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**TRYING THE WRONGFUL DEATH CASE IN TENNESSEE
STRATEGIES IN PREPARATION AND VALUATION**

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I. Overview and Update of the Law

A. *History of Wrongful Death Law.*

This year, Mel Gibson's movie, *Braveheart*, won the "best picture" academy award. The amount of killing and carnage shown in this thirteenth century medieval epic is amazing. It is not, therefore, surprising that under the English common-law rule "in a Civil Court, the death of a human being could not be complained of as an injury." *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808). The theory behind the common-law rule was that there could be no civil recovery for an act that also constituted a felony (the so-called felony merger doctrine). See *Holdsworth, The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431 (1916). Sadly, when the common-law traveled across the Atlantic, American courts generally adopted the English rule as the common-law of this country as well. In 1846, England passed Lord Campbell's Act, 9 & Vict. c. 93 (1846) which granted recovery to the families of persons killed by tortious conduct, "although the Death shall have been caused under such Circumstances as amount and Law to Felony." In the United States today every state has enacted a wrongful death statute and Congress has created actions for: wrongful death of railroad employees (see the Federal Employers' Liability Act, 45 U.S.C. § 51-59), merchant seaman (the Jones Act, 46 U.S.C. § 688), persons on the high seas (Death on the High Seas Act, 46 U.S.C. §761) and in the Federal Tort Claims Act (28 U.S.C. §1346(b)) (for actions against the United States where the circumstances indicate that negligence caused the wrongful death of a

person). Because of the “Lord Campbell’s Statutes” it is now no longer cheaper to kill a person than it is to inflict a non-fatal injury.

In 1850, less than four years after Lord Campbell’s Act, the Tennessee Legislature enacted statutes designed to provide some remedy for wrongful injuries resulting in death. Tennessee Public Acts, 1849-50, *et seq.* 58 §§1-2. These provisions are now codified at Tennessee Code Annotated §20-5-106. *et seq.*¹

One of the important early cases addressing the Tennessee wrongful death statute is *Louisville and Nashville Railroad Company v. Burke*, 46 Tenn. 45 (1868). The Tennessee Supreme Court held that the damages recoverable in a wrongful death case are those that are suffered by the decedent and which he could have recovered had he lived and not those suffered by his widow and children in consequence of his being killed. *Burke* involved an instantaneous injury and the Court held that since the killing was instantaneous there was no interval between injury and death for which the decedent could have suffered damages. The Court therefore held no recovery. In 1871 the court, in *Nashville & C.R.R. v. Prince*, 49Tenn. 580 (1871) again addressed an instantaneous death case and the damages claimed were those sustained by the widow and children because of the death of the husband and father. The court ruled that the damages intended to be provided for by the statute were for the loss of the husband or father. As one commentator notes:

“This decision, and the opinion announcing it, was destined to cause confusion in subsequent cases, because it seemed to approve recovery of damages purely in the right of the beneficiaries—to construe the statute to provide a new cause of action for the widow or next of kin in addition to preserving that of the decedent.”

¹ T.C.A. §20-5-106.

Gamble, *ACTIONS FOR WRONGFUL DEATH*, 4 *Vanderbilt Law Review* 289, 294 (1951). It was not until 1903 that a satisfactory explanation of the nature of the cause of action in a Tennessee wrongful death case was given in *Davidson Benedict Co. v. Severson*, 109Tenn. 572, 72 S.W. 967 (1903). The Court, speaking through Mr. Justice Neil, noted that while the statute provided for two types of damages, the statute merely preserved the right the decedent would have had, had he lived and sued, and all damages recoverable are for injuries suffered by the decedent or his estate (although such injuries might also have been incidentally injurious to the beneficiaries designated to share in the recovery). Recovery is, therefore, for damages suffered by the decedent during life, plus the value of his life, which was viewed as an asset of his estate. 72 S.W. at 981. As expressed in a subsequent case, *Potts v. Leigh*, 15Tenn.App. 1, 10 (Middle Section 1931):

“The theory of our cases seems to be that no new or independent right of action arises from death by wrongful act; that the pecuniary value of the life is the value to the estate of the deceased; that the amount of money representing this value represents also the loss which the beneficiary suffered, because he is entitled, under the statute of distribution, to the money as the substitute for the life of the deceased; in other words, that the value of the life of the deceased represents the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.”

