is of consequence under the substantive rules of law governing the parties’  
7 dispute.” *Martin v. Franklin Capital Corp.*, 2008-NMCA-152, ¶ 6, 145 N.M. 179,  
8 195 P.3d 24. Our review of summary judgment is de novo. *Id.*

9 {8} The Wrongful Death Act, the substantive law applicable here, provides:

10 The proceeds of any judgment obtained in any such action . . . shall be  
11 distributed as follows:

12 . . . .

13 C. if there is no husband or wife, but a child or grandchild, then to  
14 such child and grandchild by right of representation;

15 . . . .

16 E. if there is no father, mother, husband, wife, child or grandchild,  
17 then to a surviving brother or sister if there are any[.]

18 Section 41-2-3.

19 {9} The parties clearly dispute whether Christopher and Theresa “abandoned” their  
20 father. The question is whether this dispute precludes summary judgment. While  
21 Children “strongly disagree with [Appellants’] categorization of their relationship

1 with their father as ‘abandonment’ or ‘estrangement,’ ” they argue that the veracity  
2 of Appellants’ allegations is immaterial because “[w]hether or not [Children]  
3 ‘abandoned’ their father is not a ‘material fact’ because it does not change the  
4 statutorily-mandated distribution scheme.” Appellants counter that this Court must  
5 construe the facts in the light most favorable to them and that, under that  
6 construction, Christopher and Theresa clearly did not support *Carl Barber’s Super*  
7 *Mkts., Inc. v. Stryker*, 1970-NMSC-027, ¶ 7, 81 N.M. 227, 465 P.2d 284 (“A party  
8 opposing a motion for summary judgment is entitled to have all reasonable inferences  
9 construed in a light most favorable to him.”).

10 {10} We interpret Appellants’ argument to be that whether Christopher and Theresa  
11 abandoned Carl is a disputed material fact under the Wrongful Death Act because (1)  
12 adult children have a common-law duty to “at least provid[e] emotional support” to  
13 their parents, (2) New Mexico case law prevents beneficiaries who are estranged from  
14 their decedent from recovering proceeds of a wrongful death claim, and (3) the  
15 Legislature did not intend the Wrongful Death Act to provide a windfall to adult  
16 children who abandoned their decedent parent. The crux of the question before us is  
17 whether the Wrongful Death Act’s distribution scheme may be altered when the  
18 relationship between a decedent and his or her children has deteriorated—or perhaps  
19 even evaporated. In other words, assuming that Appellants’ allegations are true,



1 should Christopher and Theresa be denied some or all of the proceeds of the  
2 Wrongful Death Act claim? Appellants' arguments rely in large part on this Court's  
3 opinion in *Perry v. Williams* and we begin with a discussion of that case. 2003-  
4 NMCA-084, 133 N.M. 844, 70 P.3d 1283.

5 {11} Perry (Mother) and Williams (Father) were the natural parents of Curtis, who  
6 died from leukemia at the University of New Mexico (UNM) Hospital in 1986 while  
7 still a minor. *Id.* ¶ 2. In May 2000 Perry obtained a settlement of \$463,332 from UNM  
8 Hospital under the Wrongful Death Act. *Id.* Shortly thereafter, Perry petitioned for  
9 termination of Williams' parental rights and for a declaration that Williams had no  
10 right to the settlement funds because he had abandoned and neglected Curtis. *Id.* ¶ 3.  
11 Williams apparently did not contest the district court's findings that Williams "utterly  
12 failed to meet the responsibilities of a father during Curtis[']s lifetime," *id.* ¶ 6,  
13 because Williams (1) "paid less than a total of \$200 as child support" throughout  
14 Curtis's life in spite of numerous court orders requiring child support; (2) did not visit  
15 Curtis in Albuquerque except for at the time of Curtis's death; (3) "had no contact  
16 with Curtis from age two until just days before his death" except for two visits in  
17 California initiated by Perry and the paternal grandfather; and (4) "did not write, did  
18 not call, did not send cards or gifts" while Curtis was hospitalized four times and  
19 "failed to cooperate in the necessary testing for a bone marrow transplant although

1 he was asked to do so” and “was one of only three possible donors.” *Id.* ¶ 5. Instead,  
2 similar to *Children here*, Williams argued that “there was no basis in law to terminate  
3 his statutory right to benefits pursuant to the Wrongful Death Act.” *Id.* ¶ 3.

