



Supreme Court of Virginia.  
 Irene T. **DOUGLAS**

v.

**CHESTERFIELD COUNTY POLICE DEPARTMENT, et al.**

Record No. 951355.  
 March 1, 1996.

Decedent's wife brought civil rights action against city **police department** and **police** officers, alleging decedent died when he was taken into custody pursuant to commitment order. The United States District Court for the Eastern District of Virginia certified question of Virginia law. The Supreme Court, [Koontz](#), J., held that wife's qualification as decedent's personal representative did not relate back to last day of two-year statute of limitations, so as to make her federal civil rights action based on decedent's death timely.

Question answered.

West Headnotes

### Limitation of Actions 241 82

#### [241](#) Limitation of Actions

##### [241III](#) Computation of Period of Limitation

##### [241III\(D\)](#) Death and Administration

[241k82](#) k. Accrual of Cause of Action Before Issuance of Letters Testamentary or of Administration. [Most Cited Cases](#)

Wife's qualification as decedent's personal representative did not relate back to last day of two-year statute of limitations, so as to make her federal civil rights action based on decedent's death timely, where wife had not qualified as personal representative until after she filed her federal action, when all applicable limitations and extensions had expired. [Code 1950, § 8.01-229](#), subd. B, par. 6.

\*\*474 \*364 Upon a Question of Law Certified by the

United States District Court for the Eastern District of Virginia. [Robert A. Dybing](#), Richmond ([John A. Gibney](#); Michael C. Allen; Shuford, Rubin & Gibney; Hairfield, Morton & Allen, on briefs), for plaintiff.

\*\*475 [Steven L. Micas](#), County Attorney ([Jeffrey L. Mincks](#), Deputy County Attorney; [Michael S.J. Chernau](#), Assistant County Attorney, on brief), for defendants.

\*363 Present: All the Justices.

[KOONTZ](#), Justice.

Pursuant to our Rule 5:42, the United States District Court for the Eastern District of Virginia certified a question of Virginia law to this Court which we accepted by order entered September 21, 1995. The question involves the provisions of [Code § 8.01-229\(B\)\(6\)](#) relating to delayed appointment of a personal representative. The order of certification states that the certified question is dispositive of all claims asserted in the action.

The following relevant facts are taken from the district court's order of certification and the record provided to this Court.

On October 9, 1991, at the request of Irene T. **Douglas** (Mrs. **Douglas**), officers of the **Chesterfield County Police Department** (the **Department**) executed a custody order requiring that John F. **Douglas** (Mr. **Douglas**), Mrs. **Douglas's** husband, be committed to a local psychiatric facility. Mr. **Douglas** resisted being taken into custody, which resulted in efforts by the officers to subdue him by forcing him to the floor and subjecting him to a "choke-hold." Mr. **Douglas** was then placed in leg and [wrist restraints](#) and transported to the psychiatric facility specified in the custody order. Mr. **Douglas** was in [car-diac arrest](#) when he arrived at the facility and "subsequently died." [FN1](#)

[FN1](#). Although this phrase is not precise as to the date of his death, the parties do not dispute that Mr. **Douglas** died on October 9, 1991.

\*365 On October 8, 1993, Mrs. **Douglas** first instituted an action in the Circuit Court of the City of Richmond (the state court) against the **Department** and several of its officers (collectively, the defendants). The style of the motion for judgment named Mrs. **Douglas** as “Executrix ... of the Estate of John Frank **Douglas**.” The motion for judgment was never served on any of the defendants and was dismissed by voluntary nonsuit taken on September 29, 1994. Thereafter, Mrs. **Douglas** retained different counsel and instituted the present federal action on March 16, 1995. In her complaint she alleged multiple deprivations of Mr. **Douglas's** constitutional rights in violation of [42 U.S.C. § 1983](#), various tort claims, and violations of the Constitution of Virginia. The complaint was filed in the name of Mrs. **Douglas** as the “executrix” of Mr. **Douglas's** estate. Although Mrs. **Douglas** was named as executrix in Mr. **Douglas's** will, she did not qualify as personal representative of the estate until April 26, 1995.

The defendants moved to dismiss the federal action on the ground that the action was barred by the two-year limitation period provided in [Code § 8.01-244](#). The defendants asserted that since Mrs. **Douglas** failed to qualify as personal representative for Mr. **Douglas's** estate until April 26, 1995, no action had been instituted by a proper party within two years after Mr. **Douglas's** death. In response, Mrs. **Douglas** asserted that the provisions of [Code § 8.01-229\(B\)\(6\)](#) permitted her April 26, 1995 qualification as personal representative to relate back to the last day of the two-year statute of limitations period, that such relating back made her the proper party to bring the state action and the federal action, that the voluntary nonsuit of her state action activated the tolling provisions of [Code § 8.01-229\(E\)\(3\)](#), and, therefore, that the filing of her federal action on March 16, 1995, within six months of the nonsuit, was timely.

