

## OVERVIEW AND UPDATE OF THE LAW

### I. A HISTORY OF WRONGFUL DEATH LAW

In 1846 the English Parliament overruled the common law decision of *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808) and passed the Lord Campbell's Act (1846), which granted recovery for persons killed by tortious conduct, "although the death shall have been caused under such Circumstances as amount at law to a felony." In the United States today, every state has enacted a wrongful death statute. The Tennessee wrongful death statute is largely a counterpart of the Lord Campbell statute and provides a remedy when death "is caused by the wrongful act, omission or killing of another." T.C.A. § 20-5-106. As discussed below, the Tennessee Supreme Court has accepted a case to determine the scope of damages under the Tennessee wrongful death act to specifically consider whether adult children may recover for the loss of parental consortium in a wrongful death case brought under Tennessee law. *Jordan v. Baptist Healthcare Affiliates, Inc., et al.*, 22 TAM 28-51 (T.C. 16, 1997). A copy of our firm's opening and reply brief is attached to these materials as Exhibit "A" and "B" respectively. In reviewing the pertinent Tennessee statutes, the following statutes are important to note and consider:

\_\_\_\_\_ T.C.A. § 20-5-101, "No Abatement Where Cause Survives." Under this section, merely because a person dies the cause of action that existed at the time of the death does not abate if the cause of action is one recognized by law to survive.

\_\_\_\_\_ T.C.A. § 20-5-102, "Actions Surviving Death of a Party." This statutory section provides which actions survive the death of a party and 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.

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

T.C.A. § 20-5-103, “Cause of Action Surviving Death of Tortfeasor.” This section provides 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. Once again, this section does not apply to wrongs affecting the character of the plaintiff.

T.C.A. § 20-5-104, “Revival by or Against Heirs.” This section 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, “Injury Resulting in Death--succession to cause of action, beneficiary who is minor or legally incompetent.” This is the current version of Tennessee’s Lord Campbell’s Act, providing a cause of action for wrongful death. The statute is not a copy of the English act but gives larger damages in that it provides for damages for 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.2d 270 (6th Cir. 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. This section also provides at T.C.A. § 20-5-106, that for the purposes of this section, a person includes a fetus which was viable at the time

of injury: “A fetus shall be considered viable if it had achieved a stage of development wherein it could reasonably expect to be capable of living outside the uterus.”

T.C.A. § 20-5-107, “Prosecution of Action by Representative or Surviving Spouse or Next-of-Kin.” This section provides that the wrongful death suit may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse’s own name or, if there is no surviving spouse, by the children of the deceased or next-of-kin; also, without the consent of the personal representative, either may use the personal representative’s name in bringing and prosecuting the suit and giving bond. T.C.A. § 20-5-107 provides that a parent cannot bring a wrongful death action until all child support arrearages, together with interest thereon at the legal rate, have been paid. Subsection (c) provides that nothing in this section shall be construed to prevent the institution of an action by a child with respect to the death of a parent.

T.C.A. § 20-5-108, “Continuation of Decedent’s Action.” This section provides that if the deceased had commenced an action [for personal injuries] before death, it shall proceed without the necessity of revivor. Subsection (b) provides that the damages shall go to the surviving spouse and next-of-kin, free from the claims of creditors.

T.C.A. § 20-5-110, “Action for Death of Spouse.” This section provides that in a suit for the wrongful death of the spouse, suit may be brought in the name of the surviving spouse for the benefit of the surviving spouse and children of the deceased, or in the name of the administrator of the deceased’s spouse or in the name of the next-of-kin or spouse. Subsection (b) provides that the surviving spouse may effect a bonafide compromise [release] in such a suit or right of action and may execute a valid release which shall be binding upon all the children of the deceased or next-of-kin.

T.C.A. § 20-5-111, “Death of Beneficiary Before Action.” This section provides that if the primary beneficiary dies before suit is brought, this shall not work a loss of the cause of action which will be deemed to survive on behalf of those who survive the beneficiary.