B. *Pertinent Tennessee Statutes.*

1. Abatement and Survival.

T.C.A. §20-5-101 provides that merely because a person dies a cause of action that existed at the time of death does not abate if the cause of action is one recognized by law to survive.

T.C.A. §20-5-102 provides the actions which survive the death of the party provides as follows:

“No civil actions commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another, except actions for wrongs affecting the character, be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described in §20-5-106 [the wrongful death statute which provides for succession similar to real property].

In short, actions affecting character such as malicious prosecution, libel, slander and similar personal actions do not survive.

T.C.A. §20-5-103 does provide that tortious and wrongful acts resulting in injury or death do survive and the common-law rule abating such actions upon the death of the wrongdoer (*Baker v. Bolton* is abrogated). Once again, this section does not apply to wrongs affecting the character of the Plaintiff.

T.C.A. §20-5-104 provides that if there is no administrator or estate for the Plaintiff or decedent then the suit can be revived and prosecuted by the heirs of the decedent.

T.C.A. §20-5-106 is the current version of Tennessee’s Lord Campbell’s Act. The statute is not a copy of the English act, but gives larger damages in that it provides for damages for the injuries suffered by the deceased in addition to the pecuniary loss of the persons entitled to recovery (which was all that was allowed under the Lord Campbell’s Act). *See Elliott v. Felton*, 119 F. 270 (6thCir. 1992). Under the wrongful death statute, T.C.A. §20-5-106, the cause of action survives first to the person’s spouse, and if there is no surviving spouse, then to the person’s children or next of kin; or to the person’s personal representative for the benefit of the surviving spouse or next of kin; or to the person’s natural parents or parents of next of kin. The funds received are free from the claims of creditors.

In general, the wrongful death statute provides for succession just as if the funds were estate proceeds from personal property. A section of the original Tennessee statute provided "If the deceased had commenced an action before his death, it shall proceed without a reviver. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property." Because wrongful death proceeds are distributed as personalty, the widow shares equally with the children. See *Throgmorton v. Oliver*, 144 Tenn. 282, 230S.W. 967 (1921).

Under the Tennessee wrongful death statute a person includes a fetus who was viable at the time of injury. A fetus shall be considered viable if it shall have achieved a state of development where it could reasonably be expected to be capable of living outside the uterus. T.C.A. §20-5-106.

T.C.A. §20-5-107 provides who may institute the action (personal representative of the deceased, surviving spouse or if no surviving spouse by the children or next of kin). A parent is not permitted to recover an action until all child support arrearage together with interest have been paid to the parent in order to receive the support.

T.C.A. §20-5-110 provides that the surviving spouse may settle the case and it shall be binding upon the children.

T.C.A. §20-5-111 provides that the death of the primary beneficiary before suit is brought shall not result in the loss of cause of action, but again shall survive on behalf of those who after that beneficiary could have prosecuted the lawsuit.

T.C.A. §20-5-112 also provides that a death of the beneficiary during the action shall not result in the loss of the cause of action.

2. Damages.

The damages recoverable in a wrongful death case are generally set forth in T.C.A. §20-5-113. Passed in 1883, this statutory section was intended to be a codification of the Tennessee common-law at that time. It provides as follows:

“Where a person’s death is caused by the wrongful act, fault or omission of another, and the suit is brought for damages, as provided for by §20-5-106 and §20-5-107, the parties suing, shall, if entitled to damages, have the right to recovery for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.”

