

SUBSTITUTE ADMINISTRATOR-ACTION AGAINST ALLEGED KILLER TO REPLACE HIM AS ADMINISTRATOR OF VICTIM'S ESTATE – BRIEF

FACTS

This matter comes before the Court on plaintiff's application to be appointed Administrator ad Prosequendum for the purpose of prosecuting a wrongful death action on behalf of his deceased sister, Joan Gisler. Joan Gisler died on September 13, 1994. She was murdered in her home in Wayne, New Jersey. There were no signs of forced entry into her home and no money or other valuables were taken. She lived alone with her husband, Ernest Gisler and she had no children. She is survived by her husband and her only brother, plaintiff Joseph J. Luongo, Jr. . On September 5, 1996 plaintiff filed an action against Ernest Gisler (hereinafter Gisler) for the wrongful death of his sister and for other relief in the Law Division (hereinafter "Law Division action")¹. (Copy of Complaint attached as "Exhibit 1").

N.J.S.A. 2A:31-2 requires that an action for wrongful death be brought by the Administrator ad Prosequendum or if there is a will, by the executor of the estate. Ernest Gisler is the Executor of the Estate of Joan Gisler. Plaintiff has filed an application before this court to permit him to be appointed administrator ad prosequendum for the purposes of pursuing the wrongful death suit which he has filed.

Plaintiff's father Joseph Luongo, Sr. died on July 4, 1994. Plaintiff and his sister were both appointed co-executors of their father's estate in accordance with the provisions of his last will and testament. After plaintiff's sister was killed, he was appointed sole executor of his father's estate on October 7, 1994

¹ In the complaint captioned Joseph J. Luongo, Jr. as Administrator ad Prosequendum of the Estate of Joan E. Gisler, deceased vs. Ernest M. Gisler, et al., Superior Court of New Jersey, Law Division, Passaic County, Docket# L06561-96, plaintiff also seeks survival damages and a constructive trust over the assets of the estate of the decedent.

In August of 1995 Ernest Gisler filed an action in the Superior Court in Bergen County (hereinafter "Bergen County litigation") to compel plaintiff to account as Executor of his father's estate. Gisler stated in his verified complaint that plaintiff's alleged actions were due to the fact that plaintiff blamed him for Joan Gisler's death. Plaintiff asserted a counterclaim and various equitable defenses in which he did claim Gisler was responsible for his wife's death. Plaintiff moved to amend his counterclaim to assert the wrongful death action and other relief, including an order from the court to compel Gisler to pay his wife's funeral bill of \$12,000.00.² The court decided that the issue to be tried in the Bergen County litigation would be limited to the ownership of several bank accounts which were in the joint names of Joseph J. Luongo, Sr. and Joan Gisler and the court would not address the issue of Joan Gisler's death. The Court also held, in response to plaintiff's concerns that plaintiff was not precluded by the entire controversy doctrine from bringing this action in another court.. That litigation has recently been resolved. The resolution included a division of the non- probate asset bank accounts,; an agreement that Gisler, and not the estate was to pay his counsel fees and also , Gisler agreed to pay for his wife's funeral bill.³

In the lawsuit which plaintiff has filed in the Law Division he seeks pecuniary damages under the Wrongful Death Act, N.J.S.A. 2A:31-1, et. seq., survival damages pursuant to N.J.S.A. 2A:15-1 and also, a constructive trust over assets of the Estate of Joan Gisler because her husband should be precluded from taking through her estate. The underlying factual basis for these claims is that Ernest Gisler was involved in causing the death of Joan Gisler.

Under N.J.S.A. 2A:31-4, plaintiff would be the sole person entitled to recover in a wrongful death action against Ernest Gisler. Under the remaining claims, plaintiff would share in one-half of the residuary estate with the brother of Ernest Gisler, in accordance with the

² This application was filed in the Bergen County litigation because plaintiff was concerned that he might be precluded from bringing a separate action due to the entire controversy doctrine.

³ The funeral bill has previously been paid by plaintiff on behalf of his sister and Gisler will be required to reimburse him.

provisions of the decedent's will dated November , 1982 which was admitted to probate in October 1994.

The application before this Court is limited to plaintiff's request to be appointed Administrator ad Prosequendum for the purpose of pursuing the wrongful death action in the Law Division.

