



---

ATTORNEY FOR APPELLANT

Matthew T. Kavanagh  
Schiller Law Offices, LLC  
Carmel, Indiana

ATTORNEYS FOR APPELLEE

Thomas R. Schultz  
Jon L. Bucher  
Schultz & Pogue, LLP  
Indianapolis, Indiana

---

IN THE  
COURT OF APPEALS OF INDIANA

---

Betty Johnson as personal  
representative of the Estate of  
Bobby Nicley as natural father  
and guardian of deceased minor  
D.N.,

*Appellant-Petitioner,*

v.

Ralph Harris, Pamela Harris,  
and Michelle Nicley,

*Appellees-Respondents.*

August 23, 2021

Court of Appeals Case No.  
20A-CT-2384

Appeal from the Morgan Superior  
Court

The Honorable Brian H. Williams,  
Judge

Trial Court Cause No.  
55D02-1506-CT-1070

**Weissmann, Judge.**

[1] Today we are asked to decide a novel issue grounded in tragedy: whether a paternal grandmother, as personal representative of her deceased son's estate, may file a wrongful death action against the maternal grandparents for the death by drowning of their two-year-old grandson.<sup>1</sup> Finding the child wrongful death statute does not authorize a personal representative to file a wrongful death claim pursued but never filed by the deceased parent, we affirm the trial court's entry of summary judgment in favor of the maternal grandparents.

## Facts

[2] In June 2013, D.N., the two-year-old son of Bobby Nicley (Father) and Michelle Nicley (Mother), drowned in the backyard swimming pool of his maternal grandparents, Ralph and Pamela Harris (Maternal Grandparents). Two weeks later, Mother filed for divorce from Father. Within weeks, Father had retained a lawyer to represent him in a possible wrongful death lawsuit against Maternal Grandparents. In October 2013, the dissolution court issued its decree ending Mother and Father's marriage. Father died four days later.

[3] Nearly two years after D.N.'s death and 1½ years after Father's death, Betty Johnson (Paternal Grandmother), as personal representative of Father's estate, filed a wrongful death lawsuit against Mother and Maternal Grandparents,

---

<sup>1</sup> We conducted oral argument in this case July 21, 2021. We thank counsel for their presentations.

alleging their negligence caused D.N.'s death. Paternal Grandmother was represented by different counsel than Father had retained.

[4] Mother and Maternal Grandparents (collectively, Defendants) filed a motion for summary judgment, alleging Indiana's child wrongful death statute (CWDS)—Indiana Code § 34-23-2-1—did not authorize Paternal Grandmother to file a wrongful death action arising from the death of D.N. The trial court granted the motion, finding:

The statute is in derogation of the common law, and thus must be construed strictly and narrowly. It is silent as to the survival and passing of these statutorily created rights in the event of the death of one of the parents. The court finds that the right to pursue a case for wrongful death under the statute remains only with the surviving parent. In this matter, the surviving parent has been named as a liable Defendant, in addition to answering pursuant to the statute as to her right to recover.

The Court finds Mother would be entitled to parental immunity from suit, and, more importantly, is the only remaining person per statute who would be entitled to pursue any claims against her own parents. Under the state of the pleadings[,], she is not electing to do so.

App. Vol. III, p. 37.

[5] The trial court’s grant of summary judgment essentially ended Paternal Grandmother’s lawsuit. Paternal Grandmother appeals, challenging summary judgment only as to the trial court’s ruling that she has no standing to sue.<sup>2</sup>

## Discussion and Decision

[6] Paternal Grandmother claims the trial court erred in granting summary judgment because she, as personal representative of Father’s Estate, was authorized by the CWDS and Indiana Code § 29-1-13-3 to file the wrongful death action as to D.N. We apply the same standard as the trial court when reviewing summary judgment rulings. *Fox v. Barker*, 170 N.E.3d 662, 665 (Ind. Ct. App. 2021). Maternal Grandparents, as the parties seeking summary judgment, bear the burden of showing that no genuine issues of material fact exist and they are entitled to judgment as a matter of law. *Id.* Summary judgment is improper if Maternal Grandparents failed to meet this burden. *Id.* Consistent with our standard of review, we construe all factual inferences in Paternal Grandmother’s favor but all doubts as to the existence of a material issue against Maternal Grandparents. *Id.* at 665-66.

### I. Paternal Grandmother Is Not Authorized to File Under CWDS

[7] At issue is the CWDS, which provides, in relevant part:

---

<sup>2</sup> Paternal Grandmother does not challenge the trial court’s ruling that Mother is immune from liability.

(c) An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child. The action may be maintained by:

- (1) the father and mother jointly, or either of them by naming the other parent as a codefendant to answer as to his or her interest;
- (2) in case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and
- (3) a guardian, for the injury or death of a protected person.

