

RENDERED: SEPTEMBER 19, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001667-DG

ANGELA RUTLEDGE;  
DARLEEN BURKHEAD;  
JOHNNY BURKHEAD, II;  
SHARON BURKHEAD

APPELLANTS

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 07-XX-000022

CYNTHIA MCKEE, ADMINISTRATRIX  
OF THE ESTATE OF CAROL BURKHEAD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: Angela Rutledge; Darleen Burkhead; Johnny

Burkhead, II; and Sharon Burkhead appeal from an Opinion and Order of the

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

Jefferson Circuit Court which reversed the Jefferson District Court, Probate Division, upon the issue of whether they are entitled to the proceeds from a wrongful death lawsuit involving their grandmother pursuant to the wrongful death statute, Kentucky Revised Statutes (KRS) 411.130. In reversing the probate court, the circuit court determined that the appellants were not entitled to a share of the proceeds. For the reasons stated below, we affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

Carol Burkhead died intestate on September 3, 2001. She had five children – Johnny Burkhead, Bobby Burkhead, Dennis Burkhead, Cynthia Burkhead Mckee, and Angela Burkhead Decker. Johnny and Bobby predeceased Carol. Johnny and Bobby’s surviving children are appellants Angela Rutledge; Sharina Burkhead; Johnny Burkhead, II; and Darleen Burkhead.<sup>2</sup>

On May 22, 2003, Cynthia was appointed as Administrator of Carol’s Estate. In her capacity as Administrator of the estate, Cynthia brought a wrongful death action pursuant to KRS 411.130 against Mt. Holly Nursing Home based upon the suspicion that Carol received negligent care while a resident there which resulted in her death. The lawsuit was ultimately settled for \$100,000.00. After consultation with counsel, Cynthia distributed the net proceeds among herself and her two surviving siblings, Dennis and Angela.<sup>3</sup>

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<sup>2</sup> The exact parent-child relationships are not more specifically stated in the record.

<sup>3</sup> The siblings later decided to share one-quarter of the proceeds with Carol’s ex-husband, George Burkhead, with each of the siblings also receiving a one-quarter share.

On June 2, 2006, Cynthia filed an informal settlement affidavit in probate court, and the probate proceedings were accordingly concluded.

On November 29, 2006, Angela, Sharina, Johnny II, and Darleen filed a motion in the probate court seeking to set aside the informal settlement, to reopen the probate proceedings, and to obtain a per stirpes share of the Mt. Holly settlement proceeds. On April 2, 2007, the probate court entered an order requiring Cynthia to redistribute the Mt. Holly proceeds so as to provide for the payment of per stirpes shares of the funds to Angela, Sharina, Johnny II, and Darleen.

On April 24, 2007, the siblings filed a notice of appeal from the probate court's decision. They later filed a Statement of Appeal alleging the probate court had erred in its determination that the appellants were entitled to a share of the settlement proceeds. On July 12, 2007, the circuit court entered an opinion and order reversing the probate court's determination that the appellants are entitled to a share of the settlement proceeds. The circuit court determined that the plain language of KRS 411.130 provides that under the present circumstances the whole of the wrongful death proceeds are to be distributed to Carol's three surviving children. The appellants filed a "motion to reconsider," which was denied by order dated August 30, 2007. This appeal followed.

#### DISTRIBUTION OF WRONGFUL DEATH PROCEEDS

The appellants contend that the circuit court erred in determining that they are not entitled to a per stirpes share of the wrongful death proceeds. They

allege the per stirpes provisions contained in the descent and distribution rules as set forth in KRS Chapter 391 should be applied in determining the distribution of the funds. *See* KRS 391.020; 391.030; and 391.040. Under this theory, amounts representing the shares belonging to their deceased fathers – Bobby and Johnny – should pass to them per stirpes. *See* KRS 391.040.

Section 241 of the Kentucky Constitution provides as follows:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. *The General Assembly may provide how the recovery shall go and to whom belong*; and until such provision is made, the same shall form part of the personal estate of the deceased person. (Emphasis added).

Thus, the General Assembly is vested with the constitutional authority to direct how the proceeds of a wrongful death recovery are to be distributed. The General Assembly exercised that authority by enacting KRS 411.130, the wrongful death statute. The statute states as follows:

(1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

(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.

“A court may not interpret a statute at variance with its stated language.” *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky.App. 2001). The first principle of statutory construction is to use the plain meaning of the words used in the statute. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005); KRS 446.080(4). “[S]tatutes must be given a literal

interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.” *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). We lend words of a statute their normal, ordinary, everyday meaning. “We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used.” *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

An examination of KRS 411.130(2) discloses that subsection (c) is the applicable provision under the present circumstances. The provision provides that “[i]f the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.” This is precisely the circumstances existing in the present case. Carol left no husband (she was divorced from George Burkhead), but she did leave children – Dennis, Cynthia, and Angela. Thus the statute provides that “the whole” be distributed “to the child or children” – that is, Dennis, Cynthia, and Angela in the case at bar. Accordingly, the circuit court correctly determined that the probate court’s interpretation of the statute was in error.