POINT I
PLAINTIFF IS ENTITLED TO BE
APPOINTED ADMINISTRATOR AD
PROSEQUENDUM BY THIS COURT
FOR THE PURPOSE OF PROSECUTING
THE WRONGFUL DEATH ACTION
IN THE LAW DIVISION.

While the relief the plaintiff seeks in the Law Division Action is substantive, that which he seeks before this Court is essentially procedural in nature. The relief which plaintiff seeks in the case at bar is limited to being appointed Administrator ad Prosequendum so that he can pursue the substantive claims against Gisler in the Law Division action.

In Point I of his brief filed with this Court, Gisler attacks plaintiff's standing to bring this action. The issues raised in Point I of Gisler's brief will be addressed herein.

On page 5 of Gisler's brief it is asserted that plaintiff has brought the wrongful death action "without Court approved authority to do so". This argument has no merit.

Plaintiff was required to file the wrongful death and survival action in the Law Division. Pursuant to N.J.S.A 2A:31-2, in order for plaintiff to bring that action he had to be appointed Administrator ad Prosequendum by the Passaic County Surrogate. Since Gisler was already appointed Executor of his wife's estate and he has no intention of suing himself, plaintiff was compelled to file this application with this Court in order to obtain the appointment for this limited purpose.

The fact that plaintiff filed the Law Division action prior to being appointed Administrator ad Prosequendum does not create a defect in the Law Division Action.

The Courts of New Jersey have held that it is not necessary to be appointed Administrator ad Prosequendum as a prerequisite to filing a wrongful death action. Letters of Administration issued after the actual institution of the death action will become effective nunc pro tunc. In re Strong, 65 N.J. Super. 576 (App. Div. 1961); Cammarata v. Public Service Coordinated Transport, 124 N.J.L. 38 (1940).

The next issue raised by Gisler in Point I is also stated on page 5 of his brief, in which he attacks the allegations in the Law Division Complaint, stating:

"Plaintiff alleges that the action is being brought on behalf of individuals who were dependent on Joan E. Gisler and who have sustained pecuniary loss resulting from the death of the decedent. Plaintiff does not identify, either in the aforementioned or within matter, who those persons might be."

This argument appears to address the nature of the pleading of the Law Division action and it is not germane to the present application of plaintiff before this Court. Nevertheless, in response to the question raised by Gisler's argument; the answer is clear. The "individual" on whose behalf the wrongful death action is brought is Joseph J. Luongo, Jr., the plaintiff. That fact is the only logical conclusion which can be drawn from both a reading of the law and also, the language in plaintiff's Law Division complaint.

N.J.S.A. 2A:31-4 provides that:

"The amount recovered... shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same."

The Law Division Complaint (First Court, paragraph 2) states that Joan Gisler died without issue and her surviving heirs at law are Ernest Gisler and plaintiff. Since Gisler is the party being sued for wrongful death and he cannot recover for his own wrongdoing, the only logical conclusion which can be drawn is that plaintiff is the sole individual who would be deemed to be "entitled to take" in accordance to N.J.S.A. 2A:31-4.

The third argument raised by Gisler in Point I is set forth on page 6 of his brief where he asserts that plaintiff was not economically dependent upon Joan Gisler and is therefore, precluded from being appointed Administrator ad Prosequendum by this Court.

Again, Gisler's argument confuses the relief sought here and that which is sought in the Law Division. To accept Gisler's argument would mean that before someone can be appointed Administrator ad Prosequendum by the Surrogate or this Court, he must prove his substantive claims asserted in the Law Division action. Such an argument is totally untenable and is clearly contrary to the intent of the law relating to the functions of the Administrator as Prosequendum.

The relief which plaintiff seeks herein is the right to prosecute the death action on behalf of himself and pursue the other claims on behalf of the estate, of which he would be an one-half residuary beneficiary. The relief he seeks in the wrongful death action in the Law Division is the right to have a jury of his peers not only determine if Gisler is liable for the death of plaintiff's sister but also to award the amount of damages. The courts of this State and the Federal Court have interpreted this provision of the Wrongful Death Act and have held that the Administrator ad Prosequendum is "merely a nominal representative" and a "trustee" for those entitled to recover pursuant to N.J.S.A. 2A:31-4. See, e.g., Wright v. Cion Corp. Peruna Desvportes, 171 F. Supp. 735 (D.C.N.J. 1959); Kasharian v. Wilentz, 93 N.J. Super. 479 (App. Div. 1967); and Loughney v. Thomas, 117 N.J.L. 169 (1936).

