

**HAMILTON v. WELSH**

2023 OK 103

Case Number: 119694

Decided: 10/24/2023

**THE SUPREME COURT OF THE STATE OF OKLAHOMA**

Cite as: 2023 OK 103, \_\_ P.3d \_\_

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

IN THE MATTER OF THE ESTATE OF KATHA MAE WILLIAMS,

KIMBERLY HAMILTON, as Personal Representative of the ESTATE OF KATHA MAE WILLIAMS and as Trustee of THE WILLIAMS FAMILY TRUST DATED THE 28TH DAY OF MAY 2014,  
Petitioner/Appellee/Respondent,

v.

CATHERINE Z. WELSH, as Personal Representative of the ESTATE OF EARL WILLIAMS, JR., Respondent/Appellant/Petitioner.

**CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION III  
HONORABLE KURT G. GLASSCO, TRIAL JUDGE**

¶10 The parents of Elliott Williams created their individual wills and joint trust after Elliott died. A wrongful death lawsuit was filed on Elliott's behalf, and the Williamses were statutory beneficiaries to proceeds from the lawsuit. Before they received any such proceeds, they attempted to transfer them into their trust for estate planning purposes. Both parents subsequently died before the proceeds were determined or distributed. The petitioner, the personal representative of Elliott's mother's estate, then sought to have Elliott's mother's share judicially determined to belong in the trust. The trial court determined they belonged in the trust. The personal representative of the father's estate appealed, and the Court of Civil Appeals affirmed. We hold that the proceeds from a wrongful death lawsuit can be transferred into a trust before they are obtained by the trust settlor, and if they are, they belong in the trust.

**COURT OF CIVIL APPEALS OPINION VACATED;  
TRIAL COURT AFFIRMED.**

Catherine Z. Welsh, Jim C. McGough, Tulsa, Oklahoma, for Respondent/Appellant/Petitioner.

George M. Miles, Maureen M. Johnson, Tulsa, Oklahoma, for Petitioner/Appellee/Respondent. <sup>1</sup>**KAUGER, J.:**

¶11 The first impression question presented is whether proceeds from a wrongful death cause can be transferred into a trust before they are obtained by the trust settlor. We hold that they can, and if they are, they belong in the trust.

**FACTS/PROCEDURAL HISTORY**

¶12 This cause concerns a lengthy, convoluted court battle over the estate of Katha Williams (Katha/wife) and the distribution of her interest of \$1,178,157.44 from a wrongful death lawsuit involving her son, Elliott Williams (Elliott). However, the facts leading up to this controversy are also interconnected with her husband Earl Williams's (Earl/husband, collectively the Williamses) probate, and the family's trust, and their son Elliott's probate and wrongful death lawsuit.

¶13 The probates have not been consolidated, but some factual information about the interconnections is helpful to set forth the facts, timeline, and procedural history of this cause. To this degree, we take judicial notice of those proceedings. <sup>2</sup> However, taking such judicial notice is not meant, in any way, to supplant the rule that the record on appeal consists of only those materials which were before the trial court at the time of the decision appealed, unless otherwise ordered by a court. <sup>3</sup>

¶14 The Williamses' son, Elliott, died on October 27, 2011, after being arrested by Owasso police for causing a disturbance. Once in jail, he became paralyzed from injuring his neck and died without receiving any mental health or medical treatment. <sup>4</sup> He left behind a surviving wife, but no children as heirs. Elliott's probate (PB-2011-724) was initially filed November 7, 2011, in the Tulsa County District Court. As a result of his death, a wrongful death action was also filed the same day in the United States District Court for the Northern District of Oklahoma (No. 11-CV-720-JEDC-PJC) against the Sheriff of Tulsa County. Pursuant to Oklahoma's wrongful death statute, the wrongful death action is filed by the decedent's personal representative. <sup>5</sup> Damages, when the decedent has a surviving spouse, no children, and surviving parents are distributed to the spouse and parents as provided by 84 O.S. 2021 §213. <sup>6</sup>

¶15 On May 28, 2014, the Williamses, established the Williams Family Trust together, and executed individual wills. Their wills, in identical provisions, left each of their estates to the Williams Living Trust. <sup>7</sup> Each will also listed their heirs to include, their spouse, eight living adult children, and their deceased son, Elliott. <sup>8</sup>

¶16 Katha Williams died on July 24, 2014. On March 22, 2017, final judgment was entered in Elliott's wrongful death lawsuit in accordance with a jury verdict. The jury awarded \$10 million in compensatory damages and \$250,000.00 in punitive damages. Post judgment motions were all denied by March 31, 2018, and the defendants appealed to the Tenth Circuit Court of Appeals.

¶17 On March 23, 2017, the Williamses' daughter, Kimberly A. Hamilton (Hamilton) filed Katha's probate as personal representative in the District Court of Tulsa County Oklahoma (PB-2017-231), with a copy of Katha's will attached. <sup>9</sup> The trial court admitted the will to probate and issued letters testamentary on June 13, 2018, and appointed Hamilton the personal representative. On August 20, 2019, the Tenth Circuit affirmed in part and reversed in part the wrongful death judgement. It affirmed the district court on all grounds, with the exception of the denial of the Sheriff's motion for a set off. On December 2, 2019, the parties settled, disclosing the settlement for \$10 million plus post-judgment interest at 4.75% per annum, with an agreed judgment against the Tulsa County Sheriff.

