*In re Est. of Williams v. Welsh,* 2023 OK 103, \_\_ P.3d \_\_

 *In re Estate of Williams* answers the first impression question whether wrongful death proceeds can be transferred into a trust before they are obtained by the trust settlor. The Court answers that they can, and if they are, they belong to the trust. *Id.* at ¶ 1.

 The Court characterizes the “cause” as “concern[ing] a lengthy, convoluted court battle over the estate of Katha Williams . . . and the distribution of her interest of $1,178,157.44 from a wrongful death lawsuit involving her son. . . .” *Id.* at ¶ 2. That characterization was an understatement.

 The William’s son, Elliot died in jail in 2011 after being arrested by Owasso police for causing a disturbance (he was paralyzed from a neck injury while in the jail and treatment was withheld resulting in his death). Elliot was married at the time but had no children. Both his probate and a wrongful death action were filed the same day—the probate in Tulsa County, the death action in the Northern District federal court, naming the Tulsa County Sheriff as defendant. Per the wrongful death statute, 12 O.S. § 1053, damages under such circumstances (where the decedent has a surviving spouse and parents, but no children) are distributed to the spouse and parents—in accordance with Oklahoma’s law of descent and distribution, set out in 84 O.S. § 213. *Id.* at ¶ 4.

 In 2014, Katha Williams and her husband (Elliot’s parents) established a family trust and each also executed wills leaving each of their estates to the trust. Both wills listed “heirs,” including each other as “spouse,” their eight living children, and the deceased Elliot. Several months after the trust and wills were created, Katha Williams died.

Three years later, final judgment was entered on a jury verdict in the wrongful death action for $10 million in compensatory damages and $250,000 in punitive damages. The next day, a daughter filed Katha’s probate in Tulsa County. The court admitted Katha’s will to probate and issued letters testamentary appointing the daughter as personal representative. About two years later, the Tenth Circuit affirmed in part and reversed in part the wrongful death judgment (the reversal merely gave the Sheriff a set-off). The parties then settled the wrongful death action for $10 million, plus post-judgment interest.

“At some point” in 2017 (the Court notes that the record is unclear), Katha’s husband was placed under a guardianship in Tulsa County. He died in 2019—after the Tenth Circuit decided the appeal in the wrongful death action, but before that case was settled post appeal. The same daughter then probated his estate as well. The husband’s will was attached, listing the same eight living children and the deceased Elliot, as in Katha’s will. On January 6, 2020, the trial court appointed the daughter as personal representative of her father’s estate. “At this point, Elliot’s, Katha’s, and Earl’s [Katha’s husband] estates were all still pending.” *Id.* at ¶ 8.

On May 11, 2020, the trial court admitted Earl’s will to probate and appointed a replacement administrator, Attorney Catherine Welsh (the Court had no explanation for the substitution). Welsh then filed a “Certificate to Make Election by Surviving Spouse” on behalf of Earl, in Katha’s probate. This was “an apparent attempt for the deceased’s husband’s election against his wife’s will, even though 84 O.S. 2021 §44(B)(4) requires such an election to be done during the lifetime of the surviving spouse.” *Id.* at ¶ 10.

A few months later, the daughter, as trustee of the family trust, sought a determination that the proceeds of Elliot’s wrongful death case were property of the family trust rather than Katha Williams probate estate. Attached to the motion was a copy of a portion of the trust along with a purported 2014 assignment by the Williamses of their interest in the wrongful death judgment to the trust. In response the probate court entered an order determining that the proceeds were not property of the probate estate. The trial court allocated proceeds in the amount of $1,178,057.44 to be distributed to the family trust.

Attorney Welsh sought original jurisdiction review in the Supreme Court, characterized by the respondent (and the Court) as an attempt to circumvent the usual appeal process. The Court ordered the filing of an “amended petition in error” instead. Welsh then appealed the probate order. The response claimed the appeal was “immaterial” because the entirety of Katha’s estate goes into the trust. The Court of Civil Appeals affirmed the probate decision and the Supreme Court then agreed to certiorari review.

Welsh argued that the wrongful death claim was unassignable because it was a tort claim, and that that also made the proceeds unassignable. The respondent argued that the proceeds were assignable and transferrable to the trust, and thus belonged in the trust and were not part of the probate estate.