(d) In case of death of the person to whom custody of a child was awarded, a personal representative shall be appointed to maintain the action for the injury or death of the child.

(e) In an action brought by a guardian for an injury to a protected person, the damages inure to the benefit of the protected person.

Ind. Code § 34-23-2-1.

[8] Paternal Grandmother claims her authority to sue under the CWDS arises from subsection (d) above as well as from Indiana Code § 29-1-13-3. The latter provides in relevant part:

Every personal representative shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such personal representative, for any demand of whatever nature due the decedent or his estate or for the recovery of possession of any property of the estate . . . .

[9] Paternal Grandmother essentially argues that Father, at the time of his death, was pursuing the wrongful death action as a custodial parent of D.N. under subsection (c) of the CWDS. She asserts that after Father's death, she, as

personal representative of Father's estate, was authorized by subsection (d) of the CWDS to file the wrongful death action Father had pursued but not filed.

[10] Mother and Maternal Grandparents contend Father was never "awarded" custody of D.N. and, therefore, Paternal Grandmother, as personal administrator, is not among the persons whom subsection (d) of the CWDS authorizes to "maintain" a child wrongful death lawsuit. They also assert Paternal Grandmother does not meet the requirements of subsection (d) because Father never filed a wrongful death lawsuit. In their view, subsection (d), at most, allows a personal representative to continue an action already filed, not to initiate it.

[11] Wrongful death actions are purely statutory. *Estate of Sears v. Griffin*, 771 N.E.2d 1136, 1138 (Ind. 2002). At common law, personal injury actions did not survive the injured party's death, meaning no tort liability for killing another existed. *Id.* The CWDS must be strictly construed because it is in derogation of the common law. *See, e.g., Durham ex rel. Estate of Wade v. U-Haul Intern.*, 745 N.E.2d 755, 759 (Ind. 2001) (stating wrongful death statutes should be strictly construed against the expansion of liability). When interpreting the CWDS, our goal must be to discern and further the intent of the legislature, giving the words in the statute their ordinary meaning. *West v. Ind. Sec'y of State*, 54 N.E.3d 349, 353 (Ind. 2016).

[12] Strictly construed, the plain language of the CWDS authorizes three categories of people to "maintain" a child wrongful death lawsuit: 1) parents; 2) the child's

guardian; and 3) the personal representative of the estate of a person who had been awarded custody of the child. I.C. § 34-23-2-1(c), (d). To avoid any violation of a non-custodial parent’s right to equal protection under the Fourteenth Amendment, we have interpreted the CWDS “to permit non-custodial parents [as well as custodial parents] standing to bring an action for the wrongful death of a child,” despite contrary language in the CWDS. *Chamness v. Carter*, 575 N.E.2d 317, 319-21 (Ind. Ct. App. 1991) (interpreting an earlier version of the child wrongful death statute, then codified as Indiana Code § 34-1-1-8).

[13] The parties agree Father could have filed the wrongful death action during his lifetime. Appellant’s Br., p. 15; Appellee’s Br., p. 14. Therefore, the only issue is whether subsection (d) authorized Paternal Grandmother, as personal representative of Father’s estate, to file the action after Father’s death. We conclude it does not.

[14] When interpreting statutes, the plain language of the statute is “the first and often the last resort.” *Murray v. Conseco, Inc.*, 795 N.E.2d 454, 460 (Ind. 2003). The plain language of the CWDS reflects a legislative intent to afford parents the sole right to decide whether to file a child wrongful death action except when both parents lack custody of the child at the child’s death.

[15] This legislative intent is reflected plainly throughout the CWDS. First, the CWDS’s title—“Action by Parent or Guardian”—suggests wrongful death actions may only be filed by parents and guardians, not by grandparents who

are not guardians. *City of Alexandria v. Allen*, 552 N.E.2d 488, 492 (Ind. Ct. App. 1990) (noting title of statute in determining its scope), *reh. denied*.<sup>3</sup>

[16] The legislature’s focus on parents in the CWDS also is evident in its treatment of damages. The CWDS specifically limits damages recoverable in a child wrongful death action to those sustained by parents or, to a lesser extent, guardians. *See* Ind. Code § 34-23-2-1(f) (specifying recoverable damages under the CWDS are the child’s medical, funeral, burial, and estate administration expenses, counseling costs for parents or siblings related to the death, uninsured debts of the child for which the parent is responsible, and loss of the child’s love, companionship, and “services”). Full statutory damages are available only if at least one parent is alive, and no damages accruing after the death of both parents are recoverable at all. I.C. § 34-23-2-1(g), (h). This is the case even if a guardian files the wrongful death action under the authority of Indiana Code § 34-23-2-1(c)(3). *Id.*