¶18 The record is unclear, but it appears that at some point in 2017, Katha's husband, Earl Williams, was placed under a guardianship in the Tulsa County District Court (PG-2017-141). <sup>10</sup> He died on August 31, 2019, and Hamilton, as personal representative of her father's estate, filed his probate (PB-2018-879) on October 9, 2019, in the District Court of Tulsa County. A copy of his will was attached, and it listed the same eight living children and one deceased child, as Katha's. On January 6, 2020, the trial court appointed Hamilton as the Special Administrator of her father's estate. At this point, Elliott's, Katha's, and Earl's estates were all still pending.

¶19 The last docket entry for Elliott's probate is an order dated and filed June 30, 2020, in which it appears the trial court approved a new administrator, identified Elliott's wife and parents as his only heirs, and approved payment of attorney fees. It also identified the judgment of the wrongful death action to be the sole asset of Elliott's estate.

¶10 On May 11, 2020, the trial court admitted Earl's will to probate, and appointed the petitioner/appellant, an attorney, Catherine Z. Welsh (Welsh) as administrator of his estate. No explanation is given as to why Welsh replaced Earl's daughter, Hamilton as administrator. On August 6, 2020, Welsh, in Katha's probate, filed a Certificate to Make Election by Surviving Spouse on behalf of Earl. This filing was an apparent attempt for the deceased husband's election against his wife's will, even though, 84 O.S. 2021 §44(B)(4) expressly requires such an election to be done during the lifetime of the surviving spouse.<sup>11</sup> This statutory provision reflects the primary purpose of a spousal election, which is to provide the surviving spouse ample means for his or her care and comfort during the remainder of his or her life.<sup>12</sup>

¶11 On March 18, 2021, Hamilton, as trustee of the Williams Family Trust, filed a motion, seeking a determination that the proceeds of Elliott's wrongful death case were property of the Trust, rather than Katha Williams's probate estate.<sup>13</sup> Hamilton attached a copy of a portion of the Trust, and a copy of an document labeled "Assignment" by the Williamses of their interest in the lawsuit judgment to their Trust. The document, dated May 28, 2014, and titled, "Assignment of Judgments" provides:

EARL WILLIAMS and KATHA M. WILLIAMS do hereby transfer and assign, without consideration and in order to change formal title only, all right, title and interest which they now have in those Judgments listed below, to EARL WILLIAMS and/or KATHA M. WILLIAMS, Trustees, or their successors in trust, under the WILLIAMS LIVING TRUST, dated May 28, 2014, and any amendments thereto:

<u>Case Number</u>	<u>Court</u>	<u>Judgment Amount</u>	<u>Judgment Debtor</u>
11-CV-720-JED-PJC	Tulsa, OK	Pending	Stanley Glanz, Tulsa County Sheriff, and City of Owasso Police Dept.
201300019896	Montgomery, AL	Pending	Talcum powder litigation

Through Goldwater Law Firm

This assignment was executed on May 28, 2014.

¶12 The trial court held a hearing on the issue on June 14, 2021. On June 30, 2021, the trial court filed an order in which it determined that the proceeds were not property of the probate estate. The trial court allocated proceeds in the amount of \$1,178,057.44 be distributed to the Williams Family Trust.<sup>14</sup>

¶13 On July 6, 2021, Welsh filed an Application to Assume Original Jurisdiction and Petition for Writ of Mandamus in this Court. She sought this Court's review of the trial court's ruling. The respondent replied that Welsh was trying to circumvent the proper appeals process by requesting a writ. We agreed, and on September 13, 2021, the Court directed Welsh to file an amended petition in error within twenty days.

¶14 On October 4, 2021, Welsh filed the Court-directed amended petition in error, appealing the trial court's June 30, 2021, order. The response to the petition in error contends that the appeal is immaterial because the entirety of Katha's probate estate goes into the Williams' Family Trust pursuant to her will.

¶15 On March 2, 2022, we assigned the cause to the Court of Civil Appeals. On May 20, 2022, the Court of Civil Appeals, Division III, in an unpublished opinion, affirmed the trial court. Welsh filed a Petition for Writ of Certiorari on June 9, 2022. We granted certiorari on February 7, 2023.

**PROCEEDS FROM A WRONGFUL DEATH CAUSE CAN BE  
TRANSFERRED INTO A TRUST BEFORE THEY ARE OBTAINED BY  
THE TRUST SETTLOR, AND IF THEY ARE, THEY BELONG IN THE  
TRUST.**

¶16 The petitioner argues that because a wrongful death claim is a tort, it is not assignable to another person, and any proceeds from a wrongful death lawsuit or settlement must also be unassignable. The respondent argues that such proceeds may be transferred and, if they are, they belong in the trust. They are not a part of the probate estate.

¶17 The Williamses transferred their expected interest in any proceeds of the wrongful death lawsuit to their trust. Consequently, the term "transfer" is more apropos to what the Williamses were trying to accomplish, rather than an "assignment" to another person.<sup>15</sup> Nevertheless, the answer to whether a transfer of such proceeds can occur requires examination of the nature of wrongful death claims juxtaposed with the nature of an estate planning mechanism such as a trust.

