

SUPREME COURT OF THE
STATE OF MICHIGAN

In re Estate of CLIFFMAN.

Supreme Court No. 151998

Elmer Carter, Philip Carter, David Carter and
Doug Carter

Court of Appeals No. 321174

Allegan County Probate Court
File No. 13-58358-DE

Appellants

vs.

Betty Woodwyk and Virginia Wilson

Appellees

**APPELLANTS' BRIEF
IN REPLY TO APPELLEES
BRIEF IN OPPOSITION TO
APPELLANTS' APPLICATION
FOR LEAVE**

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BRIEF IN REPLY

The Appellants, Elmer Carter, Philip Carter, David Carter and Doug Carter (the Carters) by their attorney, Law Office of Kenneth A. Puzycki, PLLC, and as permitted by MCR 7.306(C) and MCR 7.212(G), hereby submit the following in reply to the brief submitted by the Appellees in opposition to the Carters' application for leave.

ARGUMENTS IN REBUTTAL

The Carters' application for leave asks this Court to clarify and articulate the manner in which lower courts are to interpret various undefined terms in the Wrongful Death Act. Implicit in that request is a similar question: how should courts determine whether a particular word or phrase in the statute is ambiguous? Should courts consult ordinary non-legal dictionaries, or should they also look to legal dictionaries, the context of the problematic words, and other related statutes for guidance? To be clear, the Carters do NOT believe the statute needs to be changed. This Court simply needs to tell the lower courts how to interpret its undefined terms.

The Appellees state rather categorically that "spouse" is unambiguous and that under the Wrongful Death Act, a "decedent's spouse" is limited to the decedent's "surviving spouse." The only legally relevant caselaw supporting their position is *Combs*, the very case which the Carters are trying to overturn as erroneous. The other cases, while very interesting reading, are totally irrelevant: *Cornwell v Dempsey*¹ involves an unmarried girlfriend who wanted spousal Medicaid benefits for caring for her boyfriend's child. *Byington*² is a divorce case where a woman wanted to finalize a divorce judgment after her husband's death. *In re Certified Question*³ (a/k/a *Mattison v. Soc Sec Comm'r*) involved twin children who were conceived after his father's death by artificial insemination, and whether they were entitled to social Security Benefits. None of those cases are relevant to the case presently before the Court.

¹ *Cornwell v Dempsey*, 111 Mich App 68; 315 NW2d 150 (1981)

² *Byington v Byington*, 224 Mich App 103, 109; 668 NW2d 141 (1997)

³ *Mattison v Social Sec Comm'r (In re Certified Question from the United States District Court for the Western District of Michigan)* 493 Mich 70, 78-79; 825 NW2d 566 (2012)

When interpreting a statute, courts must “consider both the plain meaning of the critical word or phrase *as well as its placement and purpose in the statutory scheme.*” *Sun Valley Foods Company v. Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (Emphasis added); citing *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995); and *Holloway v United States*, 526 US 1; 119 S Ct 966; 143 L Ed 2d 1 (1999). Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. *McCarthy v Bronson*, 500 US 136, 139; 111 S Ct 1737; 114 L Ed 2d 194 (1991); *Hagen v Dep't of Ed*, 431 Mich 118, 130–131; 427 NW2d 879 (1988).

By focusing solely on an ordinary dictionary definition, Appellees, and the court in *Combs*, have ignored relevant law dictionary definitions, have ignored the context in which “spouse” is used in the Revised Judicature Act, and have ignored the context in which the term “spouse” is used in other related statutes, including EPIC. Both *Black's Law Dictionary* and *Garner's Dictionary of Legal Usage* have separate entries for “surviving spouse” and “spouse.” *Black's Law Dictionary*, pg. 1258 and 1297(5th Edition, 1979); *Garner's Dictionary of Legal Usage*, 8th Edition, 2004. The Revised Judicature Act (of which the Wrongful Death Act is a part), uses the term “surviving spouse” on at least two occasions. MCL 600.5451 and MCL 600.6023. Likewise, Appellees and the court in *Combs* ignore the fact that EPIC specifically acknowledges that there are three kinds of spouses: surviving spouses, deceased spouses, and former spouses. MCL 700.2601 and MCL 700.2708. To ignore the law dictionary usage of the term “spouse” and the aforementioned statutes and their varied uses of “spouse” is inconsistent with Michigan case law regarding statutory construction.

Interpretation of the Wrongful Death Act IS an issue of major significance in this state's jurisprudence.

In opposing the application for leave, Appellees' argue that “the status of Section 2922(3)(b) is well settled, and is not in need of review.” Appellees' Brief, at page 5, citing

In re Combs, 257 Mich App 622; 669 NW2d 313 (2003); lv den 469 Mich 1021; 678 NW2d 440 (2004). With due respect, the logic behind this argument is difficult to follow.