4 {12} After first observing that there was a nationwide “consensus that it is bad  
5 policy to permit parents who have deserted or abandoned their children to recover for  
6 the wrongful death of those children[,]” *id.* ¶ 13, we proceeded to examine the  
7 common law as it existed when the Wrongful Death Act was enacted, observing that  
8 “it is the common law . . . that establishes the baseline for our analysis.” *Id.* ¶ 17.  
9 Under the common law, “the right of a parent to the services of the child or the child’s  
10 earnings was linked to the parent’s actual support of the child.” *Id.* ¶ 18. This Court  
11 concluded that “[w]e do not lightly assume that the [L]egislature intended to alter this  
12 common law principle when it enacted the Wrongful Death Act. To the contrary, we  
13 believe that the [L]egislature intended to incorporate this common law principle into  
14 the Act when it was passed.” *Id.* ¶ 20.

15 {13} Next, the Court examined New Mexico public policy as evinced in statutes  
16 addressing parental responsibilities to children. *Id.* ¶¶ 21-22. It concluded that a  
17 variety of statutes indicate that New Mexico “disfavors natural parents who do not  
18 acknowledge their responsibilities to their children.” *Id.* ¶ 21 (internal quotation  
19 marks and citation omitted). These statutes include, among others, the Support

1 Enforcement Act, NMSA 1978, §§ 40-4A-1 to -20 (1985, as amended through 2004),  
2 the Parental Responsibility Act, NMSA 1978, §§ 40-5A-1 to -13 (1995, as amended  
3 through 2015), and certain provisions of the Probate Code, NMSA 1978, § 45-2-  
4 114(C) (2011). *Perry*, 2003-NMCA-084, ¶ 21.

5 {14} Finally, the Court noted that case law indicated that “statutory wrongful death  
6 benefits have been determined by common law principles.” *Id.* ¶ 24 (citing *Baca v.*  
7 *Baca*, 1963-NMSC-043, ¶ 23, 71 N.M. 468, 379 P.2d 765; *Sanchez v. J. Barron Rice,*  
8 *Inc.*, 1967-NMSC-077, ¶ 4, 77 N.M. 717, 427 P.2d 240; and *Latimer v. City of Clovis,*  
9 1972-NMCA-040, ¶ 46, 83 N.M. 610, 495 P.2d 788). In the cases cited, the  
10 “contributory negligence of one of the beneficiaries under the Wrongful Death Act  
11 defeat[ed] the right of recovery to the extent of that party’s share.” *Perry*, 2003-  
12 NMCA-084, ¶ 24. The Court also pointed to *Wasson v. Wasson*, 1978-NMCA-092,  
13 ¶ 15, 584 P.2d 713, for the proposition that parental rights should be terminated when  
14 the parent has abandoned the child, except where termination would negatively affect  
15 the child’s rights vis-à-vis the parent. *Perry*, 2003-NMCA-084, ¶ 26. Thus, the  
16 *Wasson* Court refused to terminate the father’s parental rights because to do so would  
17 extinguish the child’s right to inherit from the father or recover under the Wrongful  
18 Death Act, although it observed that if the child’s right to inherit was not divested

1 through parental termination, it would otherwise favor termination. *Perry*, 2003-  
2 NMCA-084, ¶ 26.

3 {15} Based on the common law underpinnings of the Wrongful Death Act, the  
4 public policy indicated in statutes, and the application of common law principles to  
5 wrongful death benefits in other contexts, we concluded in *Perry* that it was  
6 consistent with the legislative intent behind the Wrongful Death Act to permit “a  
7 personal representative in a wrongful death action [to] present evidence of  
8 abandonment and non-support, and even seek to terminate [a parent’s] parental rights,  
9 particularly in light of the fact that the only remaining one is a right to recover  
10 money.” *Id.* ¶¶ 16, 28 (internal quotation marks and citation omitted); see *In re Estate*  
11 *of Sumler*, 2003-NMCA-030, ¶ 33, 133 N.M. 319, 62 P.3d 776; *Dominguez v. Rogers*,  
12 1983-NMCA-135, ¶ 20, 100 N.M. 605, 673 P.2d 1338, *superceded by statute on*  
13 *other grounds as stated in Spoon v. Mata*, 2014-NMCA-115, 338 P.3d 113.