**A.**

**A Wrongful Death Claim and Its Proceeds.**

¶18 Because wrongful death actions were unknown at common law, any right to bring an action is granted by virtue of statute.<sup>16</sup> In Whipple v. Phillips and Sons Trucking, LLC., 2020 OK 75, ¶10, 474 P.3d 339, we discussed the nature of wrongful death actions when a mother sought recovery for the wrongful death of her unmarried, childless adult son. The Court held that the action for wrongful death is not a separate and distinct tort, but is an action which derives from the rights of the decedent. Whatever rights the decedent might have had in his life accrue to the personal representative at death.

¶19 We also determined because the cause of action for wrongful death is purely statutory, suit may only be brought by a person expressly authorized by statute to do so. Under the applicable statute, if no personal representative had been appointed, the action may be brought by a surviving spouse or in their absence, next of kin. Implicit in this rationale is that the right to bring the cause of action for wrongful death cannot be either assigned or transferred.<sup>17</sup>

¶20 Furthermore, 12 O.S. 2021 §2017 expressly prohibits the assignment of claims not arising out of contract.<sup>18</sup> However, this cause does not concern the assignment or transfer of a wrongful death claim. Rather, it concerns the transfer of any expected proceeds of such action into a trust.<sup>19</sup> Elliott's wrongful death lawsuit had been filed before his parents created their wills or trust. They both died before the any wrongful death proceeds were determined or distributed.<sup>20</sup> Thus, the question here is whether the proceeds from the pending wrongful death action are transferable, not just from anyone to just anyone, but by the statutory entitled beneficiaries into their trust for estate planning. Our prior wrongful death cases shed light on this distinction.

**B.**

**Prior Wrongful Death Cases**

¶21 Although this Court has decided many cases concerning wrongful death actions, two in particular stand out for their discussion of the nature of the action, and its expected proceeds. In City of Shawnee v. Cheek, 1913 OK 739, ¶¶18-23, 137 P. 724, the Court discussed the nature of a wrongful death action when a child died because of the alleged negligence of a landowner. At the time, the father was the statutory beneficiary under the wrongful death statute. The father sued the landowner, but the father died ten months after the child, before the

lawsuit went to trial. The lawsuit was then revived by the child's mother, as administratrix of the father's estate.

¶22 The Court explained that when a wrongful death occurs, the nature of a wrongful death action is similar to the nature of property, and it is a right created or granted by statute. As such, when the father died, it did not extinguish his statutory right to bring a wrongful death action. The action was properly revived by the administratrix of the father's estate. The Court quoted a New York case which explained that the Legislature has chosen to regard wrongful death as a pecuniary right, a right having the essential attributes of property, so that when it is taken away, compensation is due.

¶23 The Court also relied on a New Jersey case which stated that the death of the beneficiary of a wrongful death suit (i.e., the father) cannot be made to abrogate the liability of the wrongdoer because the pecuniary injury was already sustained. The right to compensation vested in the father immediately upon the death of the child. Recovery is not precluded just because the wrongful death statute does not provide for what happens if he died before the wrongful death action was finally determined. However, the injury sustained would be limited to the duration and extent of the father's lifetime.

¶24 As we previously stated, wrongful death actions are strictly governed by the statutes creating and governing them. As such, the statutory beneficiary may not have the ability to assign or transfer a wrongful death cause of action to another person. Nevertheless, such actions are similar to a property right, already vested in the beneficiaries upon the wrongful death.<sup>21</sup>

¶25 Under the rationale of Cheek, Katha's rights as a statutory beneficiary of her son's wrongful death action vested on the death of her son. Such a right was the equivalent of a property right belonging to her. She never transferred, or attempted to transfer, her right. Consequently she did not violate the statutory prohibition relating to the assignment of claims not arising out of contracts.<sup>22</sup>

¶26 In Aetna Casualty & Surety Co. v. Young, 1924 OK 394, ¶9, 231 P.261, a case concerning the distribution of wrongful death proceeds, the Court described monies recovered by the administrator of the estate of the deceased. The Court found such monies do not belong to the estate of the deceased, but rather they are held in trust, for the benefit of next of kin of the deceased. It is the duty, then of the trustee, to properly distribute the money proportionately to the beneficiaries of the funds.

¶27 Under the rationale of Young, the proceeds from the wrongful death action were akin to trust funds held for statutory beneficiaries such as Katha, for her benefit. 25A C.J.S. Death §118, (August 2023 Update) provides:

The trust under which the personal representative or other statutory wrongful death plaintiff holds the damages recovered in a wrongful death action may be enforced by the beneficiaries. A beneficiary may recover a share by an action against the personal representative, or other statutory trustee of the recovery, and as such proceedings, as trust proceedings, are not subject to a bar of time limitations. However, a beneficiary cannot maintain such an action until the net amount for distribution and the respective shares of the beneficiaries have been determined.<sup>23</sup>

The wrongful death statute gives survivors a beneficial interest in the recovery,<sup>24</sup> and recovery inures to the exclusive benefit of the wrongful death statutory beneficiaries.<sup>25</sup> Nevertheless, nothing about the nature of the anticipated funds from the lawsuit prevented Katha from transferring her interest in them to the family trust for estate planning purposes. Nor has the Legislature prohibited such a transfer in either the wrongful death or wills and trusts statutes.

