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TORTS—CLASSES OF BENEFICIARIES IN DEATH BY WRONGFUL ACT STATUTE

On December 30, 1951 plaintiff's decedent, fourteen years of age, was killed when defendant's automobile, which he occupied as a guest and which was parked crosswise on Route 60 east of Clifton Forge, was violently struck by the oncoming car of another defendant. Plaintiff brought action under the death by wrongful act statute¹ against the owner of the car occupied by the decedent and against the driver of the other automobile involved in the accident. The trial court entered judgment on the verdict for the defendants. Upon appeal, *held*, reversed and remanded to the trial court for a new trial limited to the issue of the amount of damages to be awarded, and the apportionment thereof, to the statutory beneficiaries. The Supreme Court of Appeals held that when uncontradicted evidence shows that the automobile was crosswise in the road, either because of the act of the defendant or of his agent in his presence, defendant was guilty of gross negligence with reference to the decedent and was liable for his death, as was also the driver of the automobile who had approached at excessive speed without keeping a proper lookout. *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E.2d 654 (1953).

In this case the inequity of the inflexibility of the classes provided by the Code² is manifest. Decedent's parents separated before his birth and were later divorced. His father never contributed in any way to his support, and his mother cared for him only until he was eighteen months old, at which time she placed the child with her parents and obtained employment in another town. Later she remarried and now has five children by her second marriage. Although decedent continued to live with his grandparents, he visited his mother at reasonable intervals and she contributed in a minor way to his support. Following the applicable

1. Virginia Code of 1950, §8-633 ("Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation...and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action...and to recover damages in respect thereof, then, and in every such case, the person who, or corporation...which, would have been liable, if death had not ensued, shall be liable to an action for damages...").
2. Virginia Code of 1950, §8-636 (Cum. Supp. 1952) ("Amount and distribution of damages.—The jury in any such action may award such damages as to it may seem fair and just, not exceeding twenty-five thousand dollars, and may direct in what proportion they shall be distributed to the surviving widow or husband and children and grandchildren of the deceased, or if there be none such, then to the parents, brothers and sisters of the deceased. Nothing shall be apportioned to the parents, brothers and sisters of the deceased, if there be a surviving widow or husband, children or grandchildren, but between members of the same class the jury shall have absolute discretion as to who shall receive the whole or any part of the recovery.").

statutory provisions, the court held that the mother and the father, even though the latter had never contributed to the support of the decedent, and the brother and four sisters of the half blood fall within the same class and may participate in the damages awarded if the jury or trial court should specify, while the faithful grandparents who had furnished almost all of his support were entirely excluded.

An award to the father of the decedent of any part of the damages would be completely against equity and good conscience. It is doubtful, but not impossible, that a jury would award part of the damages to the father, but even a remote possibility of such an award should be eliminated by a statutory provision divesting a parent of his rights under the death by wrongful act statute when such parent has abandoned his child. Even without such a statutory provision, it would seem that in the face of such gross unfairness, where the family relationship is a purely biological one, the court should be allowed to make a judicial exception to the class provided by statute.

The language of the court indicates that this may be the first Virginia case, involving collaterals of the half blood, brought under the death by wrongful act statute. At first blush the court's holding may seem inconsistent with the statute of descent and distribution.³ However, it is only logical to consider them "brothers and sisters" within the statute since they are treated by no express provision, and where the distributees named in the statute of descent and distribution are different from the beneficiaries named in the statute in question, the provisions of the latter control.⁴ Also, it must be remembered that under the death by wrongful act statute the jury has absolute discretion as to who, among the members of the same class, shall receive the whole or any part of the recovery. Theoretically, it will take into consideration the actual family situation as well as the blood relationship.

Since the mother did make some small contribution to the support of the decedent and did recognize him as her child, she should receive some compensation for his death. However, to give her the entire award of damages would be unfair, and as she is the

3. Virginia Code of 1950, §64-2 ("How collaterals of half blood inherit.—Collaterals of the half blood shall inherit only half so much as those of the whole blood; but if all the collaterals be of the half blood, the ascending kindred, if any, shall have double portions.").

4. *Withrow v. Edwards*, 181 Va. 344, 25 S.E.2d 343 (1943).

only member of the class who is equitably entitled to any of the award she will probably receive it all. The grandparents who have stood *in loco parentis* to the decedent since he was eighteen months old take no share whatsoever in the award of damages for the death of their protege. This rank injustice is occasioned by the narrow scope and inelasticity of the classes of statutory beneficiaries. The remedy is a legislative one. The hands of the court are tied, and it can only apportion damages among members of the classes, which are clearly defined by statute. The absolute exclusiveness of the classes of beneficiaries and the resulting injustice are further illustrated by the case of *Porter v. Virginia Electric and Power Co.*⁵ where a decedent left a surviving husband and a widowed mother but no children or grandchildren. The court held that the language, providing that where the decedent has left a widowed mother and also a widow the amount recovered shall be divided between the mother and the widow, could not be so construed as to include a widower.