The district court certified the following question:

Whether, under the foregoing facts and for the purpose of determining the timeliness of the present action, [[Va.Code § 8.01-229\(B\)\(6\)](#)] operates to deem Mrs. Douglas as having qualified as the personal representative of Mr. Douglas on October 8, 1993.<sup>[FN2]</sup>

[FN2](#). Although the date given in the certified question is October 8, 1993, if we were to

find that [Code § 8.01-229\(B\)\(6\)](#) has application here, the applicable date would be October 9, 1993.

\*366 On brief and during oral argument, the parties addressed at length the question of \*\*476 what tolling provision applied in light of Mrs. **Douglas's** voluntary nonsuit of her state court action for wrongful death. However, Mrs. **Douglas's** federal proceeding clearly includes personal actions in addition to her claim for wrongful death.

Rather, the certified question focuses upon whether, under the “deeming” provision of [Code § 8.01-229\(B\)\(6\)](#), Mrs. **Douglas's** qualification on April 26, 1995, relates back, as she argues, to the last day of the original two-year limitation period, constituting her as the proper party to file both her state action and her federal action, and making the filing of the federal action timely. We do not think that [Code § 8.01-229\(B\)\(6\)](#) contemplates such relating back as Mrs. Douglas contends and, accordingly, we answer the certified question in the negative.

In pertinent part, [§ 8.01-229](#) provides as follows:

*B. Effect of death of a party.*-The death of a person entitled to bring an action or of a person against whom an action may be brought shall toll the statute of limitations as follows:

1. Death of person entitled to bring a personal action.-If a person entitled to bring a personal action dies with no such action pending before the expiration of the limitation period for commencement thereof, then an action may be commenced by the decedent's personal representative before the expiration of the limitation period including the limitation period as provided by subdivision E3 or within one year after his qualification as personal representative, whichever occurs later.

....

6. Delayed qualification of personal representative.-If there is an interval of more than two years between the death of any person in whose favor ... a cause of action has accrued or shall subsequently accrue and the qualification of such person's personal representative, such personal representative shall, for

the purposes of this chapter, be deemed to have qualified on the last day of such two-year period.

\*367 We think that the “deeming” language of [§ 8.01-229\(B\)\(6\)](#) was intended to address the problem of a personal representative attempting to extend the applicable statute of limitations indefinitely by delaying qualification. In response to this problem, (B)(6) sets an outer time limit for the filing of a personal action on behalf of the estate of a decedent when there is an interval of more than two years between the death of the decedent and the qualification of his personal representative, with the time running from the last day of such two-year interval. As the Revisers' Note to [§ 8.01-229](#) explains, the “deeming” language in (B)(6) was included “for the purpose of measuring the applicable statute of limitation [and extensions thereof].”

For example, where the applicable statute of limitations is two years from the death of the decedent as suggested by the certified question in the present case, if, as contemplated by [§ 8.01-229\(B\)\(6\)](#), no personal representative has qualified on an estate during an interval of more than two years after the death of the decedent, the additional one year allowed by [§ 8.01-229\(B\)\(1\)](#) for the filing of a personal action will start to run on the deemed date of qualification, *viz.*, the last day of the two-year period, thus providing an outer time limit of three years for such filing. Or, if the plaintiff takes a nonsuit on the last day of the three-year period, the tolling provision of [§ 8.01-229\(E\)\(3\)](#), interacting with the “deeming” provision of [-229\(B\)\(6\)](#), fixes the outer time limit at three and one-half years.<sup>FN3</sup>

<sup>FN3.</sup> [Code § 8.01-229\(E\)\(3\)](#) provides in pertinent part as follows:

If a plaintiff suffers a voluntary nonsuit ..., the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer.

This does not mean, however, that the filing is

timely when the personal representative fails to qualify until after the action is filed or that a subsequent qualification validates the filing. See [Code § 64.1-136](#) (executor without power until qualification). There is nothing in the language of [\\*\\*477§ 8.01- 229\(B\)\(6\)](#) indicating the legislative intent to eliminate the necessity of a personal representative having qualified at the time an action is filed or to relate a later qualification back to the date of the filing.

Here, Mrs. Douglas did not qualify as personal representative until after she filed her federal action, when all applicable limitations \*368 and extensions had expired.<sup>FN4</sup> Hence, she was not a proper party to file the action, and her qualification did not relate back and validate the filing of the federal action.

<sup>FN4.</sup> We expressly do not decide that Mrs. Douglas was entitled to the benefit of the tolling provisions of [Code § 8.01-229\(E\)\(3\)](#). Rather, because the result is the same, we will assume that she was.

*Certified question answered in the negative.*

Va., 1996.  
Douglas v. Chesterfield County Police Dept.  
251 Va. 363, 467 S.E.2d 474

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