### C.

#### Trusts

¶28 A trust, in relation to realty or personalty, may be created for any purpose for which a contract may be made.<sup>26</sup> It requires a declaration by the owner of the property that he or she holds it as trustee for another person or for him or herself. The transfer can be *inter vivos* and/or by will.<sup>27</sup> And the principal of the trust can be set aside for an eventual conveyance to another person.<sup>28</sup>

¶29 In other words, the Williamses employed a common estate planning device of creating a revocable *inter vivos* trust, and simultaneously executing pour over wills to provide for their heirs at the time of their death.<sup>29</sup> They sought to transfer their expected proceeds from their son's wrongful death lawsuit into their estate planning regime.

¶30 Although there are conflicting cases, the weight of authority is that such transfers are valid.<sup>30</sup> One explanation is that a wrongful death beneficiary's interest in the lawsuit's proceeds is not akin to assignment of the right of the action for personal tort.<sup>31</sup> Another is that it amounts to a pecuniary right, akin to property right, where when taken away, compensation is due.<sup>32</sup>

¶31 The Utah Supreme Court in, In re Behm's Estate v. Gee, 213 P.2d 657 (Utah 1950), succinctly explains why proceeds for a wrongful death lawsuit are assignable. It said in pertinent part:

. . . We conclude that respondent's portion of the death claim is assignable. Respondent's contention is that such a holding would overrule those cases in which this court had held that a cause of action for wrongful death is non-assignable. Had respondent attempted to assign a cause of action for death then the cases cited would have been controlling. However, appellant assigned not the cause of action, but rather, assigned any interest he might have in the recovery. While at first blush this may appear to be a distinction without a difference, upon closer examination it becomes apparent that there is a real and substantial difference. The cause of action cannot be split up between the heirs but the amount recovered can be and is. The problem thus presented is this. Can an heir, after a cause of action has arisen in which he has an interest make an assignment of his interest?

Much has been said by courts in the past regarding the assignability and non-assignability of contingent interests at law and in equity. Law courts originally refused to recognize assignments of contingent interests of any kind. Later, because of the Chancellor's liberal enforcement of such assignments, the judges presiding in courts of law agreed to uphold assignments of contingent interests having a potential realization at the time of the assignment.

Modern courts, however, have adopted the more liberal equitable rule enforcing assignments of things not in esse but mere future possibilities so long as the assignments are fairly made for an adequate consideration without offending against public policy. Thus assignments of future contractual interests, anticipated interests in real or personal property, future wages or the expectancy of an heir in the estate of an ancestor have all been repeatedly upheld by modern decisions.

Courts have adopted the same rule where one who has sustained personal injuries assigns such proceeds as may possibly be recovered by him in an action brought against the tortfeasor. Moreover, a court of equity will enforce the assignment even though the cause of action is not assignable. . . .

The counter views are that they are not transferable because they either do not survive the death of the beneficiary who is entitled to the proceeds, or that the wrongful death statutes make no provision for recovery for "others," including transfers.<sup>33</sup>

¶32 Here, nothing more than a transfer into a revocable *inter vivos* trust occurred for purposes of estate planning. The transfer was Katha's personal interest in the proceeds of the wrongful death suit to Katha, as the settlor, trustee, and beneficiary of the trust. The petitioner has not shown that consideration is necessary for this type of transfer. Prohibiting such a transfer is counterintuitive to the nature of a trust, general estate planning altogether. It is also contradictory to this Court's prior treatment of wrongful death proceeds.

¶33 Furthermore, Katha's unambiguous expressed intent as evidenced on the face of her will, the trust, and the assignment of the wrongful death proceeds was that: 1) the funds be placed in the trust when received; but 2) if they were not placed into the trust, her pour-over will would place them into the trust. Under the facts of this cause, it appears equity would recognize the transfer.<sup>34</sup> Regardless, we affirm the trial court and hold that proceeds from a wrongful death cause can be transferred into a trust before they are obtained by the trust settlor. We hold that they can, and if they are, they belong in the trust.

### CONCLUSION

¶34 This cause concerns the transfer of expected proceeds of a wrongful death action into a trust for estate planning. Wrongful death actions, insofar as the statutory beneficiaries are concerned, are vested upon the wrongful death.<sup>35</sup> The proceeds of such lawsuits are akin to trust funds held for the statutory beneficiaries.<sup>36</sup> Nothing in the will and trust statutes prohibits the transfer of expected proceeds into a trust. Prohibiting such a transfer would be counterintuitive to the nature of an estate trust, and our prior treatment of wrongful death proceeds. Consequently, we hold that proceeds from a wrongful death cause can be transferred into a trust before they are obtained by the trust settlor, and if they are, they belong in the trust. The trial court's determination that Katha's interest in her son's wrongful death suit belongs in the Williams Family Trust is affirmed.

**COURT OF CIVIL APPEALS OPINION VACATED;  
TRIAL COURT AFFIRMED.**

ALL JUSTICES CONCUR.

**FOOTNOTES**

<sup>1</sup> Attorneys Travis D. Horton, and Benjamin Fu, of Tulsa, Oklahoma, entered an appearance as counsel for Tracy Samuels who is not a listed party in this cause, but is interested in it. However, they are not listed as the attorneys on the first page of the opinion because they are not representing a designated party. Title 12 O.S. Supp. 2022 App. 1, Oklahoma Supreme Court Rules, Rule 1.5 (a) provides:

(a) Entry of Appearance. All parties to any proceeding in the appellate courts shall immediately, but no later than filing the first document in the appellate court, file an Entry of Appearance on the forms set forth in Rule 1.301, by counsel or an unrepresented party representing himself or herself. Copies shall be served on all other parties. Attorneys shall use the form prescribed by Rule 1.301 Form No. 1, and parties representing themselves shall use the form prescribed by Rule 1.301 Form No. 2. An original and two (2) copies of the Entry of Appearance shall be filed with the Clerk of the Supreme Court.