The death by wrongful act statute was originally enacted to remedy an inequitable situation. The right of action to recover for wrongful death did not exist at common law, and the wrongdoer was immune to civil liability.⁶ It appears that the rigid and restrictive provision for classes of beneficiaries is thwarting the statute's equitable intention and primary object of compensating the family of the deceased. The Virginia statute is the equivalent of Lord Campbell's Act,⁷ under which the term "parent" included grandparents and step-parents. When the Virginia General Assembly enacted the death by wrongful act statute in 1871,⁸ it did not see fit to include the English interpretation of "parent". The original Virginia statute had but one class of beneficiaries, "wife, husband, parent, and child of the deceased".⁹ In 1904 the statute was amended to provide for two classes of beneficiaries, "wife, husband, and child" constituting the preferred class and the deferred class consisting of "parents, brothers, and sisters of the deceased".¹⁰ In the Code of 1919 grandchildren were added to the preferred class,¹¹

5. 183 Va. 108, 31 S.E.2d 337 (1944).
6. *Virginia Electric & Power Co. v. Decatur*, 173 Va. 153, 3 S.E.2d 172, 4 S.E.2d 294 (1939).
7. 9 & 10 Vict., c. 93 (1846).
8. Acts of Assembly 1870-71, p. 27.
9. Virginia Code of 1873, Ch. 145, §§ 8 and 9.
10. Acts of Assembly 1904, p. 110.
11. Virginia Code of 1919, §5788. (Revisors' Note.—"...Under the former section, grandchildren were not put either in the preferred or deferred class, but the revised section places them in the preferred class. The attachment of grandparents for their grandchildren was considered greater than that for collateral kindred.")

and no change in the classes of beneficiaries has been made since then.

The inequitable result of *Wolfe v. Lockhart, supra*, was not occasioned by a misapplication by the court of a statute but by the inadequacy of the statute as it now reads. It is illustrative of the grave necessity for a re-evaluation by the General Assembly of the death by wrongful act statute, particularly Section 8-636. There are several remedies suggested by a consideration of this case. One is to enact a statute divesting a parent of his rights under the death by wrongful act statute when the court determines that he has previously abandoned the child. The Georgia Civil Code of 1895, Section 2502, gave the father a cause of action for damages for the loss of a child's services but also provided that this parental power is lost "(1) by voluntary contract, releasing the right to a third person; (2) by consenting to the adoption of the child by a third person; (3) by the failure of the father to provide necessities for his child, or his abandonment".¹² Another remedy would be a definitive provision enlarging and interpreting the term "parents" to include such people as the court determines have stood *in loco parentis* to the decedent. This should include foster parents, adoptive parents, grandparents, aunts and uncles and any others who might be appropriate beneficiaries.

Even assuming that these two obvious defects have been remedied, there are still many conceivable situations in which a strict application of the statute would work an injustice. For example, a person might be killed, leaving an aged sister dependent upon him for support and a grandchild independently wealthy. By a strict application of the statute the court would have to award the entire recovery to the grandchild, because he is in the preferred class. This is clearly unjust, and there should be a statutory provision giving the court the power to waive application of the classes of beneficiaries provided by the statute when such application would work a *gross* inequity.

Another problem is presented by consideration of a hypothetical situation involving the wrongful death of an adopted child. In Virginia the adopted child inherits through his natural parents and through his adoptive parents, but there has been no case determining whether the natural parents could share in the award

12. *Southern Ry. Co. v. Flemister*, 120 Ga. 524, 48 S.E. 160 (1904).

if they have allowed their child to be legally adopted. Also, there has been no case involving the situation where the decedent is a legally-adopted child and has foster brothers and sisters. In such a case the court would probably consider the foster brothers and sisters as brothers and sisters within the meaning of the statute, as it did concerning the collaterals of the half blood in *Wolfe v. Lockhart*. These situations are bound to arise in an age in which adoptions are becoming increasingly numerous, and a re-evaluation and reconstruction of the statute should consider these possibilities and make provision therefor.

As now provided, the classes of beneficiaries under the death by wrongful act statute are too restrictive and too inflexible to promote the ends of justice. The classes should be enlarged and relaxed and the court given a freer rein in the application thereof. Social legislation that has not been amended since 1919 cannot be expected to be adequate in the complexity of today's society, and a re-evaluation in the light of thirty-five years' experience would be in order.

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