

IN THE COURT OF APPEALS OF IOWA

No. 2-389 / 11-1547
Filed October 31, 2012

**IN THE MATTER OF THE ESTATE
OF SHAWN SORENSON-PETERS,
Deceased.**

**ESTATE OF SHAWN SORENSON-PETERS,
Estate-Appellant.**

Appeal from the Iowa District Court for Pottawattamie County, James Richardson, Judge.

The Estate appeals the district court's order dividing the proceeds of a wrongful death settlement between the surviving spouse, the children, and the Estate. **AFFIRMED.**

Walter P. Thomas and Aimee L. Lowe of Telpner, Peterson, Smith, Ruesch, Thomas & Simpson, L.L.P., Council Bluffs, for appellant.

John M. French, Council Bluffs, and Jacob J. Peters and John D. Kwapnioski of Peters Law Firm, P.C., Council Bluffs, for appellee surviving spouse.

John Burns, Omaha, Nebraska, for appellees surviving children.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

The Estate of Shawn Sorenson-Peters (Estate) appeals a district court order that apportioned wrongful death settlement proceeds one-third to the children, one-third to the surviving spouse, and one-third to the Estate, arguing that each of these claimants did not suffer an equal amount of damage as a result of the decedent's death. It also asserts the district court erred in concluding that the Estate's share of the wrongful death damages is subject to the surviving spouse's elective share. We affirm.

I. BACKGROUND.

Shawn Sorenson-Peters (the decedent) died as a result of a plane crash on February 16, 2007. She was survived by her husband, Shawn Peters (Peters), and her three children from prior marriages: Lindsay Sorenson, Emilee Sorenson, and Travis Wisotzkey. On March 8, 2007, an estate was opened,¹ and a wrongful death action was filed against the pilot on behalf of the Estate and the estates of two other passengers on the plane. The three estates agreed to settle the case for the insurance policy limits of the pilot. The Estate received \$450,000 of the settlement proceeds, and after settling all workers' compensation liens, it netted \$385,000 to be distributed as wrongful death damages.

The Estate filed an application with the district court proposing a division of the wrongful death damages between the Estate, the children, and Peters.

¹ The decedent's will, executed two months prior to her engagement to Peters, provided that all her property was to go to her children in equal shares. It also provided for the establishment of a trust for the benefit of her children in the event she died before any of the children reached thirty years old.

Peters objected to the proposed distribution, and a trial was held in July 2011. In its ruling following the trial, the district court divided the settlement, one-third to the children, one-third to Peters, and one-third to the Estate. The court ended its ruling this way:

Specifically, this Court concludes that Decedent's children relied upon her support and consortium in an amount equal to one third (1/3) of the settlement amount. Further, this Court concludes that Peters, as Decedent[']s spouse, relied upon her support and consortium in an amount equal to one third (1/3) of the settlement amount. The balance of the settlement amount shall be distributed to the estate. Ultimately, the Estate will distribute its interest two-thirds (2/3) to the children and one-third (1/3) to the surviving spouse, Peters.²

It Is So Ruled

The Estate filed a motion to enlarge, modify, or amend the ruling. In response the court issued a subsequent ruling stating it had found the surviving spouse's claim for support and consortium equaled \$128,333.33. It confirmed its award of the same amount to the children; though it clarified the amount awarded should be divided with Lindsay receiving 50%, Emilee receiving 25%, and Travis receiving 25%. The court then reiterated the balance remaining from the wrongful death damages should be distributed to the Estate. The court left undisturbed its statement as to how the Estate would ultimately distribute its share.³

² Peters had previously filed an election to take his elective share under Iowa Code section 633.236 (2007), entitling him to "[o]ne-third of all personal property of the decedent that is not necessary for the payment of debts and charges." Iowa Code § 633.238(1)(c).

³ The children have not appeared in this appeal.

II. SCOPE AND STANDARD OF REVIEW.

Because this case was tried to the district court as a proceeding in equity, our review on appeal is de novo. Iowa Code § 633.33 (“[A]ll other matters triable in probate shall be tried by the probate court as a proceeding in equity.”); Iowa R. App. P. 6.907 (“Review in equity cases shall be de novo.”). In an equity case, we are not bound by the district court’s decision, but we do give weight to the trial court’s factual findings, especially its determinations of credibility. Iowa R. App. P. 6.904(3)(g); *In re Estate of Roethler*, 801 N.W.2d 833, 837 (Iowa 2011). We examine the whole record and adjudicate the rights anew so long as the issue has been properly presented and error preserved at the district court. *In re Estate of Cory*, 184 N.W.2d 693, 695 (Iowa 1971).