This statutory codification is now set forth in the Tennessee pattern jury instructions which provide that the first class of damages are those sustained immediately by the injured party and include compensation for these different types of losses: 1) reasonable funeral and burial expenses; 2) loss of earning capacity during the period from injury to death; 3) loss of enjoyment of life from the period from injury to death; 4) the mental and physical suffering actually endured by the injured party between the injury and death. . . The next class of damages that may be awarded is the pecuniary value of the life of the deceased. In determining this value you should take into consideration the following: 1) the age of the deceased; 2) the life expectancy of the deceased; 3) the condition of the health of the deceased; 4) the strength and capacity for work and for earning money through skill and in an art, trade, profession or occupation or business of the deceased; 5) the personal habits of the deceased for sobriety and industry.

Passed in 1883 T.C.A. § 20-5-113 enlarged the right of the persons suing so as to permit recovery of the damages peculiar to the beneficiaries. It is important to note that prior to 1883 the only damages that could be recovered in Tennessee in a wrongful death case under the statute were damages which the deceased was entitled to recover if he had so sued. The 1883 statute did not create a new class of beneficiaries, but simply

extended the scope of recovery. *See Freeman v. Railroad*, 107 Tenn. 340, 64 S.W. 1 (1901). Thus, under the so-called first class of damages recovery may be had for physical and mental suffering, loss of time, and necessary expenses resulting to the deceased for personal injuries. In the second class of damages is embraced the pecuniary value of the life of the deceased to be determined based upon: expectancy of life; age; condition of health and strength and capacity for labor and for earning money through skill in any art, trade, profession, occupation or business; and personal habits as to sobriety and industry—all modified, however, by the fact that the expectation of life is at most only a probability. *See Memphis Street Railway v. Cooper*, 203 Tenn 425, 313 S.W.2d 444 (1958); *Interstate Life and Accident Company v. Cox*, 396 S.W.2d 80 (1965). Importantly, in Tennessee there is not a statutory limit to the amount of damages which may be awarded in a wrongful death case. The assessment of damages in wrongful death actions does not admit to any fixed rules or mathematical precision, but the matter is left to the sound discretion of a jury. *Brown v. Ellison*, 12 Tenn. App. 27 (1926).

In cases involving the death of a child the courts must look to the life-expectancy of the child and the amount awarded in similar cases as well as inflationary values. *See Pickens v. Southern Railway*, 177 F. Supp. 553 (E. D. Tenn. 1959).

C. *Recent Developments*

1. Damages for Loss of Spousal, Parental and Child Consortium.

A developing issue in the law concerns the recoverability *vel non* of damages for loss of aid, comfort, counsel, companionship and consortium of the deceased. Whether the decedent is the parent or child, a number of courts in recent years have recognized the recoverability of damages for loss of parental, spousal and child consortium. Since 1979 there has been an emerging trend of well-reasoned decisions recognizing a cause of action in these instances and, indeed, a majority of jurisdictions to have considered

the issue have allowed recovery. See *Speiser*, RECOVERY FOR A WRONGFUL DEATH, §3.50, note 59, (3rd, 1992 and Supp. 1994). There is a clear emerging trend to recognize both a child's and spouse's right to recover damages for the loss of the deceased's love, affection, society and companionship.

In Tennessee the recoverability of consortium damages has not been recently addressed by the Tennessee Supreme Court. There are a number of older cases which address the issue including *Illinois Central Railroad v. Bents*, 69 S.W. 317 (1902); *Davidson Benedict Co. v. Severson*, 72 S.W. 967 (1902); *Knoxville Railway and Light Company v. Davis*, 3 Tenn. Civ. App. 552 (1912); *Hines v. Partridge*, 231S.W. 16 (1920); *Landrum v. Callaway*, 12 Tenn. App. 150 (1930); *Phillips-Buttorf Manufacturing Company v. McAlexander*, 15 Tenn. App. 618 (1932); and in the injury context the Tennessee Court of Appeals refused to recognize the cause of action for loss of parental consortium in *Still v. Baptist Hospital*, 755 S.W.2d 807 (Tenn. Ct. App. 1988). Presently, our firm has filed a petition for interlocutory review to the Tennessee Supreme Court in *Rebecca Faye Woods v. Charles Langley*, 6th Cir. No. 95C-1884, asking the Tennessee Supreme Court to consider the recoverability of such damages. No decision has been reached by the Tennessee Supreme Court. In a number of well-reasoned decisions, however, parents, for example, have been allowed to recover for the loss of a child's consortium. See *Galimore v. Children's Hospital*, 617 N.E.2d 1052 (Ohio 1993). A copy of the Application for Permission to Appeal is attached hereto as **Exhibit 1**.

