In the Missouri Court of Appeals
Eastern District

DIVISION THREE

LOREN MACKE,	)	No. ED106271
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
PAMELA EDEN,	)	1722-CC11602
	)	
Appellant,	)	
	)	
vs.	)	
	)	
AUSTIN PATTON,	)	Honorable Jason M. Sengheiser
	)	
Defendant.	)	Filed: November 6, 2018

OPINION

This case arose from the $500,000 settlement in the wrongful death claim brought against Austin Patton as a result of an automobile accident in which twenty-five-year-old Nicklaus Macke (Decedent) died. His surviving parents, Pamela Eden (Mother) and Loren Macke (Father) failed to reach an agreement on the apportionment between them of the settlement proceeds and submitted the matter to the trial court for a hearing and determination.

Mother now appeals the judgment of the Circuit Court of the City of St. Louis that approved the settlement and distributed to her 2 percent of the proceeds with Father receiving the other 98 percent. Mother raises two points on appeal: First, she contends that the trial court erred by denying her oral motion for continuance made on the day of the hearing. Second, she asserts that

the court's apportionment of only 2 percent of the wrongful death proceeds to her is grossly inadequate and resulted from the trial court's erroneous application of the law. We reverse and remand.

Factual and Procedural Background

Decedent was born on December 7, 1991 to Mother and Father. He perished on April 25, 2017 as a result of injuries he suffered in a motor vehicle collision. At the time of his death, Decedent was 25 years old, unmarried, and had no children. Father pursued a wrongful death civil claim against Austin Patton alleging that Patton's negligence caused Decedent's death. Father communicated and negotiated with representatives of Patton's automobile insurance company and reached a settlement in which the insurance company agreed to pay its $500,000 policy limit on behalf of Patton. Mother was at the time unaware of these negotiations.

On October 25, 2017, Father filed in the Circuit Court of the City of St. Louis a petition for approval and apportionment of the wrongful death settlement. A hearing on the petition was scheduled for November 21, 2017. A notice of this hearing was issued to Mother on October 26, 2017. Hours before the hearing, Mother, an Alabama resident, telephoned the court and requested a continuance because she was not present in Missouri and had not yet hired an attorney. She advised the court that she had just learned that the subject of the hearing was the distribution of $500,000 in wrongful death settlement proceeds and that she had until then understood that the hearing concerned only the reimbursement of Decedent's medical and funeral expenses. The court granted a one-week continuance to November 28, 2017.

Mother then appeared with counsel at the November 28th hearing. Counsel made an oral motion for continuance, asserting that he had just been retained and had not had sufficient time to conduct discovery or otherwise prepare for the hearing. The motion was denied and the court

proceeded to hear evidence to determine the proper apportionment of the wrongful death proceeds. The court heard testimony from Mother and her husband, and from Father, his wife, and his sister.

The testimony evinced the following undisputed facts: Mother and Father married after she became pregnant with Decedent and they moved to Paris, Illinois from Marshall, Illinois, a nearby town. Mother gave birth to Decedent when she was 16 years old. When Decedent was about one-and-a-half years old, Mother and Father divorced. Decedent went to live with Father and his mother back in Marshall and Mother was allowed supervised visitation.

Following the divorce, Mother spent less and less time with Decedent, and by the time he was four or five, their relationship had largely dissipated. Mother remarried which was followed within a few years by another divorce, and she lost contact with Decedent. Father, for his part, assumed responsibility—together with substantial assistance from his mother and other family members—for raising Decedent. He remarried and provided Decedent with consistent support, a healthy and stable home-life including trips and hobbies, and maintained with Decedent a deep and meaningful relationship.

At the hearing, Father's counsel took an aggressive approach with respect to the testimony regarding Mother's relationship with Decedent. Through vigorous cross-examination of Mother and direct testimony of Father and members of Father's family, Father's counsel adduced testimony against Mother concerning her past conduct some of which occurred over two decades ago including marital infidelity, alleged illegal drug activity, and other dysfunction.