The Court notes that wrongful death actions were unknown to the common law and are created by statute. As such, a wrongful death action is not “a separate and distinct tort, but is an action which derives from the rights of the decedent.” *Id.* at ¶ 18. Thus, whatever rights the decedent may have had, in life, accrue to the personal representative at death. *Id.*

Next the Court holds that a cause of action for wrongful death “cannot be assigned or transferred.” *Id.* at ¶ 19. That too is because such actions are “purely statutory” and thus may be brought only by those authorized to do so by the statute. *Id.* But the Court then distinguishes the transfer or assignment of proceeds from a wrongful death action from a transfer or assignment of a cause of action not arising on contract. *Id.* at ¶ 20. This distinction is important because it takes the assignment outside the operation of 12 O.S. § 2017 which forbids assignment of a cause of action not arising out of contract. This case, says the Court, concerns the former rather than the latter.

After laying the above groundwork, the Court then notes that the wrongful death action was filed before Elliot’s parents created their wills and the trust. The both also died before the wrongful death proceeds were determined or distributed. Thus, the question becomes: “whether the proceeds from the pending wrongful death action are transferable, not just from anyone to just anyone, but by the statutorily entitled beneficiaries into their trust for estate planning.” *Id.* at ¶ 20. To answer that question, the Court addresses “prior wrongful death cases. . . .” *Id.*

Per the Court, two prior wrongful death cases “stand out.” *Id.* at ¶ 21. They are *City of Shawnee v. Cheek,* 1913 OK 739, 137 P. 724, and *Aetna Cas. & Sur. Co. v. Young,* 1924 OK 394, 231 P. 261. In *Cheek,* like here, the wrongful death beneficiary (a father) died before his son’s wrongful death action went to trial. The mother then revived the wrongful death action as administratrix of the father’s estate. In that case, the Court holds that a wrongful death action is like property—it is a pecuniary right”—created by statute. *Id.* (citing a New York rule). *Cheek* also relies upon a New Jersey case that holds that the death of a wrongful death beneficiary “cannot be made to abrogate the liability of the wrongdoer because the pecuniary injury was already sustained.” *Id.* at ¶ 23. Since the right to compensation vests in the beneficiary immediately upon the death of the wrongful death victim, the right to recovery is not precluded just because the wrongful death statute does not say what happens when the beneficiary dies before the death action is decided. But, notes the Court in that instance, the “injury sustained” (meaning, presumably, the beneficiary’s “injury”) is limited to the duration and extent of the beneficiary’s lifetime. *Id.*

The Court then applies the above to hold that a wrongful death *cause of action* may not be assignable, but such actions are “similar to a property right” in that they vest in the beneficiaries upon the wrongful death. *Id.* at ¶ 24. Thus, Katha’s rights vested upon the death of her son and “[s]he never transferred, or attempted to transfer, her right.” *Id.* By saying she did not attempt to transfer her “right,” presumably the Court means her right of action rather than her right to benefits. Accordingly, holds *Williams,* Katha did not violated the 12 O.S. § 2017 prohibition of assigning claims not arising out of contract. *Id.*

The Court then turned to *Young,* “a case concerning distribution of wrongful death proceeds.” *Id.* at ¶ 26. There, the Court holds that such proceeds do not belong to the estate of the deceased (referring here to Elliot rather than to Katha), but are rather held in trust for the benefit of the wrongful death beneficiaries. *Id.* That creates a duty on the part of the “trustee” to properly distribute the money to the wrongful death beneficiaries. Under the rationale of this case, the Court notes that the wrongful death proceeds are “akin to trust funds held for statutory beneficiaries such as Katha, for her benefit.” *Id.* at ¶ 27. The Court also quotes in this regard 25A C.J.S. Death § 118, (August 2023 Update), for a rule that wrongful death statutes give beneficiaries an enforceable beneficial interest in wrongful death proceeds:

The trust under which the personal representative or other statutory wrongful death plaintiff holds the damages recovered [\*\*18] in a wrongful death action may be enforced by the beneficiaries. HN9 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.