III. APPORTIONMENT OF SETTLEMENT PROCEEDS.

Iowa Code section 633.336 provides in part that if the damages recovered as a result of a wrongful death action include damages for the loss of service and support of the decedent, “the damages shall be apportioned by the court among the surviving spouse and children of the decedent in a manner as the court may deem equitable consistent with the loss of services and support sustained by the surviving spouse and children respectively.”⁴ The right to bring the wrongful

⁴ Iowa Code section 633.336 was amended in July of 2007 to include the apportionment of wrongful death damages to a parent as a result of the death of a minor or adult child. However, the amended statute is not applicable to this case as the decedent died in February of 2007, before this amended was enacted or effective. See *In re Estate of Parsons*, 272 N.W.2d 16, 19 (Iowa 1978) (providing the wrongful death distribution statute in effect on the date of the death applies unless any amendment to the statute specifically provides for retroactive application). Furthermore, the decedent’s parents did not seek an apportionment of the wrongful death damages in probate court.

death lawsuit rests with “legal representative or successors in interest of the deceased.” Iowa Code § 611.22. Iowa Code section 613.15 provides the appropriate administrator “may recover the value of services and support as spouse or parent, or both, as the case may be, in such sum as the jury deems proper.” “Services” has been interpreted to include loss of consortium damages. See *Kulish v. W. Side Unlimited Corp.*, 545 N.W.2d 860, 862 (Iowa 1996).

Thus, in this case the executor of the decedent’s estate had the right to bring the wrongful death action and recover the loss to the estate as well as the value of the lost services and support the decedent would have provided her spouse and children. The wrongful death damages in this case resulted from a settlement rather than a verdict by a judge or jury, which could have apportioned damages awarded amongst the parties. Further, the negotiated settlement could have, but failed to, provide an apportionment of damages between the parties for whom settlement damages were recovered. Under these circumstances, Iowa Code section 633.336 charges the probate court with equitably apportioning the recovery in a manner that is consistent with the loss sustained by Peters, the children, and the Estate.

The Estate alleges the district court did not apportion the \$385,000 equitably because the evidence showed the claimants (the three children, Peters, and the Estate) did not sustain equal loss. The Estate submitted an expert report detailing the projected loss of value the Estate sustained as a result of the decedent’s premature death. The report concluded the Estate lost between \$2.8

and \$18.5 million. The range of value depended on the future projections of decedent's salary and share of ownership in her family's business.

The Estate argues each of the children testified to a very close, loving relationship with their mother and the emotional and financial support they received from her. Lindsay was only sixteen when her mother died and still living at home with her mother and Peters. She was enrolled in college at the time of the probate trial. Emilee was nineteen and a freshman in college when her mother died. At the time of trial she was still in college and living with her grandparents. Finally, Travis was twenty-four years old when his mother died. He was living in Council Bluffs and working for the family business after he had sustained head injuries from a severe motor vehicle accident in Colorado. He testified he saw his mother every day, frequently ate lunch at her house, and had dinner at her house on occasional Sundays.

The Estate contrasts this testimony with the testimony of friends and family of the decedent, who claimed the marriage between Peters and the decedent was failing and the decedent wanted to get out of the marriage. Some testified the decedent planned to end the marriage after the youngest child graduated from high school. Others testified the decedent was contacting realtors to look for a condo in order to move out of the home. Witnesses testified the decedent described Peters as lazy, with no work ethic, who was using her for her income.

Peters denied there were problems in the marriage, stating he got along with the decedent "very well." The decedent handled the finances from a joint

bank account and never gave him any indication she was unhappy about paying some of the expenses Peters incurred. He testified they regularly drove down to their vacation home in the Ozarks and always had a good time. At no time were they separated and they always shared a bedroom. As far as he knew, she was happy and loved him, and he loved her.

At the time of her death, Peters and the decedent had been married for approximately two and one-half years. This was the third marriage for both parties, and prior to the marriage, Peters signed a prenuptial agreement, disclaiming any interest or right in the decedent's family's business. However, Peters was the beneficiary on the decedent's life insurance policies totaling approximately \$360,000. He also received, along with Lindsay and Emilee, a portion of the applicable workers' compensation death benefits. At the time of the trial, Peters had received roughly \$100,000 in workers' compensation benefits, and he will continue to receive weekly benefits so long as he is alive and unmarried. See Iowa Code § 85.31(1)(a)(1). The workers' compensation benefit Peters receives will increase to approximately \$65,000 per year once Lindsay and Emilee become ineligible for benefits.⁵ He also received the decedent's 401K, the furniture in the house not belonging to the children, and the balance in the joint checking account.