In light of the plain language of the statute, we are unpersuaded by the appellants’ argument that its provisions may be interpreted so as to provide for a per stirpes distribution to them under the circumstances of this case, nor are we persuaded that the per stirpes descent and distribution provisions of KRS Chapter 391 are applicable in the present wrongful death action. By its plain language KRS 411.130 overrides any contrary provisions contained in KRS Chapter 391.

The appellants also cite us to the following statement in *Totten v. Parker*, 428 S.W.2d 231 (Ky. 1967): “[*Moore v. Citizens Bank of Pikeville, Ky.*, 420 S.W.2d 669 (1953)] and *Ryburn v. First National Bank of Mayfield, Ky.*, 399 S.W.2d 313 [(1965)], are to the effect that anyone claiming as a beneficiary under the statute of descent and distribution, *which is embodied in KRS 411.130*, must show that the persons ahead of him in the order of taking are dead.” *Id.* at 237-238. They argue that this utterance establishes that the descent and distribution procedures contained in Chapter 391 are to be applied under the wrongful death statute. We construe this statement as commentary upon the fact that the statute of descent and distribution provisions of Chapter 391 are indeed embodied in subsection (2)(e); however, that subsection of the statute is not applicable under the present circumstances, and accordingly does not aid the appellants’ position.

The appellants also cite us to the anomalous inclusion of the phrase “or their descendants” in KRS 411.130(2)(a). However, in the case at bar, as previously noted, Carol did not leave a husband and KRS 411.130(2)(c) is directly on point, and so the subsection is not pertinent to our review.

In summary, the circuit court correctly concluded that the siblings were entitled to the whole of the Mt. Holly wrongful death settlement proceeds pursuant to KRS 411.130(2)(c).

#### CIRCUIT COURT JURISDICTION

As we construe this argument, the appellants contend that the appellees did not properly invoke the circuit court’s jurisdiction following the

adverse ruling by the probate court because they filed an “appeal” to the circuit court rather than an original action. They state:

Pursuant to KRS 24A.120(2) district court has jurisdiction over *uncontested* probate matters only. Adversary proceedings shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an “appeal.” KRS 24A.120(2).

When Judge Haynie ruled that KRS 411.130 mandated inclusion of the Appellants as beneficiaries of the wrongful death proceeds recovered by the estate of Carol Burkhead the aggrieved party’s remedy was *not* to “appeal” but rather to commence an adversary proceeding in Circuit Court. The decedent’s personal representative failed to do so.

KRS 391.035 provides: “if real or personal property passes by the laws of intestate succession or under a will to a beneficiary not named in the will, proceedings may be had in the District Court to determine the persons entitled to the property.”

KRS 391.035 provides for the District Court to enter a judgment naming the persons entitled to share the subject property or proceeds. The statute further mandates that any aggrieved party may, not later than thirty (30) days from the date of judgment, institute an adversary proceeding in Circuit Court pursuant to KRS 24A.120(2).

We need not discuss in detail the potential procedural problems with the proceedings below. However, we note the following.

First, the appellants’ filing in probate court was in the nature of a contested matter. Thus, by application of their own argument as set forth above, proper jurisdiction for their filing asserting a claim to the settlement proceeds would have been in circuit court.



Second, while it is true that the siblings filed a “Notice of Appeal” and set forth their arguments in a filing captioned “Statement of Appeal”; nevertheless, Civil Rule 8.01 requires pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." “The principal objective of a pleading is to give the opposing party fair notice of the essential nature of the claim presented and the type of relief to which the claimant deems himself entitled.” *Lee v. Stamper*, 300 S.W.2d 251, 253 (Ky. 1957). Thus assuming, arguendo, that the appellants are correct that the siblings should have filed an original action “adversary proceeding in Circuit Court pursuant to KRS 24A.120 (2)” rather than an appeal, we are persuaded that their filing gave the appellants fair notice of the essential nature of the claim presented and the type of relief to which they deemed themselves entitled.

In the same vein we note another problematic procedural issue regarding the appellants’ invocation of the jurisdiction of the probate court to raise their claim of an entitlement to a portion of the wrongful death proceeds. “[A] recovery [under KRS 411.130] is not for the benefit of the estate, but is for the next of kin as determined under the statute.” *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967). “The statutory authority of the administrator, where the decedent leaves any of the kindred named in the statute, is to sue for the benefit of the next of kin. The administrator is merely a nominal plaintiff. The real parties in interest are the beneficiaries whom he represents.” *Vaughn's Adm'r v. Louisville & N.R. Co.*, 297 Ky. 309, 179 S.W.2d 441, 445 (1944). We believe that in

situations involving KRS 411.130(2)(a) – KRS 411.130(2)(d) that the statute contemplates the wrongful death proceeds to be paid directly to the beneficiaries as defined under the statute without passing through the estate or the probate process.

Only under the circumstances described under KRS 411.130(e) do wrongful death recovery proceeds become a part of the deceased's estate. The statute makes no similar provision under the present circumstances. Thus the jurisdiction of the probate court to entertain the appellants' motion for a share of the wrongful death proceeds in the first place is questionable for this reason. Based upon our disposition as described above, however, we need not further address this issue.

#### CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas M. Denbow  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Mat A. Slechter  
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