

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED MARCH 30, 2000

SONNY N. GILLIAM, deceased)	SULLIVAN COUNTY CIRCUIT
by next friend, wife and)	No. C32285 (L)
personal representative,)	
RUTH M. GILLIAM and RUTH)	
GILLIAM, individually)	NO. 03A01-9904-CV-00133
)	
Plaintiffs/Appellees)	
)	
v.)	HON. RICHARD E. LADD
)	CHANCELLOR
LORIANN CALCOTT and,)	
GARRY CALCOTT)	
)	
Defendants)	
)	
and)	
)	
JERRY W. GILLIAM, SHEILA ANN)	
CAWOOD, ROGER DALE GILLIAM,)	
SALLY ANN HARRELL, and GLEN)	
ALLEN GILLIAM,)	
)	
Intervenors/Appellants)	REVERSED and REMANDED

John S.Bingham, Kingsport, Tennessee, for Intervenors/Appellants.

William K. Rogers, Kingsport, Tennessee, for Plaintiff/Appellee.

O P I N I O N

GODDARD, Presiding Judge

I

Sonny N. Gilliam was killed in a traffic accident. He was survived by his widow, Ruth M. Gilliam - with whom he had no children - and by five adult children of his first marriage.

This action for damages for the wrongful death of Sonny Gilliam was filed by "Sonny N. Gilliam, deceased, by next friend, wife and personal representative, Ruth M. Gilliam."¹

A Motion to Intervene was filed by the five children of Sonny N. Gilliam, alleging that "Ruth Gilliam intends to appropriate all the proceeds from the wrongful death settlement or judgment to her own use and benefit to the exclusion of the children of Sonny Gilliam." A declaratory judgment adjudicating the respective rights of the parties to share in the recovery, *inter alia*, was sought.

The Motion to Intervene was allowed for the limited purpose of determining the rights of the parties to share in the prospective recovery. There is no factual dispute.

II

¹In the complaint Sonny N. Gilliam is identified as a plaintiff, notwithstanding that he was deceased. Although Ruth M. Gilliam, his widow, filed the complaint as "next friend, wife and personal representative," one of the deceased's sons, Jerry W. Gilliam, is identified as the personal representative of the estate of Sonny N. Gilliam.

Neither party filed a motion for judgment on the pleadings, nor for summary judgment, but by agreement submitted the dispositive question of law to the court. The trial court ruled:

The controlling statute is T.C.A. 20-5-106, which states,

"The right of action which a person who dies from injuries received from another shall pass to the person's surviving spouse and in case there's no surviving spouse to the children or next of kin". The statute is clear that the cause of action goes to the spouse and not to the children, if there is a spouse, and I so hold. This is buttressed by the next section, 20-4-107, which states, "The action may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or, if there is no surviving spouse, by the children or by the next of kin." Now, in conflict with this holding is 20-5-110 which states, "A suit for the wrongful killing of the spouse may be brought in the name of the surviving spouse for the benefit of the surviving spouse and children of the deceased or in the name of the administrator of the deceased spouse or in the name of the next of kin." This does not create the cause of action. It states in whose name the cause of action can be brought. It states "may." It's in conflict with 106, and I find that it has no application and the suit cannot be brought as stated in this statute for the benefit of the surviving spouse and the children of the deceased because there is no cause of action for the children of the deceased unless there is no spouse. If I'm found in error by the appellate court - I also find that under T.C.A. 20-5-113, "Damages Recoverable in Wrongful Death," if the appellate court holds I'm in error and somehow construes these statutes the way the bar has thought they have been construed for time immemorial, in this Code section, 113, giving the two categories of damages and apparently there's no authority on who collects those damages, I find that if

I'm in error and if the spouse and children, whether they be minor or adults, share in the wrongful death proceeds that the spouse alone has the right to the first category of physical suffering, loss of time and necessary expense resulting to the deceased, and the value of the deceased's life would then be shared by the spouse and children. My reasoning behind this, as pointed out by counsel in the argument, you could get some very unjust results in the case. The surviving spouse would be responsible for medical expenses and funeral expenses of the deceased, and yet its not unusual for the proceeds from the wrongful death case to be less than the medical expenses, and yet the children could share in those proceeds and the spouse would not be made whole . . ."

III

The Intervenors appeal, and present for review the issue of the correctness of the ruling that in a wrongful death action the children of a decedent who was survived by a spouse cannot share in a recovery of damages. Our review is *de novo* on the record with no presumption of correctness. *Estate of Haynes v. Braden*, 835 S.W.2d 19 (Tenn. Ct. App. 1992); *Rimer v. City of Collegedale, Tennessee*, 835 S.W.2d 22 (Tenn. Ct. App. 1992).

IV

Before the enactment of T.C.A. § 20-5-106 no recovery could be had for the wrongful killing of another. This statute, patterned after and declaratory of Lord Campbell's Act, see: *Hogan v.*

McDaniel, 319 S.W.2d 221 (Tenn. 1958); *Jordan v. Baptist Three Rivers Hospital*, 984 S.W.2d 593 (Tenn. 1999) provides

“. . . the right of action which a person, who dies from injuries received from another . . . would have had against the wrongdoer, in case death had not ensued, shall not abate . . . but pass to the person's surviving spouse . . .”