14 {16} In an echo of the reasoning in *Perry*, Appellants first argue that the Wrongful  
15 Death Act incorporates the common law principle that “adult children have the legal  
16 duty to support their parents.” They point to the Elizabethan Poor Laws, which were  
17 passed in 1601 and, they argue, incorporated into the common law of New Mexico.  
18 [BIC 6] See Robin M. Jacobson, Note, *Americana Healthcare Center v. Randall: The*  
19 *Renaissance of Filial Responsibility*, 40 S.D.L. Rev. 518, 527 (1995) (discussing the

1 Poor Laws).<sup>2</sup> Filial responsibility laws such as the Poor Laws were predicated on  
2 protection of the indigent as well as the public fisc. Jacobson, *supra*, at 527 (stating  
3 that “[t]he purpose of the Poor Laws was to relieve the general public from  
4 supporting indigent persons whose relatives had the ability to contribute to their  
5 support”); Christina Leshner et. al., *Whose Bill Is It Anyway? Adult Children’s*  
6 *Responsibility to Care for Parents*, 6 Est. Plan. & Cmty. Prop. L.J. 247, 249 (2014)  
7 (stating that the Poor Laws were “based on a theory that relatives were the first and  
8 primary source of aid to the indigent, and government assistance was merely a  
9 secondary source”); Seymour Moskowitz, *Filial Responsibility Statutes: Legal and*  
10 *Policy Considerations*, 9 J.L. & Pol’y 709, 711 (2001) (“The overarching principles  
11 of the Elizabethan ‘[P]oor [L]aws’ dictated that blood relatives were the primary  
12 source of support for family members, including the elderly, but that public assistance

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13 <sup>2</sup>Jacobson quotes the statute as follows:

14 [The parents, grandparents, and the children of] everie poore olde blind  
15 lame and impotente person, or other poore person not able to worke,  
16 beinge of sufficient abilitie, shall at their owne Chardges releive and  
17 maintain everie suche poore person, in that manner and accordinge to  
18 that rate, as by the Justices of the Peace of that Countie where suche  
19 sufficient persons dwell, or the greater number of them, at their generall  
20 Quarter-Sessions shalbe assessed; upon paine that everie one of them  
21 shall forfeite twenty shillings for everie monthe which they shall faile  
22 therein.

23 *Id.* n.94; *see* The Poor Relief Act, 1601, 43 Eliz. 1, c. 2, § 6.

1 was available for those unable to sustain themselves with private resources.”).  
2 Notably, they did not require that adult children financially contribute to their parents  
3 if the parents were self-supporting, nor did they require adult children to visit,  
4 communicate with, admire, love, respect, obey, or otherwise emotionally support their  
5 parents.

6 {17} Here, Appellants’ complaint alleges that Christopher and Theresa “abandoned  
7 their child-parent relationship” based on their failure to visit Carl, communicate with  
8 Carl, invite Carl to Christopher’s wedding, attend Carl’s funeral, or ask about Carl’s  
9 ashes. None of these behaviors falls within the reach of the common law as addressed  
10 by the Poor Laws. Moreover, Appellants do not allege that Carl was indigent or  
11 dependent on government benefits. Thus, even if we assume without deciding that the  
12 Poor Laws were adopted by New Mexico and imposed a duty to provide financial  
13 support on adult children, we conclude that Appellants have not even alleged, much  
14 less shown, that that duty was breached here. *Wallace v. Blanchard*, 1920-NMSC-  
15 019, ¶ 21, 26 N.M. 181, 190 P. 1020 (stating that “these [P]oor [L]aws were local to  
16 England, and no state, so far as we are aware, has ever held that by the adoption of  
17 the common law such [P]oor [L]aws were introduced into the adopting state”).

