

**In the Matter of the Appointment of a Trustee for the Heirs of Mary LaVerne
Gilliard.**

C2-91-1811

COURT OF APPEALS OF MINNESOTA

1992 Minn. App. LEXIS 243

**March 5, 1992, Decided
March 17, 1992, Filed**

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

PRIOR HISTORY: Appeal from District Court, Hennepin County; Hon. Ann Montgomery, Judge. District Court File #895541

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, a putative trustee, appealed the judgment of the District Court, Hennepin County (Minnesota) which dismissed her wrongful death action on behalf of the deceased's estate because a trustee had not been appointed in time to save the action from the expiration of the statute of limitations.

OVERVIEW: The deceased died in an elevator accident. A putative trustee for the deceased's heirs sought to bring a wrongful death action against the elevator company and others within the three-year limitation period of the wrongful death act. Although she timely filed a petition for appointment as trustee, accompanied by a complaint, with the court administrator, the court administrator did not properly route the petition for judicial action. Subsequently, after the three-year limitation period expired, it was discovered that the appointment had not occurred. The trial court eventually dismissed the action on grounds that a trustee had not been appointed in time to save the action from the expiration of the statute of limitations. On appeal, the court reversed finding that the putative trustee complied with all statutory requirements to be appointed trustee before the statute of limitations had run and that her failure to be appointed was due to an error or omission of the trial court for which she should not be penalized. The court held that it had authority, under Minn. R. Civ. P. 60.01, to correct what was in es-

sence a clerical mistake arising from oversight or omission.

OUTCOME: The court reversed the judgment of the trial court.

CORE TERMS: wrongful death action, appointment, appointed, omission, statute of limitations, administrator's, clerical, elevator, wrongful death statute, failure to respond, apartment building, dispositive

LexisNexis(R) Headnotes

*Estate, Gift & Trust Law > Estates Created by Trusts & Wills > General Overview
Torts > Wrongful Death & Survival Actions > General Overview*

[HN1] A trial court's failure to respond to a petition for the appointment of a trustee for the purpose of initiating a wrongful death action is a clerical error which cannot be dispositive of the petition under Minn. R. Civ. P. 60.01.

*Governments > Courts > Common Law
Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Wrongful Death & Survival Actions > Defenses > Statutes of Limitations*

[HN2] *Minn. Stat. § 573.02, subd. 1* (1990) provides that a wrongful death action must be brought within three years of the date of death, provided that the action is brought within six years after the wrongful act or omission. The wrongful death statute, although liberally construed, creates actions in derogation of the common law so that rights under the statute cannot be enlarged by the courts. The statute of limitations under the wrongful death statute is strictly construed.

Civil Procedure > Parties > Capacity of Parties > General Overview

Torts > Wrongful Death & Survival Actions > General Overview

[HN3] *Minn. Stat. § 573.02, subd. 1* requires that a wrongful death action be brought by a duly appointed trustee. The Minnesota Supreme Court has held that the appointment of a trustee is a jurisdictional prerequisite to filing or maintaining a wrongful death action.

Civil Procedure > Counsel > General Overview

Civil Procedure > Appeals > Records on Appeal

[HN4] Under *Minn. R. Civ. P. 60.01*, the court may correct clerical mistakes in the record which arise from oversight or omission.

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JUDGES: Considered and decided by Crippen, Presiding Judge, Parker, Judge, and Stone, * Judge.¹

* Retired judge of the district court, acting as judge of the Court of Appeals by appointment pursuant to *Minn. Const. art. VI, § 2*.

¹ Consistent with the request of counsel for respondent Twin City Elevator, we have not considered information received after oral argument.

OPINION BY: GARY L. CRIPPEN

OPINION

UNPUBLISHED OPINION

CRIPPEN, Judge

[HN1] A trial court's failure to respond to [*2] a petition for the appointment of a trustee for the purpose of initiating a wrongful death action was a clerical error which cannot be dispositive of the petition under *Minn. R. Civ. P. 60.01*. We reverse.

FACTS

In August 1987, Mary Laverne Gilliard was fatally injured in an elevator accident which occurred at her Minneapolis apartment building. The apartment building was operated by respondent Minneapolis Community Development Agency and the elevator was serviced by respondent Twin City Elevator Company, Inc. Appellant, as putative trustee for the defendant's heirs, sought to bring a wrongful death action against respondents within the three year limitation period of the wrongful death act. In March 1987, appellant filed a petition for appointment as trustee, accompanied by a complaint, with the Hennepin County Court Administrator. However, the court administrator did not route the petition for judicial action, nor did appellant's attorney take action to ensure that the petition for the appointment of a trustee was routed to a judge for a response within the wrongful death act's three-year limitation period.

It was discovered in May 1991 that the 1987 appointment had not occurred. [*3] Process in the case had then unfolded for four years and it is undisputed respondents were not prejudiced by inaction on the 1987 petition. After a hearing on the issue, the trial court dismissed the action because a trustee had not been appointed in time to save the action from the expiration of the statute of limitations. Appellant argues that she complied with all statutory requirements to be appointed trustee before the statute of limitations had run and that her failure to be appointed trustee was due to an error or omission of the trial court for which she should not be penalized.

DECISION

[HN2] *Minn. Stat. § 573.02, subd. 1* (1990) provides that a wrongful death action must be brought within three years of the date of death, provided that the action is brought within six years after the wrongful act or omission. The wrongful death statute, although liberally construed, creates actions in derogation of the common law so that rights under the statute cannot be enlarged by the courts. *Beck v. Groe*, 245 Minn. 28, 33-34, 70 N.W.2d 886, 891-92 (1955). The statute of limitations under the wrongful death statute is strictly construed. *Berghuis v. Korthuis*, 228 Minn. 534, 536, 37 N.W.2d 809, 810 (1949). [*4]

[HN3] The statute requires that a wrongful death action be brought by a duly appointed trustee. *Minn. Stat. § 573.02, subd. 1*. The Minnesota Supreme Court has held that the appointment of a trustee is a jurisdictional prerequisite to filing or maintaining a wrongful death action. *Regie de l'assurance Auto. du Quebec v. Jensen*, 399 N.W.2d 85, 90-92 (Minn. 1987).

The circumstances of the instant case compel a result different than that suggested by Jensen. Here, a

timely application was made for the appointment of a trustee. There is no claim that the petition was not in proper form or that there was a legal impediment to ordering the appointment. The sole question before us is the legal effect of the omission caused by the court administrator's failure to bring the application to the court's attention and the attorney's failure to ensure that an order appointing a trustee was considered and signed. [HN4] Under Minn. R. Civ. P. 60.01, the court may correct clerical mistakes in the record which arise from oversight or omission. Although the attorney's filing of a petition

may not constitute presentation to a judge, the failure to respond to the petition was a clerical error [*5] which cannot be given dispositive effect under the circumstances of this case.

Reversed.

Gary L. Crippen

March 5, 1992