⁵ Under the workers' compensation statutes, a dependent child of a decedent can receive a weekly benefit until the age of twenty-five if that child is actually dependent on the decedent. Iowa Code § 85.31(1)(a)(2). If the child is enrolled as a full-time student in any accredited educational institution, it is considered prima facie evidence of actual dependency. *Id.*

The children received the decedent's interest in the family corporation totaling \$928,500, payable in annual installments of \$70,000, which is subject to a debt subordination agreement. They also will receive their equal share of the property in the Estate under the will after Peters's one-third elective share is paid.

The Estate faults the district court for not first calculating the total damages each claimant sustained as a result of the decedent's death and then apportioning the wrongful death settlement pursuant to each claimant's share of the total damages. Iowa Code section 633.336 provides that the district court is to apportion the wrongful death damages in an equitable manner consistent with the loss of service and support each claimant sustained; however, we do not find this language requires the district court to articulate on the record the total amount of loss each claimant sustained and then prorate the settlement proceeds accordingly. No mathematical formula is proscribed by the statute. The court is specifically directed to *equitably* apportion the wrongful death proceeds. See Iowa Code § 633.336.

The district court found the testimony offered regarding the marital difficulties between Peters and the decedent was inadmissible hearsay. It also found that despite this testimony, the couple remained together as a married couple until the decedent's death. It concluded the consortium claims were immeasurable and incalculable, and determined the wrongful death recovery was not sufficient to compensate any of the claimants for their non-economic losses. It found that the decedent, when she was alive, divided the fruits of her efforts equally between her spouse, her children, and her accumulation for the future.

Thus, it concluded the settlement should be divided equally between the three categories of claimants as well.

In its ruling on the Estate's motion to enlarge, the district court stated it used

well-established rules in arriving at damages suffered by the surviving spouse and the dependent children. In determining the present value of financial support Decedent would have provided the surviving spouse and children the following factors were considered: Decedent's age at the time of death; Decedent's health, strength, character, skills, and training; the normal life expectancy of the Decedent, surviving spouse, and dependent children; Decedent's employment and earnings; Decedent's expectancy for earnings in the future; the ages of the surviving spouse and children, and the present and future need for support; the amount of money after taxes available for support; and all other facts and circumstances bearing on the present value of financial support.

The court found the facts do not support the Estate's contention that the marriage was doomed. The district court clearly found the out-of-court statements and the testimony regarding the marital difficulties were of questionable value. We give deference to the district court's findings of credibility. *Roethler*, 801 N.W.2d at 837. It also determined the objective facts clearly establish the decedent did not choose to limit any economic rights of Peters except the rights to the family business as outlined in the prenuptial agreement. It thus reaffirmed its decision to divide the sums equally among the claimants with the added direction that the children's share should be allocated with Lindsay receiving 50%, and Emily and Travis each receiving 25%. And it left undisturbed the last sentence of its original conclusions that "[u]ltimately, the

Estate will distribute its interest two-thirds (2/3) to the children and one-third (1/3) to the surviving spouse, Peters.”

Neither party had requested that the district rule on the Estate’s ultimate distribution of the wrongful death proceeds, but each has raised the issue in this appeal and has fully briefed the issue.⁶ The Estate urges us to decide the issue by concluding that the Estate’s share of the wrongful death proceeds is not subject to the surviving spouse’s elective share. Peters argues that we should not reach the issue as any ruling would be an advisory opinion. We note, however, that the entire last paragraph of the original ruling, including the last sentence, constitutes an order (the paragraph is followed immediately by “It Is So Ruled”).

In order to decide the propriety of the apportionment ordered by the court, we have considered whether that last sentence of the original ruling was an additional explanation relating to the court’s ordered apportionment disposition, whether it was “uncoupled” from the apportionment and simply an order of direction to the executor (as suggested by the Estate), or whether it was superfluous and premature commentary made without any other present purpose

⁶ While it is arguable the district court was not required to reach that issue, as we explain below a reading of the ruling makes it clear that as the court was considering the apportionment of the wrongful death proceeds, it was contemplating the impact the apportionment would have on the final distribution and then announced that impact. As part of the apportionment decision, the district court considered and decided the issue of whether the wrongful death proceeds are subject to a surviving spouse’s elective share. Therefore, we find the issue is adequately preserved and presented for our review. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).

or authority (as essentially argued by Peters). We conclude that in the context of the other conclusions reached in the paragraph, the last sentence clearly illustrates that the court was in fact contemplating how its apportionment of the wrongful death proceeds would ultimately be distributed. We must then determine whether it was appropriate for the district court to consider and then order such distribution at this stage of the proceedings.

