

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001202-MR

LOIS CLARK; AND FRED CLARK, NOW DECEASED

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 96-CI-01742

CITY OF FRANKFORT; AND RICHARD  
D. WHELAN, NOW DECEASED

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Lois Clark (Appellant) and Fred Clark<sup>1</sup> appeal the order of the Franklin Circuit Court dismissing the claim of Fred Clark and denying Appellant's motion pursuant to CR 6.02 for additional time to revive the action under CR 25.01. She argues on appeal that under the circumstances it was not necessary to revive the claim of Fred Clark after his death;

---

<sup>1</sup> Although Fred Clark is named as an Appellant, he passed away on April 12, 1998.

that Appellants substantially complied with the requirements of the revival statute, KRS 395.278; or, in the alternative, that Appellant should be allowed additional time to revive the action pursuant to CR 6.02 and CR 25.01. Finally, she argues that Appellees did not affirmatively assert the alleged failure to comply with the statute, and so waived this claim. Appellees respond that the claim of Fred Clark was properly dismissed, not being revived pursuant to law, and assert that they did not waive their right to seek dismissal.

On November 25, 1996, Lois and Fred Clark filed suit for personal injuries against the City of Frankfort and Richard D. Whelan.<sup>2</sup> Fred Clark died on April 12, 1998. On May, 6, 1998, Lois Clark was appointed Executrix of Fred Clark's estate. Appellant notified Appellees of Fred Clark's death on September 4, 1998. On April 4, 2002, the Appellees moved to dismiss the claims of the decedent, Fred Clark, based upon the failure of Appellant to revive his claim timely pursuant to KRS 395.278. The Franklin Circuit Court entered an order on May 24, 2004, dismissing Fred Clark's claim with prejudice. Appellant appeals that order. We affirm.

KRS 411.140 allows for a personal injury action to be revived by personal representative of the decedent. Hammons v. Tremco, Inc., 887 S.W.2d 336, 337 (Ky. 1994). Revival of a

---

<sup>2</sup> Richard Whelan is also deceased.

cause of action of a decedent by the decedent's personal representative is governed by KRS 395.278, which states, "[a]n application to revive an action . . . shall be made within one (1) year after the death of a deceased party." KRS 395.278.

KRS 395.278 operates as a statute of limitations; therefore, revival of a decedent's action within the period set forth in the statute is mandatory and not subject to enlargement. Hammons, 887 S.W.2d at 338. This provision has always been strictly construed. Daniel v. Fourth and Market, Inc., 445 S.W.2d 699 (Ky. 1968). As KRS 395.278 is not a statute "relating to pleading, practice or procedure," the time period required by the statute is mandatory, which prevents a party or the court from extending such time under CR 6.02. Mitchell v. Money, 602 S.W.2d 687, 688 (Ky.App. 1980). An action not revived within the one-year statutory period of this provision must be dismissed. Snyder v. Snyder, 769 S.W.2d 70, 72 (Ky.App. 1989).

The Appellant's primary argument is that "under the circumstances" there was no necessity for revival. The circumstances appellant cites are that Lois was already a party to the litigation, and after Fred's death Lois was appointed executrix of his estate. Additionally, Lois was Fred Clark's sole heir according to his Last Will and Testament, and so any damages recovered as a result of the suit on behalf of the

estate of Fred Clark would pass to Lois. Appellant argues that under all of the above circumstances, no substitution of parties or revival of the action was required to be taken. However, Appellant cites no authority for her claim that under those circumstances compliance with the revival statute, KRS 395.278, was not necessary. The law clearly supports the Appellee's position, and the court's order.

Appellant further argues substantial compliance with the intent of the revival statute by giving notice of Fred Clark's death to the other parties. However, we disagree with Appellant that the revival statute is only concerned with notice. Instead, revival of a decedent's claim serves to allow another party to succeed to the decedent's rights and status as a litigant. Snyder, 769 S.W.2d at 72. Thus, giving notice was not enough to revive the claim, and the statute should have been followed.

Appellant's alternative argument, waiver of the right to dismissal, is inapplicable here. Defendants who act between the time of a claimant's death and the appointment of a personal representative do not waive their right to have the action dismissed, since they have no reason to presume the action would not be revived in due course. Daniel, 445 S.W.2d at 701.

Furthermore, Lois' claim that Appellees' actions after receiving notice of Fred Clark's death constitute waiver of

their right to dismissal is misplaced. Appellees' actions continued after notice of Fred's death because Lois Clark's claim against Appellees still existed and action was necessary to move the case forward to resolution.

We conclude the Franklin Circuit Court was correct in granting Appellees' motion to dismiss. For the foregoing reasons, we affirm the order of the Franklin Circuit Court granting the Appellees' motion to dismiss and denying Lois Clark's motion for additional time to revive the action pursuant to CR 6.02.

MINTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

James Dean Liebman  
Liebman and Liebman  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Richard D. Bissell  
Boehl, Stopher and Graves  
Frankfort, Kentucky