First, although there are no cases directly contradicting *Combs with respect to the narrow issue of step-children*, the manner in which the terms of the Wrongful Death Act have been interpreted by courts over the past 30 years is anything but well-settled. This fact is demonstrated by the varied cases cited in the Carters' brief in support.⁴ Except for *Combs*, all of those cases looked to other related statutes (the RJA and the RPC) *in pari materia* for guidance in determining the meaning of the statute.

Second, the mere fact that *Combs* has stood unchallenged at the appellate level does not mean that it is well-settled, or that it was correctly decided, or that it is not in need of review. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

Third, Appellees argue that the lack of legislative action to change the statute somehow supports their position that the issue of interpreting the Wrongful Death Act "is not of major significance to the State's jurisprudence." Appellees' brief, at page 13. Since when is statutory interpretation not of major significance to this Court?

Fourth, the Appellees state that the legislature has "acquiesced" in the *Combs* interpretation of the statute. This is simply not true. The House Judiciary Committee of the Michigan legislature in 1985 actually thought that by taking "surviving" out of the draft language, the children of deceased parents *were being included*. (See Legislative History argument in Appellants' brief.) In addition, even if there was a perceived problem, who is going to propose the legislation necessary to change the language of the statute? There are no lobbyist groups or other organizations representing step-children whose parents have died. Plaintiffs' organizations don't have a reason to change the law, and insurance

⁴ *Lindsey v Harper Hospital*, 455 Mich 56, 564 NW2d 861 (1997); *In re Renaud Estate Boling v. Renaud*, 202 Mich App 588 (1993), lv den 444 Mich 987 (1994); and *In re Claim of Rodney Turner, Turner v Grace Hospital*, 209 Mich App 66 (1995); *application for leave granted* 451 Mich 899 (1996); *leave vacated and lower court ruling reversed* 454 Mich 863 (1997).

companies don't either. Again, the Carters do NOT believe the statute needs to be changed. This Court simply needs to tell the lower courts how to interpret its undefined terms.

The fact pattern in Combs and the case at bar are NOT unique.

Appellees argue that this matter is not in need of review because the fact pattern in Combs and in the case at bar are “unique.” Appellees’ Brief, at page 6. That the fact pattern appears in three appellate cases⁵ clearly demonstrates that the fact pattern is *not* unique. In addition, it is difficult to dispute the contention that there is an ever-increasing prevalence of non-traditional marriages, and that since 1985, there has been an increase in not only the frequency of wrongful death litigation and settlements, but also the size of the awards/settlements. Together, those facts lead to the obvious prediction that situations such as the one at bar will become more and more common. Given the ever-increasing prevalence of step-child / step-parent relationships, the impact of this case would certainly affect more than the current litigants.

While it is true that the appellate courts have dealt with the issue of step-children three times, it would be impossible to say with any level of confidence how often probate courts and/or circuit courts have (mis)interpreted the Wrongful Death Act, MCL 600.2922, prior to 2003, or since. It is possible, even probable, that many courts are not aware of Combs, and have interpreted the statute to include the children of deceased spouses. Similarly, it is impossible to know how lower courts have interpreted the several other undefined terms in the Wrongful Death Act. For example, many courts may have interpreted the word “child” to include a decedent’s *adopted* children as well as biological children. Under a dictionary definition, such an interpretation would be contrary to Combs. Without some guidance from this Court on how to interpret such terms, courts are left wondering how to interpret the statute on many levels.

⁵ Combs, Galeski v Wajda, (Michigan Court of Appeals unpublished opinion, Docket No. 260878 (2005) cited by Appellees), and the case at bar,

Betty was Gordon's spouse for nearly 20 years.

Appellees side-step the issue of when “spousehood” is to be determined. In *Combs*, the court seemingly assumed (without discussion) that the legislature intended for “spousehood” to be determined at the time of the decedent’s death. Had the legislature intended such a result, it would have done so very easily, by using the term “surviving spouse” or inserting “at the time of the decedent’s death.” The statute does not specify when “spousehood” is to be ascertained. The wording of the statute supports the Carters’ position:

(3) . . ., the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages *and survive the deceased*:

(a) *The deceased's spouse*, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased. [MCL 600.2922 (emphasis added)]

If, as the Appellees argue, the word “spouse” only means a “surviving spouse,” the language in (3) above, requiring that the spouse “survive the deceased,” is mere surplusage. Courts must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory. *People v Cunningham*, 496 Mich 145, 154; 852 NW2d 118 (2014), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

By including the survival language in (3), the legislature implicitly acknowledged that the persons listed in paragraph (a) may or *may not* have survived the decedent. If “spouse” only means a surviving spouse, the legislature would not have included “the deceased’s spouse” in the class of claimants who were required to have survived the decedent. The statutory language would/should have read:

(3) . . ., the person or persons who may be entitled to damages under this section shall be limited to *the decedent's spouse*, *and* any of the following who suffer damages and survive the deceased:

(a) The deceased's ~~spouse~~, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

As alluded to in the Carters' prior brief, this is very similar to the problem this Court faced in *Crystal v. Hubbard*, 92 Mich App 240; 285 NW2d 66 (1979); *rev'd* 414 Mich 297; 324 NW2d 869 (1982), which gave rise to the 1985 amendments to the Wrongful Death Act. As alluded to in the Carters' original brief in support, the Court in *Crystal* found that the Wrongful Death Act was ambiguous as to *when* a decedent's next-of-kin were to be ascertained.

A satisfactory answer to the stated issue is not plainly evident merely upon examination of the naked and somewhat opaque language of the statute. The critical language quoted and emphasized is abstruse and uninformative, for although it identifies the persons who are entitled to damages for the wrongful death of another as "the class" who, by law, would be entitled to inherit had the decedent died intestate, it provides no enlightenment to determine *when* that class is to be identified. Does the statute itself establish the class? In other words, should the language be interpreted as establishing, at the time of enactment, a class of persons entitled to seek recovery which includes all those who, under the countless varying possibilities which might exist in the future at the time of a decedent's wrongful death, would be eligible to inherit under Michigan's intestacy laws? If that is the case, Ms. Hubbard's brothers and sisters are entitled to the recovery awarded to them for Ms. Hubbard's death. Or does the statute mean that the "class" named in the statute is left open to be defined only in the future at the actual time of decedent's death and depending upon the particular legal relationship of the surviving relatives in a particular case? If that is the case, Ms. Hubbard's surviving parents alone would be entitled to seek damages. [*Crystal v. Hubbard*, at pg. 307-8, emphasis in original.]

Here, MCL 600.2922 creates the same conundrum. The statute fails to specify when "spousehood" is to be determined. Is it at the decedent's moment of death? a minute before, a day before, 120 hours before, 20 years before? Here, it is uncontroverted that Betty was Gordon's spouse from 1979 until 1996. They were spouses to one another. If this Court adopts an approach consistent with the Court in *Crystal*, this Court must conclude that the current Wrongful Death Act is ambiguous regarding when "spousehood" is to be determined.

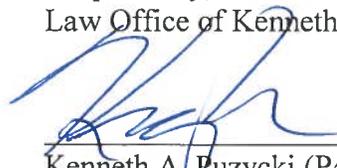
The statute is ambiguous with respect to children of ex-spouses, too!

Appellees' final plea is the proverbial "Pandora's Box" argument: if this Court finds that the statute includes children of a *deceased* spouse, what would keep it from also including the children of an *ex-spouse*? Finally, the Carters and Appellees have agreed on something! The Carters believe this is an argument in favor of this Court granting leave on this appeal, rather than against granting it. Whether children of ex-spouses are included is definitely not clear from the statute. The statute is ambiguous and a statutory analysis is necessary to clear up that issue.

Although the issue of ex-spouses is not directly before the Court here, the Carters contend that allowing children of former spouses to file claims would be entirely consistent with the 1985 amendments to the Wrongful Death Act. The impetus behind the 1985 amendments was to amend the statute so as to provide an opportunity for those who had a close relationship with a decedent to file claims. The Wrongful Death Act is a remedial statute intended to compensate a decedent's family members for their losses. Nearly 350 years ago, jurist William Blackstone expressed his belief that "it is better that ten guilty persons escape than that one innocent suffer." *Commentaries on the Laws of England*, Blackstone, W., c. 1760. By an admittedly stretched analogy here, and keeping in mind that in order to receive a portion of the settlement proceeds, each claimant has to prove a loss, it would be better to allow ten step-children who *did not have* a good relationship with the decedent the opportunity to file a claim, than to deprive a step-child who *did have* a good relationship from an opportunity to file a claim simply because his biological parent died an hour, a day, or fifteen years before their step-parent.

Based on the foregoing discussion, the Carters respectfully request leave to appeal this Honorable Court.

Respectfully,
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8-28-15
Date

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PROOF OF SERVICE

Kenneth A. Puzycki states that on August 28, 2015, he mailed a copy of Appellants' Brief in Reply to Appellees' Brief in Opposition to Appellants' Application for Leave to attorney Kenneth B. Breese, at 321 Settlers Road, Holland, Michigan 49423, and attorney Richard Persinger, at 503 Century Lane, Holland, Michigan 49423, by placing the documents in the U.S. mail, properly addressed, with first-class postage fully prepaid.

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