Title 12 O.S. Supp. 2023 App. 1, Rule 1.25(b) provides in pertinent part:

The style and the sequence of the parties in an appeal shall be exactly the same as the style and sequence in the judgment or order from which the appeal is taken. 20 O.S. § 3002. Designations such as "et al." shall not be used in the style. Each party shall be designated in the caption as they were in the trial court followed by a slash "/" behind the trial court designation. For example, Plaintiff/Appellant, Plaintiff/Appellee, Defendant/Appellant, Defendant/Appellee. A party who is neither seeking relief on appeal, nor opposing another party's attempt to seek relief on appeal, has no appellate designation and remains listed in the style with the same designation as in the trial court. A party who seeks appellate relief but was not included in the caption of the trial court action shall be designated according to the appropriate appellate designation on appeal (e.g., appellant), without a trial court designation, and shall be last in sequence of the parties in the caption on appeal. . . .

Unless a prior version of a statute requires the application of significantly different statutory language to this cause, all citations to the Oklahoma Statutes herewithin are to the most recent version.

**KAUGER, J.:**

<sup>2</sup> This Court takes judicial notice of the Dockets of District and Appellate Courts. State ex rel. Oklahoma Bar Ass'n v. Layton, 2014 OK 21, ¶19, fn. 12, 324 P.3d 1244; Collier v. Reese, 2009 OK 86, ¶ 8, fn. 7, 223 P.3d 966. See, State ex rel. Oklahoma State Board of Examiners of Certified Shorthand Reporters v. Parrish, 2006 OK 91, ¶ 7 fn. 1, 152 P.3d 202; Mehdipour v. State ex rel. Department of Corrections, 2004 OK 19, ¶ 7 fn. 15, 90 P.3d 546; Myers v. Lashley, 2002 OK 14, ¶ 5, fn. 8, 44 P.3d 553. See, Ritter v. State, 2022 OK 73, ¶12, fn. 19, 520 P.3d 370. Title 12 O.S. 2021 § 2202 provides:

A. This section governs only judicial notice of adjudicative facts.

B. A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is either:

1. Generally known within the territorial jurisdiction of the trial court; or
2. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

C. A court may take judicial notice, whether requested or not.

D. A court shall take judicial notice if requested by a party and supplied with the necessary information.

E. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

In Ind. School Dist. #52 of Okla. County v. Hofmeister, 2020 OK 56, ¶¶22-23, 473 P.3d 475 we stated:

In federal court, judicial notice of fact may occur when the fact is not subject to reasonable dispute and it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Oklahoma statute has similar language. Some federal courts have stated a court may take judicial notice of an indisputably accurate fact on the world wide web (or internet), and public records and government documents available from reliable sources on the internet, such as websites run by governmental agencies may be used for the purpose of judicial notice. Some federal courts have also concluded public agency actions, factfinding, and decisions may be appropriate for judicial notice. . . .

<sup>3</sup> See, Oklahoma Supreme Court Rules, 12 O.S. 2021 App. 1., Rule 1.33 provides in pertinent part:

. . . Only papers filed and exhibits presented to the trial court together with transcripts necessary to the appeal may be included in the record on appeal. . . .

Rule 1.28(b) provides in pertinent part:

. . . Materials which were not before the trial court at the time of the decision appealed are not properly part of the record on appeal without order of the trial court or the appellate court. . . .

A party may not supplement the record on appeal by injecting into it material that was not before the trial court. United States Through Farmers Home Administration v. Hobbs, 1996 OK 71, ¶5, fn 11, 921 P.2d 338.

<sup>4</sup> Matt Clarke, \$10 Million Post-Appeal Settlement in Oklahoma Jail Prisoner Death Suit, Prison Legal News, pg. 60, (March 4, 2020), [https://www.prisonlegalnews.org/news/2020/mar/4/10-million-post-appeal-](https://www.prisonlegalnews.org/news/2020/mar/4/10-million-post-appeal-settlement-oklahoma-jail-prisoner-death-suit/)

settlement-oklahoma-jail-prisoner-death-suit/.

<sup>5</sup> Title 12 O.S. Supp. 2020 §1053(A) provides:

A. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his or her personal representative if he or she is also deceased, if the former might have maintained an action, had he or she lived, against the latter, or his or her representative, for an injury for the same act or omission. The action must be commenced within two (2) years

<sup>6</sup> Title 84 O.S. 2021 §213 provides in pertinent part:

Second. If the decedent leave no issue, the estate goes one-half (1/2) to the surviving husband or wife, and the remaining one-half (1/2) to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares; but if there be no father or mother, then said remaining one-half (1/2) goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares: Provided, that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said property remain, one-half (1/2) of such property shall go to the heirs of the husband and one-half (1/2) to the heirs of the wife, according to the right of representation.