18 {18} Appellants next argue that the holding in *Perry* applies here and requires  
19 reversal. They also argue that it is unfair to permit “ungrateful adult children who

1 have abandoned their parents to pursue their own self[-]interests” to recover a  
2 “windfall” through the Wrongful Death Act and that Christopher and Theresa “are no  
3 different than the greedy father in *Perry*.” In essence, Appellants ask that we simply  
4 apply the responsibilities of parents addressed in *Perry* to adult children. But the  
5 *Perry* holding was based on an analysis of legislative intent relevant to *child* welfare.  
6 *Perry* rested on the Court’s conclusion that the Legislature incorporated a duty found  
7 in the common law into the Wrongful Death Act and also intended that public policy  
8 embodied in other statutes would apply to the distribution of benefits. We have  
9 already determined that Appellants have not alleged a breach of a common law duty  
10 to financially support indigent parents, if there is one. Appellants also do not identify  
11 any statutes indicating that it is public policy in New Mexico to require adult children  
12 to support their parents. The closest statute we uncovered is a filial responsibility law  
13 passed in 1955. 1955 N.M. Laws, Spec. Sess. ch. 3, §§ 1-7. That statute provided that

14 [e]very child in the state who has reached his seventeenth birthday shall  
15 support or contribute to the support of his parent or parents if: 1) the  
16 parent is unable to support himself and is, or is about to become a public  
17 charge, and 2) the child is financially able to furnish partial or complete  
18 support.

19 *Id.* § 1.

20 {19} The statute was codified as NMSA 1953, §§ 13-1-45 to -50. Like the Poor  
21 Laws, this statute clearly requires only financial support. For example, it directs the

1 department of public welfare to “prepare and publish scales based on the income and  
2 primary obligations of the children [to be used] in determining the extent and  
3 minimum amount of support recipients are entitled to receive from their children.”  
4 1955 N.M. Laws, Spec. Sess. ch. 3, § 3. In 1957, the statute was amended to include  
5 a scale of monthly payments to parents based on the adult child’s income. 1957 N.M.  
6 Laws, ch. 184, §§ 1-2. The statute does not mention any kind of support other than  
7 financial. Moreover, even this statute was repealed in its entirety in 1967. 1967 N.M.  
8 Laws, ch. 46, § 1 and ch. 109, § 1. Hence, there is no New Mexico statutory authority  
9 indicating a public policy requiring adult children to support their parents, either  
10 financially or emotionally. *See generally* Katherine C. Pearson, *Filial Support Laws*  
11 *in the Modern Era: Domestic & International Comparison of Enforcement Practices*  
12 *for Laws Requiring Adult Children to Support Indigent Parents*, 20 *Elder L.J.* 269,  
13 304 (2013) (table showing which states have filial support laws and indicating no  
14 such statute in New Mexico); Leshner, *supra*, at 250-51 (stating that “thirty state codes  
15 currently include [filial responsibility] laws” and noting that they are rarely enforced).  
16 The lack of such authority distinguishes the analysis here from that in *Perry*.  
17 Appellants have failed to provide any authority for the proposition that adult children  
18 have responsibilities to their parents corresponding to those of parents to their  
19 children. In the absence of such authority, *Perry* is inapplicable here.



1 **CONCLUSION**

2 {20} We conclude that, even if adult children have a common law duty to financially  
3 support their parents, Appellants have not alleged conduct breaching that duty. In  
4 addition, there is no statutory authority indicating that the Legislature intended to  
5 alter the distribution scheme in the Wrongful Death Act based on adult childrens'  
6 abandonment of their decedent parent. Consequently, the dispute over whether  
7 Christopher and Theresa failed to emotionally support their father is immaterial to the  
8 distribution of benefits under the Wrongful Death Act. The district court's grant of  
9 summary judgment is affirmed.

10 {21} **IT IS SO ORDERED.**

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**MICHAEL D. BUSTAMANTE, Judge**

13 **WE CONCUR:**

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**JAMES J. WECHSLER, Judge**

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**LINDA M. VANZI, Judge**