In the Law Division action plaintiff will be permitted to demonstrate damages for the loss of such things as companionship, guidance, counsel and advice. Green v. Bittner, 81 N.J. 1 (1980); Lovely v. Rahway Hospital, 227 N.J. Super. 614 (Law Div. 1988). These are legitimate elements of damage which plaintiff is legally entitled to pursue and not only have New Jersey

courts so held, but courts in other states have likewise held such damages to be recoverable, specifically by a sibling of the decedent. See, eg., Chrystal v. Hubbard, 324 N.W.2d. 869 (Mich. 1982).

Gisler argues on page 6 of his brief that plaintiff should be precluded from recovery in the Law Division because he is economically "self-sufficient", As evidence supporting this argument Gisler cites two quotes by plaintiff from his deposition in the Bergen County litigation. These quotes are misleading and actually relate to questions by Gisler's attorney, John J. Byrne, III relative to plaintiff's representation by Michael Diamond, Esq.⁴ Attached as Exhibit "2" is a transcript of the portion of plaintiff's deposition which incorporates the quotes of plaintiff recited on page 6 of Gisler's brief. In addition to there being no factual support for Gisler's allegations, likewise, they are not supported in the law. The fact that plaintiff may be "self sufficient" will not preclude recovery on his part in a wrongful death action. Wellbrook v. Ocean County Trust Co., 9 N.J. Misc. 273, 154 A. 521 (1931).

Gisler seeks to have this Court adjudicate the merits of the Law Division Complaint in order to preclude plaintiff from being permitted to be named trustee by this Court to pursue that action. Such a request is clearly inappropriate as being beyond the scope of the relief requested before this Court.

The final argument raised by Gisler is set forth on page 7 of his brief and relates to the third count of the Law Division Complaint in which plaintiff seeks a constructive trust. Gisler is correct in that if he is precluded from recovering from his wife's estate, the residuary estate would pass one-half to his brother and one-half to plaintiff, in accordance with the provisions of Joan Gisler's will. The essence of Gisler's argument on the last paragraph of page 7 of his brief is that plaintiff should not be permitted by this Court to proceed with the Law Division action because plaintiff "is not qualified as a dependent to maintain that action" Again, Gisler

⁴ The representation of plaintiff by Michael Diamond, Esq. is the subject of a motion to disqualify Gisler's present counsel which is presently pending before this Court.

seeks to have this Court substitute for a jury in the Law Division action, without a trial and deny plaintiff the right to pursue a lawful claim. The issue of dependency and the amount of damages, if any, to be recovered on behalf of plaintiff will be a question for the jury in the Law Division matter and not by the Court in this matter. See N.J.S.A. 2A:31.5; Capone v. Norton, 21 N.J. Super. 6 (App. Div. 1952) and Franklin v. Rowan, 10 N.J. Misc. 964 (1932).

POINT II

PLAINTIFF'S REQUEST TO BE APPOINTED ADMINISTRATOR AD PROSEQUENDUM BY THIS COURT SHOULD NOT BE DENIED FOR FAILING TO JOIN INDISPENSABLE PARTIES.

In Point II of Gisler's brief, he argues that plaintiff's claim for relief should be denied since he failed to join indispensable parties. He names the indispensable parties to be Phyllis Bloise and Ernest Gisler's brother.

Phyllis Bloise is a specific legatee of jewelry under Joan Gisler's will. The relief requested in the Law Division complaint does not impact upon her. She is entitled to receive jewelry under the will of Joan Gisler and regardless of the outcome of the Law Division action, she will receive no more and no less.

It is agreed that Ernest Gisler's brother will receive one half of Joan Gisler's estate if Gisler is prohibited from recovering in accordance with the third count of the Law Division Complaint. He may therefore, be a necessary party to the Law Division action and if Gisler wishes to assert this argument in that action, , the Law Division Complaint perhaps should be amended accordingly. The matter before this Court, however, is limited to the appointment of the Administrator ad Prosequendum who shall serve in the capacity of trustee to pursue the wrongful death claim for the individual entitled to take under N.J.S.A. 2A: 31-4.

