

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000249-MR

LORRIE J. DAVIDSON, ADMINISTRATRIX
OF THE ESTATE OF TIFFANY ANNA
PAIGE HOPE WILLIAMS (DECEASED)

APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NOS. 16-CI-00060 AND 16-CI-00121

GREGORY DARRELL PENNINGTON,
ADMINISTRATOR OF THE ESTATE
OF KYSON GAGE PENNINGTON (DECEASED)

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

TAYLOR, JUDGE: Lorrie Davidson, as administratrix of the estate of Tiffany Anna Paige Hope Williams, brings this appeal from a January 4, 2018, Order of the Clay Circuit Court determining that the estate of Kyson Gage Pennington,

Tiffany's son, was entitled to the insurance proceeds recovered for the wrongful death of his mother. We affirm.

The underlying facts of this case are tragic. On December 18, 2015, a motor vehicle operated by Jason Gibson crossed the centerline and collided with a motor vehicle operated by Judy A. Pennington-Adams. Inside the Pennington-Adams vehicle were five occupants – (1) Judy, (2) Tiffany Williams, (3) Easton Williams, Tiffany's eight-month-old fetus, (4) Kyson Pennington, Tiffany's two-year-old son, and (5) Charlene Lewis. Judy, Tiffany, Easton, and Charlene were pronounced dead at the scene of the motor vehicle accident. Kyson died a day later at a hospital. There is no dispute that Gibson was solely responsible for causing the accident.

Administrators and administratrixes for the estates of Judy, Tiffany, Easton, Kyson and Charlene filed wrongful death actions against Gibson.¹ The parties agreed as to the available insurance proceeds and agreed as to the distribution of these proceeds between the five estates. However, a controversy emerged concerning who was Tiffany's next of kin entitled to the proceeds recovered by her estate under the wrongful death statute, Kentucky Revised Statutes (KRS) 411.130(2). In particular, Gregory Darrell Pennington,² as

¹ At the time of her death, Tiffany Anna Paige Hope Williams was unmarried.

² Gregory Darrell Pennington was the father of Kyson Gage Pennington.

administrator of Kyson's estate, maintained that Kyson was entitled to the proceeds as he survived his mother and died the following day at a hospital under KRS 411.130. Conversely, Davidson maintained that Kyson died shortly after Tiffany, and under the Kentucky Uniform Simultaneous Death Act,³ Kyson could not be considered Tiffany's "beneficiary." Davidson's Brief at 3. Davidson, as administratrix of Tiffany's estate, argued that the proceeds should be distributed to her (Davidson), as Tiffany's mother, per KRS 411.130. Both Pennington and Davidson filed motions for declaratory judgment upon the narrow legal issue of which party was entitled to the insurance proceeds recovered for the wrongful death of Tiffany under KRS 411.130.

By order entered January 4, 2018, the circuit court determined that Kyson's estate was entitled to the insurance proceeds recovered for the wrongful death of Tiffany:

KRS 411.130 sets forth the distribution scheme when dealing with wrongful death proceeds. The applicable portion of the statute in this matter is KRS 411.130(2)(c) which states: "If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children." Davidson concedes in her motion for declaratory judgment that Kyson Gage Pennington survived Williams, his mother, and passed away that following day. At the time of Williams's death, Kyson Pennington qualified as the sole recipient of the proceeds pursuant to KRS 411.130 which contains no qualification that a recipient survives the decedent by any

³ The Uniform Simultaneous Death Act is codified in Kentucky Revised Statutes Chapter 397.

specific period of time. While Davidson argues that the 120 hour rule in descent and distribution situations should apply in this matter, general statutes regarding descent and distribution have no application concerning wrongful death proceeds.

January 4, 2018, Order at 1-2. This appeal follows.

Davidson contends that the circuit court erred by concluding that Kyson's estate was entitled to the insurance proceeds recovered for the wrongful death of Tiffany. Davidson argues that KRS 397.1002, contained in the Uniform Simultaneous Death Act, requires an individual to survive 120 hours after the decedent in order to be entitled to inherit property or to take an interest in property of the decedent. Davidson maintains that KRS 397.1002 should be applied to KRS 411.130(2), the wrongful death statute. By so doing, Davidson argues that an individual will only be considered a decedent's next of kin for purposes of recovery of wrongful death proceeds if that individual survives the decedent by 120 hours. As it is undisputed that Kyson did not survive Tiffany by 120 hours, Davidson asserts that the circuit court committed an error of law by determining that Kyson qualified as Tiffany's next of kin, and thus his estate was entitled to the wrongful death proceeds.

KRS 411.130, the wrongful death statute, provides, in relevant part:

- (2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the

defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:

- (a) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to the widow or husband.
- (b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.
- (c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.
- (d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, “mother” and “father” shall mean the adoptive parents of the deceased.
- (e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.

KRS 397.1002, codified in the Uniform Simultaneous Death Act, reads:

Except as provided in KRS 397.1006, if the title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead, or family allowance depends upon an individual's survivorship of the death of another

individual, an individual who is not established by clear and convincing evidence to have survived the other individual by one hundred twenty (120) hours is deemed to have predeceased the other individual. This section shall not apply if its application would result in a taking of intestate estate by the state.

Some five decades ago, our Supreme Court rejected any interconnection between KRS 411.130 and KRS 397.1002 in *McCallum v. Harris*, 379 S.W.2d 438 (Ky. 1964). In *McCallum*, the Supreme Court plainly held that KRS Chapter 397 only applied to the title to or devolution of property and had no application to recovery of wrongful death proceeds under KRS 411.130:

It will be seen that KRS 411.130(2)(d) is applicable to the case at bar, since Rhonda Fay Harris had no widow, husband nor child to survive her. Under such circumstances the cited statute directs that recovery for wrongful death shall 'pass to the mother and father of the deceased, one moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother is living, the whole thereof shall go to the mother.' We said in *Sharp's Adm'r v. Sharp's Adm'r*, Ky., 284 S.W.2d 673, that the person entitled to benefits under the statute is to be determined at the time of the death of the person wrongfully killed.

In order to show that Golene Harris, as surviving mother of Rhonda Faye Harris, is entitled to the *entire* recovery, rather than one moiety, it is necessary to show that Virgil Harris, father of Rhonda Faye Harris, was dead at the time of the death of Rhonda Faye. It is upon that condition precedent that the surviving mother is entitled to take the whole recovery. The failure to establish that condition precedent is fatal to the right of the mother to receive *all* of the recovery. In this record there has been

no affirmative showing that Rhonda Faye Harris survived her father – nor is there any evidence to reflect that he survived the child. The Uniform Simultaneous Death Act (KRS Chapter 397) presents no solution to the instant problem, since it deals with the title to or devolution of property – as distinguished from the statutory right of recovery for wrongful death, which was never property of which title was in the decedent. . . .

McCallum, 379 S.W.2d at 443-44. The *McCallum* Court also instructed that the individual entitled to recover proceeds under KRS 411.130 was determined at the time of the decedent’s wrongful death. *Id.*

In this case, it is uncontroverted that at the time of Tiffany’s death Kyson was still alive. Kyson died the following day at a hospital. Therefore, in accordance with *McCallum*, 379 S.W.2d 438, we conclude that the circuit court properly determined that Kyson’s estate was entitled to the insurance proceeds recovered for the wrongful death of Tiffany pursuant to KRS 411.130.

For the foregoing reasons, the Order of the Clay Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin W. Johnson
Matthew L. Bowling
Hazard, Kentucky

ORAL ARGUMENT FOR
APPELLANT:

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BRIEF AND ORAL ARGUMENT
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