[17] Once damages are awarded under the CWDS, the statute effectively prevents virtually anyone but parents from collecting those monies. Damages recovered for counseling costs, uninsured debts of the child, and the loss of the child’s love, companionship and services are distributed equally to the parents if they

---

<sup>3</sup> Paternal Grandmother makes clear in her appellate brief that she is proceeding as personal representative under subsection (d) of the CWDS and not as a guardian under subsection (c). Although Paternal Grandmother suggested in the trial court proceedings that she may have been a *de facto* guardian of D.N., she never was appointed guardian of D.N. by a court. A *de facto* guardian has no authority to file a child wrongful death action. *Parsley v. MGA Fam. Grp., Inc.*, 103 N.E.3d 651, 655 (Ind. Ct. App. 2018).



both had custody of the child at the child's death. I.C. § 34-23-2-1(i)(1). Where one parent or a grandparent had custody of the child, such damages are split between the custodial parent or grandparent and the non-custodial parent(s). I.C. § 34-23-2-1(i)(2). Only when both parents are dead are such damages paid to a custodial grandparent. I.C. § 34-23-2-1(i)(3). But a parent or grandparent who abandoned a deceased child recovers nothing under the CWDS. I.C. § 34-23-2-1(i). The remaining damages recoverable in a child wrongful death action are for services—medical, funeral, burial, and estate administration—typically provided and billed by third parties to the child's parents or guardian. *See* I.C. § 34-23-2-1(f), (i).

[18] These provisions of the CWDS evince a clear legislative intent to create a statute focused on recovery by parents and not other relatives or third parties. Of course, legislative intent also can be gleaned from what the statute does not say, and such silence speaks volumes here. *City of Lawrence Utils. Serv. Bd. v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017). Unlike Indiana Code § 34-23-1-1, the general wrongful death statute (GWDS), the CWDS does not expressly authorize the personal representative of the deceased person—an adult under the general wrongful death statute and a child under the CWDS—to bring a wrongful death action. I.C. § 34-23-2-1. Incorporating that language from the GWDS into the CWDS would have been one means of allowing third parties to file a child wrongful death lawsuit, but the legislature effectively barred it.

[19] The clear legislative intent of the CWDS was to give parents the exclusive right to file a wrongful death action except where both parents lacked custody of the

child at the time of the child's death. The only person other than a parent who is specifically named in subsection (c) of the CWDS is a child's guardian, who would have custody only when the parents do not.<sup>4</sup> In other words, only people with custody of the child at the child's death are authorized under subsection (c) to pursue a wrongful death action. If both parents die before any child wrongful death action is filed and at least one of the parents had custody of the child at the child's death, the CWDS does not authorize *anyone* to file a wrongful death action after the parents' deaths. I.C. § 34-23-2-1(c)(3), (g)-(h).

[20] Given the directives of the CWDS, Paternal Grandmother had no standing to file a wrongful death action as to D.N. *See* I.C. § 34-23-2-1. After Father died, Mother was the only person authorized by the statute to file the action, and she chose not to do so. Just because Paternal Grandmother disagreed with Mother's inaction does not mean Paternal Grandmother may sue in Mother's place, as the CWDS does not expressly permit that action. *See Durham*, 745 N.E.2d at 759 (noting strict construction of CWDS is required). Paternal Grandmother essentially is asking this Court to "engraft new words onto a statute or add restrictions where none exist," an invitation we must decline. *Kitchell v. Franklin*, 997 N.E.2d 1020, 1026 (Ind. 2013).

---

<sup>4</sup> Although limited guardianships are possible (such as for educational or financial matters), we do not believe the CWDS's reference to "guardian" includes a guardian who lacks custody of the child. *See* Ind. Code § 29-3-5 et seq.; Ind. Code § 29-3-1-6 ("Guardian . . . includes . . . limited guardian . . .").

## II. Probate Statute Does Not Authorize Paternal Grandmother's Filing

[21] The probate statute upon which Paternal Grandmother relies—Indiana Code § 29-1-13-3—does not call for a different result. That statute provides Paternal Grandmother, as personal representative of Father's estate, the right to sue for damages owed Father at his death. *See* I.C. § 29-1-13-3. Father had a right under the CWDS to file a wrongful death lawsuit during his lifetime. I.C. § 34-23-2-1(c). However, Father's right to file the lawsuit for the wrongful death of his child expired at Father's death under the CWDS. I.C. § 34-23-2-1(c). As neither Father nor Mother ever filed a wrongful death lawsuit against Maternal Grandparents, Maternal Grandparents owed nothing to either Father or his estate as a result of D.N.'s death. Therefore, Paternal Grandmother, as personal representative of Father's estate, had nothing to collect from Maternal Grandparents under Indiana Code § 29-1-13-3.

[22] The judgment of the trial court is affirmed.

Kirsch, J., and Altice, J., concur.