



Alerts

Attorney Owes Duty to Next of Kin in Wrongful Death Action Despite Lack of Direct Retention of Attorney

October 10, 2013

Lawyers for the Profession® Alert

Estate of Powell v. John C. Wunsch, P.C., 2013 IL App (1st) 121854

Brief Summary

A court-appointed public guardian brought professional negligence claims against a variety of lawyers and law firms that were involved in litigating the underlying wrongful death action. The trial court dismissed the complaint on the basis that there was no direct attorney-client relationship between the lawyers and the estate's next of kin. On appeal, the court reversed the dismissal and held that next of kin are the intended beneficiaries of a wrongful death cause of action, and the attorneys litigating that case owe a duty to the next of kin.

Complete Summary

Powell Smith (Powell) was adjudicated disabled, and the court appointed his parents, Perry Powell (Perry) and Leona Smith (Leona), to serve as co-guardians of his person, but they were not appointed to serve as guardians of his estate. Perry died on April 11, 1999 and was survived by his wife, Leona, and his two children, Powell and Emma Smith. Leona hired defendant law firm to bring a wrongful death action against the medical providers who treated Perry before his death. Leona then filed a petition to appoint herself as the special administratrix of Perry's estate. The petition also identified Leona, Powell and Emma as Perry's next of kin and stated that they were entitled to recover under the Illinois Wrongful Death Act ("the Act") and the Illinois Survival Act (755 ILCS 5/27-6 (West 2010)). The petition was approved, and Leona was appointed as special administratrix of her husband's estate.

Defendant law firm then filed a complaint against the medical providers, which included five counts under the Act, one count under the Illinois Survival Act and one count under the Rights of Married Persons Act. In 2005, Leona filed a verified petition for settlement and distribution of wrongful death case (first settlement). Pursuant to the settlement, the amount distributable to Leona, as special administratrix, totaled \$15,000, and Leona, Emma and Powell were identified as Perry's surviving next of kin. Powell was identified as a disabled adult and Leona was his sole keeper and provider. Each next of kin was to receive \$5,000. The court entered the order of settlement and distribution and, according to the order, Powell's settlement distribution of \$5,000 was to be paid to Leona.

Attorneys

Terrence P. McAvoy

Katherine G. Schnake

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Defendant law firm then referred the case to second defendant law firm because it was unable to take the wrongful death case to trial. Leona then executed an attorney-client agreement with the second defendant law firm to continue litigating the wrongful death action. After negotiations, Leona filed a petition to approve the second settlement and order distribution of settlement funds, whereby Leona, Emma and Powell were listed as Perry's heirs, and Powell was identified as Perry's disabled son. The court entered an order approving the second settlement, distributing \$118,091.35 to Leona and \$118,091.34 to Powell. Emma waived her right to the second settlement proceeds.

In 2008, Emma became concerned about Powell's well-being after visiting him at Leona's home. She subsequently petitioned the probate court to remove Leona as guardian of Powell's person, or to appoint her as co-guardian. The petition also asserted that the funds distributed to Powell from the second settlement were deposited in an account in Powell's and Leona's names and the funds were not being expended toward his care. In 2009, the probate court entered an order removing Leona as Powell's guardian of his person and appointed Emma as the plenary guardian of Powell's person. The court also entered an order appointing a public guardian as plenary guardian of the estate of Powell. The public guardian then filed a complaint for professional negligence against the defendant lawyers and law firms alleging claims for fraud and breach of fiduciary duty and unjust enrichment against Leona.

Defendant law firm moved to dismiss the complaint based on the fact that there was no attorney-client relationship with Powell, and that Powell failed to properly allege facts supporting the existence of a duty and proximate cause. In granting the motion, the circuit court reasoned that there was no duty to Powell because the attorney-client relationship was to benefit Perry's estate and not the estate beneficiaries.

On appeal, Powell argued that an attorney-client relationship existed based on his classification as Perry's next of kin, and defendant law firms were retained by the special administratrix of Perry's estate to bring a wrongful death action against the underlying defendants-doctors. Defendant law firms claimed that they did not have a direct attorney-client relationship with Powell, and that he was not an intended beneficiary of the contractual relationship that they did have with Leona, as special administratrix of Perry's estate.

In reversing the underlying court's dismissal of the complaint, the appellate court looked to the legislative intent behind the Illinois Wrongful Death Act. The court held that because Powell was a next of kin, the Act was intended to compensate him, in addition to Leona, as a surviving spouse, and his sister Emma, also as next of kin, for the pecuniary losses resulting from Perry's death. According to the Act, wrongful death actions are brought in the name of the decedent's personal representative, but, unless otherwise provided, the surviving spouse and next of kin are statutorily identified as the beneficiaries of such causes of action. While the court acknowledged that the defendants did not directly enter into an attorney-client relationship with Powell, the court held that the next of kin are the intended beneficiaries of a wrongful death cause of action and the attorneys litigating that case owe a duty to the next of kin.

Significance Of Opinion

Probate remains one of the leading areas of law in which lawyers may owe a duty of care to non-clients. This case is significant because it highlights yet another category of "non-clients" to which an attorney may owe a duty of care.

For more information, please contact [Terrence P. McAvoy](#) or [Kate Schnake](#).

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