That individual is plaintiff. Therefore, while Gisler's brother may be an indispensable party for the purposes of Counts 2 and 3 of the Law Division action, he is not an indispensable party concerning the matter before this Court.

POINT III

PLAINTIFF'S REQUEST TO BE APPOINTED ADMINISTRATOR AD PROSEQUENDUM BY THIS COURT SHOULD NOT BE DENIED BASED UPON THE DOCTRINES OF WAIVER, LACHES AND ESTOPPEL.

Gisler argues in Point III of his brief that plaintiff waited too long to file the wrongful death action and therefore, he should be precluded from bringing the Law Division action under the Doctrines of Waiver, Laches and Estoppel. The nature of this argument is indicative of the lack of equity and good faith with which Gisler approached the proceedings in Bergen County involving The Estate of Joseph J. Luongo Sr. and also the instant matter.

The essence of Gisler's argument in Point III of his brief is set forth on page 9 in which he says "To permit a challenge to Mr. Gisler's entitlement at this late stage, would be totally unfair and, in fact, it can easily be deemed that Mr. Luongo waived his right to make any such claim at this time or should be precluded from making any such claim based on The Doctrine of Waiver, and Laches". The question is raised. How is filing the Law Division action within the statutory time permitted by law "unfair" to Gisler? He certainly is not surprised by this action.

In August of 1995 when Gisler filed the action in the Bergen County matter regarding The Estate of Joseph J. Luongo Sr., plaintiff asserted a counterclaim and various equitable defenses against Gisler on the basis that he was precluded from recovering due to his involvement in the murder of Joan Gisler. Thereafter, on February 29, 1996 Joseph J. Luongo Jr. filed an application with the Court in the Bergen County action to amend his counterclaim against Gisler to assert relief which plaintiff now seeks in the Law Division action. On April 25,

1996 the attorney for Gisler strenuously argued against plaintiff's right to assert such claims in the Bergen County matter stating as follows:

"This is a claim which seeks to disqualify Ernest M. Gisler from receiving any distribution from the Estate of Joan E. Gisler, on the grounds that he allegedly was involved in the murder of his wife. Thus, the defendants seek to expand this probate action to include, in effect, a wrongful death action." "Again, all of the foregoing comments apply, and it is clear that this claim is not properly before this Court which is concerned with the administration of the Estate of Joseph J. Luongo."

He thereafter stated: "All claims relating to the administration of the Estate of Joan E. Gisler must be venued in Passaic County."

Plaintiff addressed the issue of The Entire Controversy Doctrine in the Bergen County matter as plaintiff did not want to be precluded from bringing this subsequent action on the basis that he had failed to join all indispensable parties in the Bergen County action. The attorney for Gisler conceded that a subsequent action could be brought in Passaic County for the relief which plaintiff now seeks. The Court in the Bergen County action agreed with the argument of Gisler's attorney that the relief requested by plaintiff should be brought in a separate action in Passaic County. Accordingly, Judge Lesemann entered an order that Joseph J. Luongo Jr. would not be precluded under The Entire Controversy Doctrine from bringing the action in Passaic County which he has recently filed.

On page 10 of Gisler's brief he makes a somewhat incongruous argument based on an assertion of The Doctrine of Estoppel. Throughout the course of the Bergen County litigation, Gisler's attorney was placed on notice that there would be a wrongful death action against Gisler and this action comes of no surprise to Gisler or his attorneys. With respect to the nature of the settlement of the Bergen County litigation, the benefit or detriment to either of the parties in the settlement is of no moment to this action and it is unfairly characterized by Gisler in his brief. Gisler fails to mention that as part of the settlement of the Bergen County matter is that Gisler and not the Luongo Estate became responsible for his legal fees and of much importance to

plaintiff, Gisler will finally pay for his wife's funeral bill in the amount of \$12,000. For almost two years plaintiff had been requesting of Gisler and his attorneys to have Joan Gisler's funeral paid but Gisler refused to do so. (See Exhibit "3"). Plaintiff finally paid it himself out of respect to his sister.