For her part, Mother adduced the following evidence concerning her more recent relationship with Decedent: As Decedent approached adulthood, Mother reestablished contact with him. Decedent was in a rock music band and she attended one of his concerts when he was in high school. Mother also brought her family to his high school graduation ceremony and party

to congratulate Decedent. Mother married her current husband in 2010 and moved with him to Alabama in 2014 for his work. Mother again reconnected with Decedent in Marshall in February 2016 when his grandmother—Father's mother—died. They discussed the past, Mother apologized for having been absent, and Decedent stated he forgave her. Thereafter they kept in contact through text messages and social media communications, with Decedent updating Mother about aspects of his daily life. Mother also invited Decedent on a beach trip with her family, which Decedent was not able to attend due to work, and before he died in April 2017, Mother and Decedent had discussed plans for her to drive up from Alabama to see him over Memorial Day weekend at his condominium in downtown St. Louis.

The trial court approved the $500,000 settlement; found Mother and Father to be the only claimants under § 537.080[1] entitled to seek a share of the settlement proceeds; and apportioned the proceeds 98 percent ($490,000) to Father and 2 percent ($10,000) to Mother. This appeal follows.

Point I: The Trial Court's Denial of Mother's Motion for Continuance.

In her first point on appeal, Mother argues that the trial court erred by denying her oral motion for continuance made on the day of the apportionment hearing. While we believe that granting Mother and her newly-hired counsel some additional time may have improved the tone and substance of the hearing, we are unable to convict the trial court of an abuse of discretion.

We find two bases for upholding the trial court here. First, Mother's oral motion fails to comply with Rule 65.03's requirement that an application for a continuance be made by written motion accompanied by a supporting affidavit unless the adverse party consents to an oral motion. Father did not consent to the motion being made orally. Absent compliance with Rule 65.03, there

[1] All statutory references are to RSMo 2016.

can be no abuse of discretion in the denial of a continuance. *In re G.G.B.*, 394 S.W.3d 457, 468 (Mo.App.E.D. 2013).

Second, even if Mother had complied with Rule 65.03, we would still be unable to find that the trial court abused its discretion in denying Mother's motion for continuance. Our well-worn abuse of discretion standard of review means that we reverse only in extreme cases where it clearly appears that the trial court's ruling was against the logic of the circumstances and so unreasonable and arbitrary as to shock the sense of justice and indicate a lack of careful consideration. *In the Interest of V.C.N.C.*, 458 S.W.3d 443, 450 (Mo.App.E.D. 2015). Mother has the burden of making a strong showing of abuse as well as prejudice resulting from the denial of the request. *In the Matter of A.L.R.*, 511 S.W.2d 408, 414-15 (Mo.banc 2017).

It is true, as Mother argues here, that the court's denial of Mother's continuance request deprived her counsel of the opportunity to depose Father and any of his witnesses and to otherwise conduct discovery and thus may have undermined the effectiveness of his cross-examination and the presentation of Mother's position generally at the hearing. However, we are unpersuaded that this constitutes an abuse of discretion given the record here which demonstrates that Mother's counsel was able to effectively and rather comprehensively make a record of Mother's losses as a result of Decedent's death. Moreover, we are also unpersuaded because we believe—in light of the legal principles we rely on in our analysis of Point II below—that extensive discovery including depositions should normally be unnecessary in an apportionment hearing on a wrongful death settlement.

Point I is denied.

Point II: The Trial Court's Apportionment of the Wrongful Death Proceeds.

In her second point, Mother asserts that the trial court's apportionment of only 2 percent of the wrongful death proceeds to her is grossly inadequate and resulted from the court's erroneous application of the law. We agree.