An argument could be made that because the elective share statute is separate and distinct from the apportionment statute the two statutes should be considered and treated completely separately. If that were the case, then the elective share consequences should not be considered in our evaluation of the apportionment. On the other hand, one could logically argue that when the legislature gave the directive that “damages shall be apportioned . . . in a manner as the court may deem equitable,” it intended that the court would sit in equity and consider the implications of the entire legislative probate distribution scheme on its apportionment, rather than take a surgical view of only isolated statutes. When seeking the meaning of particular sections of the Probate Code, “[e]ach section must be construed with the act as a whole and all parts of the act considered, compared and construed together.” *Ritter v. Dagele*, 156 N.W.2d 318, 321 (Iowa 1968). Consequently, because we evaluate the district court’s apportionment under section 633.336, we will consider the application of section 633.238, the elective share statute.

The Estate asserts the wrongful death settlement proceeds are not subject to the elective share of a surviving spouse, and thus, it has no obligation to

distribute its portion of the settlement to Peters. It would have us reverse the district court on this issue. In support of its position, the Estate points us to the elective share statute, section 633.238,⁷ which the Estate contends limits the property the surviving spouse may elect to take to the personal property that was subject to the control of the decedent prior to death. The Estate cites Iowa case law that holds a decedent does not control the wrongful death action at any time because the action itself did not exist until after the decedent is dead, and at the time of death, the decedent is not capable of owning any property interests. See *In re Estate of Johnson*, 213 N.W.2d 536, 538 (Iowa 1973).

While it is true that the decedent could not have pursued the wrongful death claim, the ruling in the *Estate of Johnson* case was focused on whether the wrongful death claim should be included as part of “[a]ll personal property that, at the time of death, was in the hands of the decedent . . . exempt from execution.” *Id.* at 537 (applying Iowa Code § 633.212(2) (1971)). The widow claimed all the proceeds were exempt from execution and she should get them all as part of her

⁷ Iowa Code section 633.238(1) provides:

1. The elective share of the surviving spouse shall be all of the following:
 - a. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no express written relinquishment of right.
 - b. All personal property that, at the time of death, was in the hands of the decedent as the head of a family, exempt from execution.
 - c. One-third of all personal property of the decedent that is not necessary for the payment of debts and charges.
 - d. One-third in value of the property held in trust not necessary for the payment of debts and charges over which the decedent was a grantor and retained at the time of death the power to alter, amend, or revoke the trust, or over which the decedent waived or rescinded any such power within one year of the date of death, and to which the surviving spouse has not made any express written relinquishment.

surviving spouse share under section 633.212(2). *Id.* The supreme court concluded the wrongful death claim and proceeds were not “in the hands of the decedent” at the time of his death, so the proceeds could not be exempt personal property, but would be distributed as “personal property belonging to the estate of the deceased” under then section 633.336. *Id.* at 538.

In the present case, the focus is on whether “personal property belonging to the estate” under the wrongful death distribution statute is included as “personal property of the decedent” under the surviving spouse’s elective share statute. We find the plain language of the statutes controlling here. Iowa Code section 633.336 (2007) provides the damages recovered as a result of a wrongful death action “shall be disposed of as *personal property* belonging to the estate of the deceased.” (Emphasis added.) “Estate” is defined as “the real and personal property of . . . a decedent.” Iowa Code § 633.3(15). Section 633.238 provides the surviving spouse’s elective share shall include “(c) One-third of all *personal property* of the decedent that is not necessary for the payment of debts and charges.” (Emphasis added.) The language of the statutes is clear and unambiguous. See *Coralville Hotel Assocs., L.C. v. City of Coralville*, 684 N.W.2d 245, 248 (Iowa 2004) (“[P]recise and unambiguous language should be given its plain and rational meaning without resort to the rules of statutory construction.”).

We also find persuasive the discussion regarding the distribution of wrongful death proceeds in *In re Estate of Young*, 273, N.W.2d 388, 394 (Iowa 1978). In *Young*, the court was asked to decide the power of the probate court to

establish a trust to administer the wrongful death proceeds of the decedent. 273 N.W.2d at 393. Ultimately the court found the district court lacked the authority to establish the trust and remanded the case to distribute the proceeds between the children and spouse of the decedent consistent with Iowa Code section 633.336 (1973) and the intestacy statutes of section 633.211 et seq. *Id.* at 394.