2. Application of Comparative Negligence to Survivors Claim for Consortium.

In an Iowa case, *Nichols v. Schweitzer*, 472 N.W.2d 266 (Iowa 1991) the court held the decedent's fault may not reduce the survivor's consortium claim under Iowa law. The plaintiffs sought damages from the defendant driver for the death of her husband

and for her own loss of consortium due to the death. The trial court jury found the decedent 51% responsible for the accident. On the consortium claim, however, the full amount of the jury's finding was awarded on the theory that the wife's claim was independent from the husband's conduct.

3. Evidence of Remarriage.

In *Westfall v. Caterpillar, Inc.*, No. 18190, the Idaho Supreme Court, (November 26, 1991) held that the wrongful death statutes are designed to reimburse heirs for their expectations of parental beneficence they would have received had the decedent lived. In theory therefore, this regime did not allow for consideration of financial circumstance that arise subsequent to the death of the parent. This is an extremely well-reasoned case and should be cited by all plaintiffs where this issue arises. If, however, a loss of consortium claim is recognized in Tennessee then evidence of remarriage or marital difficulties would be relevant. See *Dotson v. Sears Roebuck*, 510N.E.2d1208, (Ill.Ct. App. 1987) (once husband withdrew his claim for loss of consortium in wrongful death action evidence as to the quality of his marriage as relating to the loss of wife's material services was irrelevant and its admission was reversible error).

4. Earning Capacity.

It cannot be stressed too strongly that the measure of damages in Tennessee in a wrongful death case is not a deceased's actual earnings, but the measure of loss of earning capacity. See *Ellis v. White Freight -liner Corp.*, 603 S.W.2d 125, 129 (1980); *Memphis Street Railway Co. v. Cooper*, 313 S.W.2d 444 (1958). As the court noted in *Ellis*:

“We think the jury could have properly found that the deceased's real earning capacity was greatly in excess of the adjusted gross income shown on his tax returns. Mr. Ellis testified that the deceased was a hard working man in good health who performed all the work around the house, that he was proud of the three big trucks he had owned, and maintained himself. He was a deacon in his church and did

not drink. We are of the opinion that the evidence in this record of the deceased's earning capacity, health, strength, and personal habits evaluated by the appropriate guidelines supports the award."

Again, the Tennessee Pattern Jury Instructions ask the jury to weight the probabilities based upon the most optimistic and pessimistic expectations. In a case, therefore, involving the death of a child or mother outside the work force, substantial damages may be awarded:

"Substantial damages may be recovered by the parents of a deceased minor child even though the child has never been gainfully employed and damages are to be measured by the skill and knowledge of the jury, enlightened by the knowledge of the age, sex and mental characteristics of the child. *Crowe v. Provost*, 374S.W.2d645; *King v. Louisville and Nashville Railroad*, (Tenn. Ct. App.) (September 9, 1987) (WestLaw TN-CS).

Even if the deceased is retired and has no earnings if he is capable of earning money from others this shows a capacity for earning money which may be considered. *Martindale v. Granville Pillow*, (Tenn. Ct. App.) (May 27, 1987) (WestLaw TN-CS) (slip opinion at page 8)."

5. Hedonic Damages Not Recoverable.

The Tennessee wrongful death statute does not allow claims for hedonic damages. *Spencer v. A-1 Crane Service, Inc.*, 880 S.W.2d 938 (Tenn. 1984). In considering an analysis of a wrongful death case please see **Exhibit 2**—a settlement conference in a products liability case which illustrates how to value such a case.