The plain language of T.C.A. § 20-5-106 controls the manner of bringing suit. It does not control the disposition of a recovery of damages for wrongful death and thus has no relevancy to a resolution of this case, *Throgmorton v. Oliver*, 144 Tenn. 282, 230 S.W. 967 (Tenn. 1921), except in an historical sense. See, also, *Foster v. Jeffers*, 813 S.W.2d 449 (Tenn. Ct. App. 1991).

V

There are a number of wrongful death statutes which must be considered *in pari materia*. T.C.A. § 20-5-106 *et seq.*, *Foster, supra*.

T.C.A. § 20-5-107 establishes the priorities of those authorized to bring the action in addition to the surviving spouse, although "the widow's right of action is superior to that of the administrator." *Koontz v. Fleming*, 65 S.W.2d 821 (Tenn. Ct. App. 1933). The right of Ruth M. Gilliam to bring this action is not contested and T.C.A. § 20-5-107 thus had no application to a resolution of this case.

VI

The statutory scheme continues, as relevant here, with T.C.A. § 20-5-110 which provides that:

"A suit for the wrongful killing of the spouse may be brought in the name of the surviving spouse for the benefit of the surviving spouse and the children of the deceased . . ."

The trial judge was of the view that "T.C.A. § 20-5-110 was in conflict with T.C.A. § 20-5-106 and that it was inapplicable because there is no cause of action for the children unless there is no spouse."

VII

The statutory scheme provides (1) for the action, (2) who is entitled to file the suit, and (3) who is entitled to the proceeds of the recovery. Obviously, there is a critical distinction between the right to bring the action, on the one hand, and the right to share in the proceeds of a settlement or judgment, on the other. We have heretofore discussed the provision of the several statutes, and it is worth noting again that T.C.A. § 20-5-106 addresses only the bringing and passing of the right of action. It does not address who is entitled to the proceeds of the action.

T.C.A. § 20-5-110 is clear on the point that the action is for the benefit of the surviving spouse and children. Equally clear on the point are a long line of cases holding that wrongful death proceeds are distributed as personal property of the decedent. *Anderson v. Anderson*, 366 S.W.2d 755 (Tenn. 1963); *Black v. Roberts*, 108 S.W.2d 1097 (Tenn. 1937); *Powell v. Blake*, 33 S.W.2d 78 (Tenn. 1930); *Haynes v. Walker*, 111 Tenn. 107 (1903), 76 S.W. 902 (1903); *Woods v. Fields*, 798 S.W.2d 239 (Tenn. Ct. App. 1990); *Foster v. Jeffers*, *supra*, at 452.

T.C.A. § 31-2-104(a)(2) addresses the distribution of personal property. It provides that the surviving spouse is entitled to one-third of the estate or a child's share, whichever is greater. In this connection, the appellee strenuously argues that such distribution would be unfair because the widow's share would be liable for certain expenses. She says "it seems ludicrous to argue

that adult children be entitled to 2/3 of wrongful death benefits when the surviving spouse who is responsible for medical expenses, funeral expenses, etc. would only be entitled to a 1/3 share." We know of no authority for the assertion that the widow's share is operated as alleged.

As stated in *Foster, supra*,

"It was the intent of the legislators that control over the surviving right of action ought to follow the priorities for distribution of personal property as set forth in the intestacy statutes. It is the law in Tennessee that the proceeds from a wrongful death action become personal property of the deceased . . . The proceeds from a wrongful death action cannot pass under the will of the deceased." (Citation omitted).

VIII

The decedent and his wife had uninsured motorist coverage which was implicated in this litigation, the adverse parties being uninsured. It was stipulated that the settlement was paid by the uninsured motorist policy. Appellee argues that the policy providing for UM coverage is a contract between her and the UM insurer [Nationwide] and in light of its provision that ". . . any amount due hereunder is payable . . . if the insured be deceased, to his surviving spouse," the settlement proceeds should be paid to her.

The appellants argue that the surviving spouse receives the wrongful death proceeds in trust for those entitled to share in the recovery. The policy provides

"The company will pay . . . all sums which the insured or his legal representative shall be legally entitled to recover as compensatory damages from the owner or operator of an uninsured highway vehicle . . ."

The trial judge recited that "the policy provides benefits the same as if the uninsured motorist was insured." We agree. The identity of the payor of the recovery for the wrongful death of Sonny Gilliam is not relevant.

IX

The trial court made various contingent rulings, none of which, with the exception of the UM coverage issue, is briefed by the parties. We therefore pretermitt a discussion of those rulings.

X

The judgment is accordingly reversed. The case is remanded for the entry of an Order directing the clerk to pay the remaining proceeds, together with accrued interest to the Intervenors.² Costs are assessed to Ruth M. Gilliam.

Houston M. Goddard, Presiding Judge

CONCUR:

Herschel P. Franks, Judge

Charles D. Susano, Jr., Judge

²The recovery was paid into the treasury of the Court, one-third of which was, by agreement, paid to the appellee. The remaining two-thirds of the recovery was retained on deposit pending further orders of the court.