The 1973 Code provided in section 633.336 that wrongful death damages “shall be disposed of as personal property belonging to the estate of the deceased,” just as it did in the 2007 Code. *Compare* Iowa Code § 633.336 (1973), *with* Iowa Code § 633.336 (2007). In addition, the intestacy code sections in 1973 provided the surviving spouse should receive “one-third of all other personal property of the decedent, which is not necessary for the payment of debts and charges.” See Iowa Code §§ 633.211(3), 633.212(3) (1973). This mirrors the elective share statute in the 2007 Code, which also provided the surviving spouse shall receive “one-third of all personal property of the decedent that is not necessary for the payment of debts and charges.” See Iowa Code § 633.238(1)(c) (2007). The court in *Young* directed that the wrongful death proceeds be distributed to the surviving spouse and children of the decedent as personal property under then applicable intestacy statutes, which contain the same wording as the code sections applicable here. While the *Young* court did not directly address the question at issue here, we find the court’s direction to distribute the wrongful death proceeds as personal property under intestacy statutes—which mirror our current elective share statutes—instructive and will apply the same interpretation.

The wrongful death statute directs that proceeds from a wrongful death action are to be disposed of as personal property belonging to the estate, and the surviving spouse elective share statute provides a surviving spouse is entitled to one-third of all personal property of the decedent. We conclude that the wrongful death proceeds apportioned to the Estate are subject to Peters's elective share as the surviving spouse.

Upon a review of the trial court's apportionment of the wrongful death proceeds, including its legally correct conclusions as to the ultimate disposition of the Estate's portion of the wrongful death proceeds, we find the apportionment was equitable. We therefore affirm the district court's ruling as to the apportionment, which includes its conclusion that the Estate will distribute its share of the wrongful death settlement one-third to Peters and two-thirds to the children.

AFFIRMED.

Danilson, J., concurs; Vogel, P.J., concurs specially in part and dissents in part.

VOGEL, P.J. (specially concurring in part and dissenting in part)

I specially concur with the majority's opinion that the division of the wrongful death proceeds between the children, surviving spouse, and the estate is equitable but arrive at that division taking a slightly different route. I read Iowa Code section 633.336, as directing all damages recovered in the wrongful death action to be property belonging to the estate, subject to apportionment by the court when damages for loss of services and support are proved by a surviving spouse and children. Therefore, in this case, all the wrongful death proceeds were first received by the executor. This was clearly set out in the executor's application for distribution of wrongful death proceeds when it sought to retain a portion for "the present worth or value of the estate." Then the court found the surviving spouse and each of the three children had suffered damage by the loss of the decedent and awarded each a portion of the wrongful death proceeds. The court then ordered, "[t]he balance of the settlement amount shall be distributed to the estate," where it remained part of the estate's assets. Because of this slight difference in language, I specially concur with the majority's opinion on the distribution.

Next, I dissent in part to express my disagreement with the majority's approval of the district court's premature direction to the executor to distribute one-third of the "estate's share" of the proceeds to the surviving spouse under the elective share statute, section 633.238. The district court, sua sponte and, in my opinion, prematurely, decided an issue that was not currently before it to decide.

A court has jurisdiction to hear a claim when the claim is ripe for adjudication. *Iowa Coal Mining Co. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996). In considering whether an issue is ripe for adjudication, the court must consider two questions: “First, are the relevant issues sufficiently focused so as to permit judicial resolution without further factual development? Second, would the parties suffer any hardship by the postponement of judicial action?” *Id.* In this case, I find the answer to both of these questions to be “no.”

The issue of whether the wrongful death proceeds received by an estate can be subject to the elective share had not been briefed or argued by the parties at the time the district court issued its directive. *See id.* (finding the ripeness doctrine “seeks to avoid the premature adjudication of cases when the issues posed are not fully formed, or when the nature and extent of the statute’s application are not certain”). There was no indication in the record that there was even a disagreement between the parties at that time. Secondly, the parties would have suffered no prejudice by the court postponing its decision of this issue until such time as this separate issue could have been fully litigated. If nothing else, in the final report, the executor would have prepared, “An accounting of all property coming into the hands of the personal representative and a detailed accounting of all cash receipts and disbursements,” not just the remaining portion of the wrongful death proceeds. Iowa Code § 633.477(9). The parties, after notice, would either consent to the proposed distribution or have the matter set for hearing. Iowa Code § 633.40(1).

Because I find the issue of the application of the elective share statute to the estate's portion of the wrongful death proceeds was not ripe for the district court's decision, I must dissent from the majority's conclusion that wrongful death proceeds are subject to a spousal elective share under Iowa Code section 633.238. Accordingly, I would strike the final sentence from the district court's ruling directing the executor to distribute the estate's share, two-thirds to the children and one-third to the surviving spouse. I would, however, affirm the distribution of the wrongful death proceeds one-third to the children, one-third to the surviving spouse, and one-third remaining with the estate.