

IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 321 of 2015

ELISA CASILDO
Administratrix of the Estate of
William Wilbert Lopez, deceased

CLAIMANT

AND

IMER HERNANDEZ

DEFENDANT

Written Submissions Filed

2016

Claimant - 4th February

Defendant – 2nd February

Decision

2016

15th February

Mr. Ryan J. Wrobel for the Claimant.

Ms. Stevanni L. Duncan for the Defendant.

Keywords: Damages - Survival Action – For Whose Benefit it may be brought – By Whom it may be brought – Party to a common law union – Interpretation of Wife - Minor in the process of being adopted – Administrator – Torts Act Cap 172 (TA) – Administration of Estates Act Cap 197 – (AEA) – Families and Children Act Cap 173

DECISION

1. This is a decision on two preliminary issues bifurcated by the court as part of its case management powers. Written submissions from both sides were considered.

The Facts:

2. Briefly, William Lopez died following a collision between his bicycle and a Chevy Silverado owned and driven by Imer Hernandez. A survival action has been brought under the T.A by Elisa Casildo who claims to be the deceased's 'common-law-wife.' The claim is brought for her own benefit and that of a five year old girl child whom she alleges was in the process of being adopted by both the deceased and her at the time of his death. Ms. Casildo has also brought her claim under the A.E.A as administratrix, for the benefit of the estate of the deceased.

The Issues:

3.
 1. **Whether a survival action under section 9 of the T.A. may be brought by or for the benefit of a party to a common law union.**
 2. **Whether a survival action under section 9 of the T.A. may be brought on behalf of or for the benefit of a person who was in the process of adoption by the deceased:**

Whether a survival action under section 9 of the T.A. may be brought by or for the benefit of a party to a common law union

4. The Claimant, Elisa Casildo, stated in her witness statement that she is the common-law-wife of William Wilbert Lopez and the administrator of his estate. She exhibits the grant of administration but offers nothing by way of

proof to support her contention that she is his common law spouse. Taken at its highest, the grant indicates only that she is entitled to administer the estate and to sue and be sued on behalf of the estate. Be that as it may, the court considers her position under sections 9 and 10 of the T.A.

5. Counsel for the Claimant submits that the T. A. is silent on the interpretation of “dependent.” I agree and proffer that perhaps this is so because the T. A never uses the word dependent. Hence, there was no need to define it. Dependent is a word used in the British Fatal Accidents Act 1976 and adopted in a general way in our practice. Quite understandably so because issues of what is considered a dependency arise in proving a loss suffered through the death of the deceased. This is an essential element of the cause of action. In fact, even the A.E.A. uses the word dependent when referring to a survival action under the T.A – see paragraph 16 of his judgment. However, what the T.A. in actuality speaks to is the survival of actions for tortious acts causing death -Section 9, and by section 10, the persons who may benefit from such actions:

“Every such action shall be for the benefit of the wife or husband and every parent and child of the person whose death has been caused ...”

Section 11 then gives this select group of persons equivalent standing to that of an executor or administrator of the deceased’s estate to bring such an action.

6. It is noteworthy that the British statutory definition of dependent is far wider than our own group of persons who may benefit. Although they are likewise included, so too are former spouses, persons cohabiting with the deceased as

husband and wife for a period of two years immediately preceding his or her death and children of the family.

Discussion:

7. Under the common law the right to bring an action for wrongful death by the “dependent” did not exist. This is a creation of statute and the right to bring such an action, and to an assessment of damages, depends on what is conferred by law, that is, sections 9 and 10 of the T.A.
8. This law does not simply require the Claimant to have had a reasonable expectation of some financial benefit from the deceased. It also requires the Claimant to be properly accommodated in the group of persons statutorily empowered to bring and benefit from a survival action. One such person is a wife.
9. ‘Wife’ is not defined in the T.A. and so, as an ordinary English word, it must be given its plain and ordinary dictionary meaning “*married woman in relation to her husband*” – The Oxford English dictionary. The Claimant could point to no authority that allows a female party to a common law union to be deemed a wife. Moreover, to be deemed a wife for the purposes of the T.A. The stylised term used ‘common law wife’ is nowhere defined in any Act in Belize. What is even more damning is the fact that the T.A specifically defines child, parent and illegitimate relations. It clearly saw no reason to give wife (or husband for that matter) any interpretation other than its ordinary dictionary, and I dare say, legal meaning. *Elena Usher v Osbert Usher Civil Appeal No. 40 of 2010* thoroughly discusses the differences between a common law union and a marriage and is instructive on the

inequality of the principles which are applicable. This judgment makes it clear that a common law spouse cannot be a husband or a wife. I rest here for support.

10. I therefore hold that a party to a common law union cannot benefit from or sustain a survival action under the T.A.

Whether a survival action under section 9 of the T.A. may be brought on behalf of or for the benefit of a person who was in the process of adoption by the deceased:

11. The Claimant's witness statement states in relation to the minor: *"He was the sole provider and income earner and took care of me and what we considered to be our five year old daughter. I wish to state that before he died we were in the process of adopting this child who is still under my care; the adoption process continues."*
12. Again, other than her say so, the Claimant offers nothing by way of proof of this alleged pending adoption. Be that as it may, we look to the T.A. to see what it says about child. Section 8 states:

*"For the purposes of sections 9 to 17 inclusive in this Act –
"child" means son or daughter, stepson or step-daughter, adopted son or adopted daughter under the provisions of the Families and Children Act or a grandson or granddaughter;"*

Section 16 enlarges this group to include illegitimate children.

Discussion:

13. We note, firstly, that this is a select group and a child of the family is not included. The only possibility left for this minor is that of adopted daughter. The Families and Children Act Cap 173 provides under Section 133 that:

"adopted child" means a child authorized to be adopted;"

Such authorization can only come through order of the court. No such order has been referred to or exhibited by the Claimant. In fact, not even an application for such an order has been presented. The issue of a child being dependent on the deceased but adopted by his widow after his death is discussed in *Eva Perez et al v Susan Moir Claim No. 161/2005*. A claim pursuant to the T.A. on the child's behalf was likewise rejected.

14. On the evidence before this court I find that this minor cannot benefit under a survival action brought under the T.A. and therefore no action can be sustained under the T.A for her benefit.

Observations:

15. For reasons of completeness, the court felt it best to now deal with an action under the A.E.A brought only for the benefit of the Estate. Such action can rightly be brought by the administrator or executor. Ms. Casildo is the lawfully appointed administratrix of the deceased's estate and so has standing to bring such a claim.

16. Section 26 of the A.E.A. reads:

“(4) On the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate.

“(8) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 8 to 16 inclusive of the Torts Act ...”

17. There can be no doubt that a party to a common law union is a beneficiary under the A.E.A. Section 54.01 allows that:

“(a) whenever the word “wife” occurs in this Part it shall be substituted by the

words “female party to the common law union.”

This section falls under the part of the A.E.A. which deals with the distribution of the deceased’s residuary estate. It is significant that even here the female party to the common law union is not deemed a wife. There is instead a substitution of terms.

Conclusion:

18. For reasons already stated, no survival action brought under the T.A on the facts presented can succeed. Further, any action brought for the benefit of the estate must be limited in its scope, to the injury and loss suffered by the deceased. It is confined to such things (by way of example only) as loss of earnings and funeral expenses.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**