II. **Initial Consideration for the Plaintiff**

A. *Conducting a Thorough Initial Interview.*

_____A standard Intake form should be used to gather relevant information (**Exhibit 3**). In a wrongful death case it is especially important to gather information about the decedent to establish the character for sobriety, industry and work capacity. Personal references, photographs, videotapes and any item which may conceivably be presented to the jury as showing who this person was is very important. Never forget that you client is in many ways the person who died.

1. Who is the Party Plaintiff and Who Gets the Money.

If at all possible, try to make the named Plaintiff representative a desirable person. In cases involving divorce or marital difficulties it is especially important to chose an interested party representative and one who will make a good representative to the jury [EXAMPLES].

2. Consider the Possibility of Waivers.

In certain cases it may be necessary to obtain a waiver from some person who has an interest in the claim and may actually have the legal right to also sue (**Exhibit4**).

B. *Assessing the Case.*

It is simply a fact of life that the more a person earns and the younger they are the greater the value of their wrongful death case. In a recent case, for example, the court held that Nine Million Dollars (\$9,000,000) for the death of a thirty-three year old executive was not too high and any such claim excessiveness was actually frivolous according to a federal judge. See *Pescatore v. Pan Am*, 89 CV 1719, NATIONAL LAW JOURNAL, May1, 1995. \$1.7 Million Dollars for the wrongful death of a child has been held to be a reasonable amount for pecuniary loss. See *Johnson v. Washington County*, 506N.W.2d 632, (Minnesota Ct. App. 1993). In Tennessee, retired or elderly persons,

however, simply do not have the same potential for wrongful death verdicts absent proof of retirement income, Social Security benefits or other measures of future earning capacity. See *McClanahan v. Clayton*, 1999 WestLaw 248183 (Tenn.Ct.App.)(June 10, 1994); *Reed v. Lawrenceburg Power Systems*, 1986 Westlaw 5034 (Tenn. Ct. App. 1986) (Fifty-three year old mentally retarded person with eighth grade education had never been employed; \$50,000 verdict upheld).

Wrongful death case assessment hinges upon a fair appraisal of the “pecuniary value” of the life of the deceased. The deceased’s earnings history and age will, therefore, serve as paramount factors in case evaluation. Only in very strong liability cases should serious consideration be given to initiating a wrongful death suit on behalf of persons whose wage earning histories will be difficult to prove. If punitive damages may be involved, however, an exception to this rule may be appropriate. A case assessment and liability investigation is no different for the wrongful death case than for any other case of personal injury or liability [EXAMPLES].

C. *What to Include in the Case Investigation.*

D. *Liability Issues.*

E. *Damages.*

Proving pecuniary value of the life of the deceased. In many cases, Plaintiffs’ lawyers are faced with the deceased who was a child or who was not in the working force. In such a case it is important to develop the testimony of an economist, expert witnesses and lay witnesses to establish that the deceased’s life had a pecuniary value. An economist can be particularly helpful in establishing the economic value of a person outside the labor force (housewife) and also the economic value of the life of a child. If the child is very young and there is no educational testing or character information available, the Plaintiff is essentially forced to use standard examples of what high

school, college, and post-graduates typically earn. If, however, there is some basis to allow the jury to infer, in a non-speculative fashion, what the future might have held for the deceased, then that proof can developed [EXAMPLE *Travis* case].

In a wrongful death case, the defendant is entitled under *Wallace v. Couch* to introduce evidence of the deceased's personal living or maintenance expenses. This is an offset to the award which would otherwise be applicable. This is the defendant's burden of proof. From the Plaintiff's perspective it is important to present the absolute minimum that these amounts would present. In Tennessee, however, it is erroneous to charge that the wrongful death case should be diminished because of taxes. The jury should not consider taxes in fixing the amount of the award. *Dixie Feed and Seed v. Byrd*, 376 S.W.2d 745; *Spencer v. A-1 Crane Service*, 19 TAM 26-262094.

In proving damages in a wrongful death case an economist will be able to calculate expected increases in retirement benefits, fringe benefits and wages generally which would more than offset the discount to present value because of inflation and interest rates.