 Applying all of the above, the Court then holds that the beneficial interest conferred by the wrongful death statute inures to the beneficiary’s exclusive benefit. *Id.* But, nothing about the nature of the “anticipated [wrongful death] funds” prevented Katha from transferring her *interest* in them to the family trust for estate planning purposes. *Id.* Nor has the legislature prohibited such a transfer in either the wrongful death statutes or the wills and trusts statutes. *Id.*

After discussing prior wrongful death cases, the Court turns to trust law, first citing general rules governing trusts: (1) A trust in relation to real or personal property may be created for any purpose for which a contract may be made; (2) a trust requires a declaration from the owner that he or she holds the property as trustee for another (or for self); (3) the transfer to a trust may be *inter vivos* and/or by will; and (4) the principal of the trust can be set aside for an eventual conveyance to another. *Id.* at ¶ 29.

 Thus, the Williamses employed a common estate planning device of creating a revocable *inter vivos* trust and simultaneously executing pour over tills to provide for their heirs at the time of their death. *Id.* at ¶ 29. By doing that, they intended to transfer their expected wrongful death proceeds into their estate planning “regime.” *Id.* The Court notes the “weight of authority is that such transfers are valid.” *Id.* at ¶30. “One explanation” is that the wrongful death beneficiary’s interest is “not akin to assignment of the right of the action for personal tort.” *Id.* Another explanation is that the interests “amounts to a pecuniary right, akin to property right, where when taken away, compensation is due.” *Id.*

Finally, the Court adopts a long passage from the Utah Supreme Court that “succinctly explains why proceeds for a wrongful death lawsuit are assignable.” *Id.* at ¶ 31. In essence, the Utah court notes such an assignment is not an assignment of the *action*, but only of the *proceeds*. That is because the cause of action “cannot be split up between the heirs but the amount recovered can be.” The Utah court then notes that modern courts adopt a more liberal rule regarding assignment of contingent interests. Such interests are freely assignable “so long as the assignments are fairly made for an adequate consideration without offending public policy.” *Id.*

Here is where *Williams* gets interesting for those of us who do not do estate planning work. According to the Utah holding adopted by our Supreme Court (or at least quoted by it in *Williams*) the modern rule permits one who has sustained personal injuries to assign such proceeds as may possibly be recovered by him or her in an action against the tortfeasor. This is so even though the cause of action is not assignable. *Id.* *“[A] court of equity will enforce the assignment even though the cause of action is not assignable.” Id.*

By the above, our Supreme Court may have answered a question that it left unanswered in *Johnson v. CSAA Gen. Ins. Co*., 2020 OK 110, 478 P.3d 422. *Johnson* permits an insured to assign a claim under a policy despite policy language that says the policy may not be assigned. *Johnson* holds that a “matured” claim is an assignable “chose in action” because it does not increase the risk assumed by the insurer. That holding was not too surprising in itself. But the insurer in *Johnson* asked the Court to also decide whether the assignment included the insured’s *bad faith claim—a tort claim* (in other words a claim not arising out of contract)—as well (on this basis, the insurer argued the appeal should have been dismissed because an assignment of only the contract claim, argued the insurer, “impermissible split the [claims]”). The Court did not answer that question because it was not decided first by the trial court. The reasoning of the Utah court adopted by our Supreme Court, however, seems broad enough to encompass a bad faith claim—whether or not that claim is characterized as a “pure tort” or a “tort arising out of contract” (another issue raised but not answered by *Johnson*). Incidentally, Justice Kane dissented in *Johnson,* stating that he would have addressed the tort claim as well and held that it was not assignable. Curiously, though, justices (with all the other justices) concurred in *Williams.*

In the end, the Court holds that nothing more exciting occurred in *Williams* than a transfer into a revocable *inter vivos* trust for estate planning purposes. *Id.* at ¶32. The transfer was Katha’s personal interest in the proceeds of the wrongful death action *to Katha as settlor, trustee, and beneficiary of the trust. Id.* No consideration is required for such a transfer. And prohibiting such a transfer is “counterintuitive to the nature of a trust, general estate planning altogether [sic]” and “contradictory” to prior wrongful death holdings. *Id.* Additionally, notes the Court in a “belt and suspenders” approach, even if the funds were not placed in the trust when received Katha’s pour over will would have placed them there as well. *Id.* at ¶ 33. Since that was Katha’s “unambiguous intent as evidenced on the fact of her will, the trust, and the assignment,” equity would recognize the transfer. *Id.*