Title [12 O.S. Supp. 2020 §1053\(C\)](#) provides:

C. In proper cases, as provided by Section 9.1 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or the person's representative if such person is deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent. For the purposes of actions maintained pursuant to subsection F of this section, "next of kin" as used in this paragraph shall mean the parent or grandparent who maintained the action as provided for in paragraph 3 of subsection F of this section.

<sup>7</sup> The wills provided in pertinent part:

#### **2.01 Pour-Over to My Living Trust**

All of my probate estate, excluding any property over which I might have a power of appointment, and after payment of expenses and taxes which are paid pursuant to this will, I give to the Trustee of the Williams Living Trust dated May 28, 2014, and executed prior to this will, to be added to the property of that trust and disposed of in accordance with its terms and any amendments prior to my death.

<sup>8</sup> Elliott Williams' probate was also filed in the Tulsa County District Court as PB-2011-724 on November 7, 2011. The last docket entry in Elliott's probate was November 10, 2021, and it is an Order Appointing Administrator, Determining Identity of Heirs, Order Approving Sale of Personal Property and Order Approving Payment of Attorneys' Fees.

<sup>9</sup> Apparently, the original will was found, and then filed on May 9, 2017.

<sup>10</sup> The Williamses' daughter, Tracy Samuels, also filed a civil lawsuit against her father in 2016 for assault and battery, intentional infliction of emotional distress and punitive damages. That lawsuit settled on June 22, 2021 for \$600,000.00 in exchange for dismissing an appeal which was pending in this Court in case No. 119,211. We dismissed that appeal on June 28, 2021.

<sup>11</sup> Title [84 O.S. 2021 §44\(B\)\(4\)](#) provides in pertinent part:

4. The right of election of the surviving spouse provided for in paragraph 2 of this subsection is personal to the surviving spouse and **may be exercised only during the lifetime of the surviving spouse**. However, if there has been a guardian or conservator duly appointed by a court of competent jurisdiction, and such court has judicially determined the surviving spouse to be incompetent, then such guardian or conservator may make the election on behalf of the surviving spouse, but only if the same is approved by the court having jurisdiction over such guardian or conservator. . . . The guardian or conservator may be appointed in any state, and may have been appointed at any time prior to the expiration of the time permitted for the election to be made as provided in paragraph 3 of this subsection. . . . (Emphasis supplied).

<sup>12</sup> See, [Turner v. First Nat. Bank & Trust Co., of Muskogee, 1953 OK 199, ¶0, 262 P.2d 897](#).

<sup>13</sup> Hamilton filed the same document in Earl Williams's probate cause seeking the same relief.

<sup>14</sup> The order made five findings/orders:

1. Earl and Katha Williams established the Williams Family Trust on May 28, 2014;
2. The trust was lawfully created and funded;
3. Katha Williams assigned her interest in the litigation of the Estate of Elliott Williams to the Williams Family Trust;
4. Proceeds from the sale of Elliott Williams wrongful death judgment in the amount of \$1,178,057.44 shall be distributed to the Williams Family Trust; and
5. The appeal bond in the amount of 125% of the amount ordered to be distributed shall be required to stay enforcement of the order.

<sup>15</sup> While the terms assignment and transfer are seemingly interchangeable, in [Noble v. Ft. Smith Wholesale Grocery Co., 1911 OK 310, ¶0, 127 P.14](#), a debtor/creditor case concerning stock of merchandise and what constitutes a chattel mortgage, the Court first described "transfer" as the act by which the owner of a thing delivers to another with the intent of passing the rights which he or she has in it to the latter. It defined "assignment" as a transfer or setting over of property or some right or interest therein from one person to another, the term denoting not only the act of transfer, but also the instrument effecting it. In [Hoffman v. Townsend, 1946 OK 325, ¶0, 178 P.2d 89](#), another case involving an attempted recovery of a debt by a creditor, the Court defined an "assignment" as an expression of intention by one that his or her rights shall pass to and be owned by another. It also distinguished between a legal assignment which must relate to a thing in being and not an expectancy or contingency and an equitable assignment which covers contingent interests, expectancies and things potential.

<sup>16</sup> [Whipple v. Phillips and Sons Trucking, LLC., 2020 OK 75, ¶¶6-11, 474 P.3d 339](#); [Wilson v. Gipson, 1988 OK 35, ¶20, 753 P.2d 1349](#); [Thomas v. Cumberland Operating Co., 1977 OK 164, ¶6, 569 P.2d 974](#). Although, statutory, pursuant to The Okla. Const. Art. 23, §7, the statutory right may never be abrogated. It provides:

The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Workers' Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive, and the Legislature may enact statutory limits on the amount recoverable in civil actions or claims against the state or any of its political subdivisions.

The purpose of Art. 23, §7 was to embody into the fundamental law, the constitution, the statutory right of action for wrongful death. [Whipple v. Phillips and Sons Trucking, LLC.](#), supra at ¶7; [Thomas v. Cumberland Operating Co.](#), supra at ¶21.

<sup>17</sup> See, [Quellette v. State Farm Mut. Auto. Ins. Co., 1994 OK 79, ¶9, 918 P.2d 1363](#); [Abel v. Tisdale, 1980 OK 161, ¶8, 619 P.2d 608](#) (A wrongful death action is purely statutory and the action can only be bought by a person expressly authorized to do so.).