We will not affirm a decree or judgment of the trial court apportioning proceeds in a wrongful death action if the judgment is grossly excessive or inadequate, *Kavanaugh v. Mid-Century Ins. Co.*, 937 S.W.2d 243, 246 (Mo.App.W.D. 1996) (citing *Kenne v. Wilson Refuse, Inc.*, 788 S.W.2d 324, 326 (Mo.App.E.D. 1990), or if the decree or judgment is not supported by substantial evidence, is against the weight of the evidence, or if it erroneously declares or applies the law. *Parr v. Parr*, 16 S.W.3d 332, 336 (Mo.banc 2000) (citing *Kavanaugh*, 937 S.W.2d at 246).

Missouri's wrongful death statute instructs that settlement proceeds shall be apportioned "among those persons entitled thereto in proportion to the losses suffered by each as determined by the court." § 537.095.3. As a threshold matter, the only persons who may be entitled to seek a share of wrongful death settlement proceeds are the decedent's spouse and certain family members related to the decedent by blood or adoption: "(1) . . . [T]he spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive; [and] (2) If there be no persons in class (1) . . . the brother or sister of the deceased, or their descendants . . . ." *See* §§ 537.080.1(1)-(2), 537.095.3. Thus, the threshold relationship recognized by the statute is strictly family based, irrespective of the quality and nature of the relationship.

Once the threshold § 537.080 relationship has been satisfied, the wrongful death statute then sets up the guideposts for the fact finder to follow in rendering a proportional assessment of

the losses suffered by each survivor. Losses that are compensable and subject to apportionment include the "reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support [the survivor(s)] have been deprived [of] by reason of such death." § 537.090. This is necessarily a forward-looking inquiry—the question under the wrongful death statute is what each person suffering a loss *will be deprived of in the future*. It is for this reason that the life expectancy of eligible survivors is relevant and admissible in a wrongful death case because the survivor's life expectancy will assist the trier of fact in determining how long into the future the loss caused by the death is likely to continue. *Dorsey v. Muilenburg*, 345 S.W.2d 134, 141 (Mo.banc 1961) (citing *Morton v. Sw. Tel. & Tel. Co.*, 217 S.W. 831, 835 (Mo.banc 1920)).

And although testimony regarding past conduct may be relevant to the question of future losses, the purpose of an apportionment hearing is not to punish a survivor for past failures, particularly when the relevance of that conduct to the actual forward-looking losses is, as here, dubious at best. Thus, while the apportionment of losses is within the sound discretion of the trial court, and it is true that the court is not bound by a set percentage or minimum, *Parr v. Parr*, 16 S.W.3d 332, 336-37 (Mo.banc 2000), we stress that the court must not—lest it commit reversible error—fail to apportion the settlement proceeds as directed in §§ 537.090 and 537.095.3, in proportion to *the actual losses that each person has suffered and is likely to suffer in the future* as a result of the decedent's wrongful death.

Indeed, the Court held in *Banner ex rel. Bolduc v. Owsley*, 305 S.W.3d 498, 503 (Mo.App.S.D. 2010) that § 537.090 requires the court to consider what the appellant has been deprived of by reason of the decedent's death, *not* what a parent has failed to provide to date. Moreover, the Court observed that the relationship between a parent and child for purposes of

wrongful death apportionment is not always susceptible to measurement simply by reference to the frequency of contact or the amount of time spent together. *Id.* at 504. On the basis of these principles, then, we find that the trial court in this case erroneously applied §§ 537.090 and 537.095.3.