An important recent case involving wrongful death damages is *Thrailkill v. Patterson*, 897 S.W.2d 836 (Tenn. 1994). The Tennessee Supreme Court reversed a remitter of \$1.5 Million and reinstated the verdict in an excellently analyzed opinion concerning the extent of personal injury damages. In this case the defendant doctors failed to diagnose pre-eclampsia. The Court of Appeals had remitted the damages to Nine Hundred Thousand Dollars (\$900,000). The Tennessee Supreme Court held that the jury's award of \$1.5 Million was not excessive because there was ample proof of pain and suffering of the decedent from which the jurors could base their award. The period of suffering was April 27, 1988 until May 7, 1988.

1. Whether to Use an Economist or Not.

In some cases one may actually be better served by not using an economist, however, this is a much more dangerous road to travel. See *McClanahan v. Clayton*.

F. *Special Issues in Wrongful Death Claims*

1. Emotional Considerations.

A wrongful death case would and should always be grippingly emotional within the bounds decent and honest advocacy. The jury should get a very clear understanding and knowledge of who the decedent was and how terrible it was to lose that person. It is often helpful to use persons other than relatives to establish the incapacity of the deceased to describe their character for working. Personal details and examples will bring emotion into the case.

2. Selecting a Personal Representative.

Real care should be given in determining who should bring the suit. The mere fact that the widow of the decedent, surviving husband, or particular child be handling the estate may be the person involved in bringing the lawsuit does not mean that that should be the personal representative. It is particularly helpful where the minor children are the beneficiaries to make sure that you can stand up in front of the jury and state that you are representing a child suing for the death of his or her father (mother).

3. Pain and Suffering.

Thrailkill v. Patterson, supra, establishes that substantial damages may be awarded in Tennessee for pain and suffering. Care should be given to establishing exactly how long the deceased suffered prior to death and the level of consciousness. Even if the deceased was unconscious it is appropriate to award damages for loss of enjoyment of life. For a recent example see *Holston v. Sister of the Third Order of St. Frances*, 618 N.E.2d 334 (Illinois Ct. App. 1993) (unconscious person may recover damages for loss of

enjoyment of life). Substantial damages may be awarded even for a very brief period of suffering prior to death [EXAMPLES].

- V. **Ethical Considerations**
- A. *Rules of Professional Conduct*
- B. *Attorney's Fees*
- C. *Conflicts Among the Beneficiaries.*

Remember that in a wrongful death case your client is first and foremost the legal representative of the estate whether that be the executor, executrix or personal administrator who is bringing the wrongful death action. Typically, this will be the spouse, or in the case of multiple children it will be a personal administrator. If there is no personal administrator it is desirable to obtain fee agreements from all of the children. In the event of the death of a child, for example, both parents have the equal right to bring the claim and should agree upon the attorney. A waiver may be appropriate in some instances. See **Exhibit 4**. In many ways it may be helpful to think of the personal injury/wrongful death counsel as counsel for an estate even though there may be separate counsel for the estate. Therefore, the major points to always consider are the following:

- 1) An agreement concerning attorney's fees and costs. The standard personal injury fee agreement should specifically name the named plaintiff administrator, next friend, executor, etc. and should also delineate who the beneficiaries are.
- 2) Dealing with beneficiaries. It is extremely vital that the personal representative and counsel for the wrongful death suit advise all beneficiaries and heirs on events concerning the status of the litigation being careful to consider the attorney/client relationship. If you are representing one parent in a wrongful death suit where the other parent has waived their interest you do not necessarily have an attorney/client

relationship. You must, however, advise the personal representative to be careful in administering the wrongful death suit just as you would have to advise such a person not to represent their personal interest.

- 3) Conflicts of Interest. You may have situations where the personal representative may be a beneficiary under the wrongful death suit and may also have a business interest or relationship effecting the deceased's assets in the estate. Communication with the estate's attorney and mutual discussion is essential. It is simply the best practice the document any such conflicts or circumstances.

OVERVIEW & UPDATE OF THE LAW

A HISTORY OF WRONGFUL DEATH LAW