<sup>18</sup> [12 O.S. 2021 §2017\(D\)](#) provides:

D. ASSIGNMENT AND SUBROGATION OF CLAIMS. The assignment of claims not arising out of contract is prohibited. However, nothing in this section shall be construed to affect the law in this state as relates to the transfer of claims through subrogation.

<sup>19</sup> This distinction is noted in [In re Behm's Estate v. Gee, 213 P.2d 657 \(Utah 1950\)](#) which we discuss further on pages 19 and 20 of this opinion.

<sup>20</sup> The petitioner relies on two cases in support of their argument which are inapplicable here. First, [Johnson By and Through Lackey v. Schick, 1994 OK 109, 882 P.2d 1059](#) concerned an estate beneficiary who assigned all of his interest to another person. The Court held that such an assignment is void under Oklahoma law because the heir has not acquired a vested right to the property. It also held that an equitable assignment may be possible if adequate or sufficient consideration is made. Here, Katha's interest in a wrongful death action vested when her son died, see discussion page 16, *infra*, and the transfer of the proceeds of a wrongful death action were not sold or made to another person. Second, [Rose Group, L.L.C. v. Miller, 2003 OK CIV APP 18, 64 P.3d 573](#) was cited as persuasive authority, but it too, is inapplicable to this cause. It involved the assignment of a tort judgment (fraud, breach of fiduciary duty, and other claims) which was held not to be vested until a judgment was issued in the tort case. Again, Katha's interest in the wrongful death cause vested when her son died.

<sup>21</sup> This rationale was also later reconfirmed by the Court in [Parker v. National Zinc Co., 1965 OK 152, 406 P.2d 493](#), when it held, in the context of workmen's compensation, that the cause of action for wrongful death possesses the quality of survivability and is not extinguished or abated by the death of the statutory beneficiary.

<sup>22</sup> Title [12 O.S. 2021 §2017\(D\)](#), see note 19, *supra*.

<sup>23</sup> Thomas Muskus, J.D. and Karl Oakes, J.D., *Apportionment of Proceeds Among Beneficiaries of Wrongful Death Action by Trustee or Representative -- Enforcement by Beneficiary*.

<sup>24</sup> [Abel v. Tisdale](#), see note 17, *supra*; [Brookshire v. Burkhart, 1929 OK 428, ¶17, 283 P. 571](#).

<sup>25</sup> [Ouellette v. State Farm Mut. Auto. Ins. Co.](#), see note 18, *supra*.

<sup>26</sup> Title [60 O.S. 2021 §175.2](#) provides:

A trust in relation to real and personal property, or either of them, may be created for any purpose or purposes for which a contract may be made.

[C&C Tile v. Independent Sch. Dist. No. 7 of Tulsa, 1972 OK 137, ¶35, 503 P.2d 554](#).

<sup>27</sup> Title [60 O.S. 2021 §175.6](#) provides:

A trust may be created by:

A. A declaration by the owner of property that he holds it as trustee for another person, or for himself and another person or persons; or

B. A transfer *inter vivos* by the owner of property to another person as trustee for the transferor or for a third person; or

C. A transfer by will by the owner of property to another person as trustee for a third person; or

D. An appointment by one person having a power of appointment to another person as trustee for the donee of the power or for a third person; or

E. A promise by one person to another person whose rights thereunder are to be held in trust for a third person; or

F. A beneficiary may be a cotrustee and the legal and equitable title to the trust estate shall not merge by reason thereof. Provided, however, that no trust in relation to real property shall be valid, unless created or declared:

1. By a written instrument subscribed by the trustor or by his agent thereto authorized by writing;

2. By the instrument under which the trustee claims the estate affected.

<sup>28</sup> Title [60 O.S. 2021 §175.3\(G\)](#) provides:

G. "Principal" means any real or personal property which has been so set aside or limited by the owner thereof, or a person thereto, legally empowered that it and any substitutions for it are eventually to be conveyed, delivered, or paid to a person, while the return therefrom, or use thereof, or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person.

<sup>29</sup> See, [Welch v. Crow, 2009 OK 20, ¶17, 206 P.3d 599](#); [Rickard v. Coulimore, 2022 OK 9, ¶18, 505 P.3d 920](#).

<sup>30</sup> Andrea G. Nadel, J.D., *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R. 4th 82 (Originally published in 1984), superseding in part, R.D. Hursh, *Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2d 500 (Originally published in 1955).

<sup>31</sup> [Anderson v. Anderson](#), 12 Ga. App. 706, 78 S.E. 271 (Ga. App. 1913).

<sup>32</sup> [Rice v. Postal Telegraph-Cable Co.](#), 174 A.D. 39, 160 N.Y.S. 172 (N.Y. Sup. Ct. 1916); [Quin v. Moore](#), 1 E.P. Smith 432, 15 N.Y. 432, 1857 WL 7060 (N.Y. App. 1857).

<sup>33</sup> Andrea G. Nadel, J.D., *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R. 4th 82 (Originally published in 1984), superseding in part, R.D. Hursh, *Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2d 500 (Originally published in 1955).

<sup>34</sup> The subject of trusts and the control of trust estates is by courts of equity. [In re Wallace Revokable Trust, 2009 OK 34, ¶12, 219 P.3d 536](#); [Peyton v. McCaslin, 1966 OK 4, ¶11, 417 P.2d 316](#).