From our review of the record, it appears that the fundamental cast of the apportionment hearing was the punishment of Mother for her past failures to provide Decedent with proper parental support—not the statutorily-mandated discernment of the extent and proportion of Mother's losses resulting from Decedent's death, and the apportionment of the wrongful death proceeds in accordance therewith. Here, Mother was forced to answer whether she had been arrested in 2002 for possession of a controlled substance; had been an illegal methamphetamine user or seller; and whether she had been married to a man charged with stealing and manufacturing illegal drugs. In fact, Father's counsel set the tone at the outset of the hearing by asking Father whether Mother at the age of seventeen had committed adultery in the marital bedroom while Decedent sat in his portable baby seat on the kitchen table. While the trial court sustained Mother's objection to questions about the specific details of her sexual misconduct, the court permitted Father's counsel to proffer that Mother committed adultery when Decedent was one year old and thus was responsible for the collapse of her marriage to Father. The purported justification for such questioning was to convey something about her relationship with Decedent that was relevant to determining her loss from his death. We disagree and we find that the testimony elicited by Father's counsel regarding Mother's decades-old misconduct was irrelevant and misdirected the focus and purpose of the hearing.

Banner explains that § 537.090 bars apportionment proceedings from being focused on past misconduct or parenting failures, and indeed it is the case in Missouri, as in other states with

comparable wrongful death apportionment procedures, that "apportionment is not a mechanism to punish an irresponsible parent but to allocate the settlement according to actual loss." *Oak v. Pattle*, 739 P.2d 61, 63 (Or. Ct. App. 1987). As a result, we cannot uphold the apportionment here.

Turning as we must, then, to Mother's and Father's *actual losses as established on this record*, we find that the court's 98-2 division of the proceeds from Decedent's death shocks the conscience; is unsupported by the evidence; and is grossly disproportionate. This occurred because the hearing—in an almost prosecutorial fashion—focused on past misconduct and failed to follow the mandates of §§ 537.090 and 537.095.3 and case law such as *Banner* directing the court to focus on the actual losses of eligible survivors which is a forward-looking exercise.

Although each case is to be decided on its own facts, wrongful death apportionments upheld in other similar cases are instructive here. *Kenton v. Hyatt Hotels Corp.*, 693 S.W.2d 83, 98 (Mo.banc 1985). In *Bishop v. Nico Terrace Apartments, LLC*, 2010 WL 2556846, *1-*4 (E.D. Mo. 2010)—a case like this one where the only survivors eligible to receive distribution of the wrongful death settlement proceeds were divorced or separated parents of the decedent—the trial court distributed *22 percent* of the proceeds to the father for the wrongful death of his three minor daughters. *Id.* at *1, *4. The father in *Bishop* spent time with his children only sporadically, in seldom-exercised weekend visitation, and he provided them with meager financial support. *Id.* at *3. The children's mother was their primary custodian, caregiver, and financial provider. *Id.* at *2.

Here, of course, Mother, following her divorce from Father—which occurred over 23 years before Decedent's death—gradually withdrew from Decedent's life, and from the time he turned four or five years old until adulthood, she was largely absent. But the record also shows that in the last several years of Decedent's life, Mother and Decedent reestablished contact and rebuilt

their relationship—arguably to a level comparable to that of the father and his children in *Bishop*—even after Mother moved to Alabama in 2014. Increasingly, they provided one another with companionship, counsel, support, and guidance.

The renewal of their relationship also shows Mother to have been more invested in Decedent's life at the time of his passing than were the fathers in *Haynes v. Bohon*, 878 S.W.2d 902, 904-05 (Mo.App.E.D. 1994), and *Glasco v. Fire & Cas. Ins. Co.*, 709 S.W.2d 550, 554-55 (Mo.App.W.D. 1986). The fathers in those two cases received approximately *10 percent* of the proceeds from their child's wrongful death suit.