POINT IV

PLAINTIFF'S REQUEST TO BE APPOINTED ADMINISTRATOR AD PROSEQUENDUM BY THIS COURT SHOULD NOT BE DENIED BASED UPON THE DOCTRINE OF UNCLEAN HANDS.

The premise of Point IV of Gisler's brief is set forth in the first sentence on page 11 in which it is stated: "Mr. Byrne's Certification makes clear that Mr. Luongo has demonstrated a lack of credibility and confidence and had refused to act as a proper fiduciary in the administration of the Luongo Estate accordingly, he should be deemed unfit to be approved by the court for the purpose of serving as fiduciary and taking any action against Ernest Gisler on behalf of any alleged dependant of Joan Gisler."

Mr. Byrne's Certification which accompanied Gisler's brief is a subjective characterization of the Bergen County litigation which labors very hard in painting a negative picture of plaintiff.

Any argument that as a result of Mr. Byrne's statements, Plaintiff is "unfit" to pursue the wrongful death action is totally baseless. Mr. Byrne's Certification certainly does not address any of the issues in the present matter although it does omit numerous facts from the Bergen County matter. Mr. Byrne's Certification could have referenced the fact that on behalf of Gisler he argued strenuously to preclude plaintiff from bringing any of the present claims in the Bergen County action asserting that they should be brought in a subsequent action in Passaic County.

Although, plaintiff has done exactly what Gisler's attorney said he should have done, Gisler's present attorney seeks to use such action against plaintiff.

Gisler makes the argument that Joseph J. Luongo, Jr. somehow comes to this court with unclean hands and is unfit to act as a fiduciary. Ernest Gisler is the executor of his late wife's estate. Her last will and testament dated November 1, 1982 provided that her debts including her funeral expenses be paid "as soon as practicable after my death." Has Gisler honored or paid respect to his deceased wife or carried out his fiduciary obligation in this aspect? No.

On page 9 of Gisler's brief his attorney states "Mr. Luongo and his attorney have been well aware that the various assets of Joan Gisler's Estate have been disposed of and distributed and, in fact, essentially all that remains that to be distributed to Ernest Gisler would be the assets coming from the Estate of Joseph J. Luongo, Sr." With this statement Gisler's attorney admits that his client has disposed of all of his wife's assets without having paid her funeral bill. On June 1, 1995 Gisler's attorney was requested by plaintiff's counsel to have Gisler pay his wife's funeral bill as up to that date he had refused to pay the bill. There was never a response to the request to pay the funeral bill, so out of respect to his sister, plaintiff paid her funeral bill. Under such circumstances if any party to this action should be estopped from acting as a fiduciary it should be Ernest Gisler and not the plaintiff.

The final argument made by Gisler in Point IV of his brief is that plaintiff should not be the party to prosecute the wrongful death action in the Law Division action. Since plaintiff would be the individual entitled to the recovery in any wrongful death action, it is only appropriate that plaintiff be the Administrator ad Prosequendum. Nevertheless, Gisler does not offer any suggestions as to who should be the Administrator ad Prosequendum. It certainly cannot be him because he has no intentions of suing himself for the death of his wife. It certainly should not be his brother who it is presumed, has such a relationship with him that he would not wish to pursue such an action.

Throughout the course of Gisler's entire brief in opposition to plaintiff being named Administrator ad Prosequendum, Gisler repeatedly falls back on his assertion that plaintiff was

not economically dependant upon his sister and therefore, should not be named Administrator ad Prosequendum. As a matter of law, plaintiff is entitled to have that issue addressed by a jury in the Law Division.

Gisler calls upon the Court to do equity, yet, when questioned at deposition in the Bergen County action, he invoked his right against self incrimination and refused to speak when questioned about his wife's death. Gisler is correct in that there should be recognition by this Court that one of the parties comes with "unclean hands".

The "unclean hands", however, belong to Ernest Gisler.

CONCLUSION

Based upon the foregoing, plaintiff respectfully requests that the relief which he seeks in his verified complaint be granted and that he be appointed administrator ad prosequendum for the purposes of prosecuting the wrongful death action in the Law Division.

Respectfully submitted,
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By
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Dated: November 8, 1996