<sup>35</sup> [Parker v. National Zinc Co., 1965 OK 152, 406 P.2d 493](#); [City of Shawnee v. Cheek, 1913 OK 739, ¶¶18-23, 137 P. 724](#).

<sup>36</sup> [Aetna Casualty & Surety Co. v. Young, 1924 OK 394, ¶9, 231 P. 261](#); 25A C.J.S. Death §118, (August 2023 Update).

## Citationizer® Summary of Documents Citing This Document

### Cite Name Level

None Found.

### Citationizer: Table of Authority

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<b>Oklahoma Court of Civil Appeals Cases</b>	
Cite	Name
<a href="#">2003 OK CIV APP 18, 64 P.3d 573</a>	<a href="#">ROSE GROUP, L.L.C. v. MILLER</a>
	Discussed
<b>Oklahoma Supreme Court Cases</b>	
Cite	Name
<a href="#">1988 OK 35, 753 P.2d 1349, 59 OBJ 950</a>	<a href="#">Wilson v. Gipson</a>
	Discussed

Cite Name	Level	
<a href="#">1913 OK 739, 137 P. 724, 41 Okla. 227.</a>	<a href="#">CITY OF SHAWNEE v. CHEEK</a>	Discussed at Length
<a href="#">1994 OK 109, 882 P.2d 1059, 65 OBJ 3341.</a>	<a href="#">Johnson By and Through Lackey v. Schick</a>	Discussed
<a href="#">1994 OK 79, 918 P.2d 1363, 65 OBJ 2222.</a>	<a href="#">Ouellette v. State Farm Mut. Auto. Ins. Co.</a>	Discussed
<a href="#">1953 OK 199, 262 P.2d 897.</a>	<a href="#">TURNER v. FIRST NAT. BANK &amp; TRUST CO. OF MUSKOGEE</a>	Discussed
<a href="#">1946 OK 325, 178 P.2d 89, 198 Okla. 335.</a>	<a href="#">HOFFMANN v. TOWNSEND</a>	Discussed
<a href="#">2002 OK 14, 44 P.3d 553, 73 OBJ 879.</a>	<a href="#">MYERS v. LASHLEY</a>	Discussed
<a href="#">1965 OK 152, 406 P.2d 493.</a>	<a href="#">PARKER v. NATIONAL ZINC COMPANY</a>	Discussed at Length
<a href="#">1966 OK 4, 417 P.2d 316.</a>	<a href="#">PEYTON v. McCASLIN</a>	Discussed
<a href="#">1972 OK 137, 503 P.2d 554.</a>	<a href="#">C &amp; C TILE v. INDEPENDENT SCH. D. NO. 7 OF TULSA</a>	Discussed
<a href="#">2004 OK 19, 90 P.3d 546.</a>	<a href="#">MEHDIPOUR v. STATE ex rel. DEPT. OF CORRECTIONS</a>	Discussed
<a href="#">2006 OK 91, 152 P.3d 202.</a>	<a href="#">STATE ex rel. OKLA. STATE BOARD OF EXAMINERS OF CERTIFIED SHORTHAND REPORTERS</a>	Discussed
<a href="#">1996 OK 71, 932 P.2d 1080, 67 OBJ 1929.</a>	<a href="#">Dept. of Human Services v. Pavlovich</a>	Cited
<a href="#">1996 OK 77, 921 P.2d 338, 67 OBJ 2242.</a>	<a href="#">U.S. Through Farmers Home Admin. v. Hobbs</a>	Cited
<a href="#">1929 OK 428, 283 P. 571, 141 Okla. 1.</a>	<a href="#">BROOKSHIRE v. BURKHART</a>	Discussed
<a href="#">2009 OK 20, 206 P.3d 599.</a>	<a href="#">WELCH v. CROW</a>	Discussed
<a href="#">2009 OK 34, 219 P.3d 536.</a>	<a href="#">IN RE: WALLACE REVOCABLE TRUST</a>	Discussed
<a href="#">1924 OK 394, 231 P. 261, 107 Okla. 151.</a>	<a href="#">AETNA CAS. &amp; SUR. CO. v. YOUNG</a>	Discussed at Length
<a href="#">2009 OK 86, 222 P.3d 966.</a>	<a href="#">COLLIER v. REESE</a>	Cited
<a href="#">2014 OK 21, 324 P.3d 1244.</a>	<a href="#">STATE ex rel. OKLAHOMA BAR ASSOCIATION v. LAYTON</a>	Discussed
<a href="#">1977 OK 164, 569 P.2d 974.</a>	<a href="#">THOMAS v. CUMBERLAND OPERATING CO.</a>	Discussed
<a href="#">1980 OK 161, 619 P.2d 608.</a>	<a href="#">Abel v. Tisdale</a>	Discussed
<a href="#">2020 OK 56, 473 P.3d 475.</a>	<a href="#">INDEPENDENT SCHOOL DISTRICT # 52 v. HOFMEISTER</a>	Discussed
<a href="#">2020 OK 75, 474 P.3d 339.</a>	<a href="#">WHIPPLE v. PHILLIPS AND SONS TRUCKING</a>	Discussed at Length
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<a href="#">1911 OK 310, 127 P. 14, 34 Okla. 662.</a>	<a href="#">NOBLE v. FT. SMITH WHOLESALE GROCERY CO.</a>	Cited

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#### Title 84. Wills and Succession

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