In *Haynes*, the father received 9.8 percent of the proceeds from the wrongful death of his fourteen-year-old daughter. 878 S.W.2d at 904. Unlike Mother here, at the time of his child's death his relationship with his daughter had been reduced to virtually nothing but the occasional, sporadic gift. *Id.* at 904-05. And in *Glasco*, the father received 10 percent of the proceeds from the wrongful death of his twenty-year-old daughter. 709 S.W.2d at 552-53. In that case, the father had almost no contact with his child, had failed to legitimize her, and had shouldered no responsibility with respect to her upbringing. *Id.*

The evidence in this record shows Mother to have shared a significantly more substantial relationship with Decedent than those between the fathers and their children in *Haynes* and *Glasco*. Indeed, it appears that if Decedent had not untimely passed away, he and Mother may have continued rebuilding their relationship and Mother may have been able to enjoy a renewed connection with her son for many years. Also, like Father, Mother may have been able to rely on Decedent's care and support in her waning days. Therefore, we conclude that Mother's losses must account for more than 2 percent of the total compensable losses from Decedent's death, and that the distribution to her of only 2 percent of the wrongful death settlement proceeds shocks the

conscience and is grossly disproportionate. Indeed, we find that Mother's ordered share of the proceeds was grossly inadequate as forbidden by *Kavanaugh*, 937 S.W.2d at 246.

For his part, Father contends that the apportionment to Mother of only 2 percent of the wrongful death proceeds in this case was justified because in his view his loss was "by far and away the major loss." In making that assertion, he equates his loss to that of the widow in *Parr v. Parr*, 16 S.W.3d 332, 336-38 (Mo.banc 2000). But *Parr* actually makes for a poor comparison to Father's case. In *Parr*, the court upheld an apportionment in which the decedent's widow received 60 percent of the wrongful death proceeds and his parents received only 1.04 percent each. *Id.* at 336. Rather than demonstrating that extraordinarily lopsided apportionments are proper when one person's loss is almost certainly greater than another's, *Parr* instead reveals a truism about apportionment of wrongful death proceeds: generally, a non-dependent parent does not suffer the same level of loss that a spouse or minor child of the deceased would. Thus, here, where two non-dependent parents are splitting the entire, substantial sum of wrongful death proceeds—and there is no spouse, as in *Parr*, the magnitude of whose loss would very likely have dwarfed theirs—it appears that neither can have suffered such a loss, relative to one another, that would justify an extremely lopsided apportionment like in *Parr*, such as the 98-2 split here.

Moreover, we note that Mother and Father are on par with respect to their status as claimants of the first class listed under § 537.080. They differ only in regard to the relative robustness of each of their losses of a future interpersonal relationship with Decedent. We cannot ignore the clear statutory language in § 537.080 that recognizes Mother's status as Decedent's birthmother in the apportionment analysis irrespective of the nature of their past relationship and what it may be held to have foretold. To illustrate this point, the sole surviving parent of an unmarried and childless decedent would take 100 percent of the proceeds over any other relative

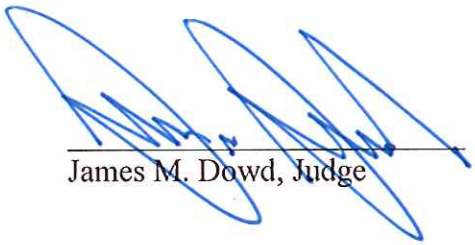
including siblings even if such parent had no relationship whatsoever with decedent from birth to death. And we find that the 2 percent distributed to Mother here not only fails to recognize her actual losses from an interpersonal relationship standpoint under §§ 537.090 and 537.095.3 but also ignores the inherent value of Mother's relationship to Decedent as recognized in § 537.080.

Father argues in addition that Mother's losses are chiefly for grief and bereavement, which are not recoverable under § 537.090. We disagree because Father's assertion ignores the uncontradicted testimony regarding Mother's losses, which are beyond mere grief and bereavement and are in a proportion substantially greater than 2 percent of the total losses suffered by her and Father from Decedent's death.

Point II is granted.

Conclusion

For the reasons stated above, we reverse the judgment and remand to the trial court with directions to enter a new judgment apportioning the settlement proceeds consistent with this opinion and based on the record already before it.



James M. Dowd, Judge

Sherri B. Sullivan, P.J., and
Lawrence E. Mooney, J., concur.