T.C.A. § 20-5-112, “Death of Beneficiary of the Action.” This section provides that no suit for personal injuries or death from wrongful act shall be abated because of the death of the beneficiary.

T.C.A. § 20-5-113, “Damages Recoverable in Wrongful Death.” This section provides:

Where a person’s death is caused by the wrongful act, fault or omission of another, and suit is brought for damages as provided for by §§ 20-5-106 and 20-5-107, the party suing shall, if entitled to damages, have the right to recover 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 statute is, in essence, a codification of the Tennessee Supreme Court’s decision in *Nashville & C.R.R. v. Prince*, 49 Tenn. 580 (1870). As set forth in Exhibit “A” (*Jordan* brief), this statute was not always interpreted to be strictly limited to pecuniary losses. Although the Tennessee Supreme Court has held that hedonic damages for the loss of the pleasure and satisfaction of life are not recoverable in a wrongful death action, *Spencer v. A-1 Crane Service*, 880 S.W.2d 938 (Tenn, 1994), it is clear that the statute is not strictly limited to a straightforward calculation of pecuniary losses.

T.C.A. § 29-26-209(3) provides for a wrongful death cause of action in the event a sexual therapist commits sexual misconduct resulting in wrongful death.

T.C.A. § 39-15-206, “Infant Born Alive During Abortion.” Subsection (c) provides, “No cause of action for wrongful death shall be brought which arises out of the death of a fetus or infant during the course of a lawful abortion, whether such fetus or infant is quick or not, so long as the abortion is performed in accordance with the provisions of this part; however, once an infant is born alive, any person in attendance thereto shall be civilly responsible for providing all reasonable and necessary care reasonably under the circumstances and the general vicinity in which they practice.”

T.C.A. § 50-6-112, “Third-Party Actions.” This section addresses the applicability of the subrogation provisions in the event that a worker’s injury or death is caused by a third party. Subsection (d)(3) provides that if the cause of action arises in a jurisdiction other than Tennessee and has a longer statute of limitations, the court hearing the cause of action shall apply the statute of limitations which provides the injured worker or those to whom such injured worker’s right of action survived the greatest amount of time in which to institute an action.

T.C.A. § 28-3-203, “Injury in the Final Year.” This section clarifies that in the case for defective improvements to real estate that “notwithstanding the provisions of § 28-3-202, in the case of such an injury to property to person or injury causing wrongful death, which injury occurred during the fourth year after substantial completion, an action to recover damages for such injury or wrongful death shall be brought within one year after the date on which such injury occurred, without respect to the date of death of such injured person.” Such action shall in all events be brought within five (5) years after the date of substantial completion of such an improvement.

T.C.A. § 20-5-114, “Death of Executor or Administrator.” This section provides that when an executor dies, the suit may be revived by or against the executor.

T.C.A. § 20-5-116, “Parties Substituted in Revivor.” This section provides that in a suit abated by the death of either party, it may be revived by or against the heir or personal representative, guardian or assign as the case may be.

T.C.A. § 20-5-117, “Death of Nominal Plaintiff.” This section provides that where a suit is commenced in the name of one person for the use of another and the nominal plaintiff dies, the suit may be prosecuted without a revivor, as if the death had not happened.

T.C.A. § 20-5-118, “Marriage of a Party.” This section provides that no action in a court of law or equity, by or against a woman, abates by her marriage.

T.C.A. § 20-5-108. “Continuation of Decedent’s Action.” In this section the damages from a wrongful death recovery go to the surviving spouse and next-of-kin, free from the claim of creditors and in accordance with the statutes of descent and distribution. *Anderson v. Anderson*, 211 Tenn. 566, 366 S.W.2d 755 (1963). Accordingly, the surviving spouse is not entitled to the whole of the fund received as administrator or administratrix but the fund goes to the surviving spouse and children in equal parts. *Throgmorton v. Oliver*, 144 Tenn. 282, 230 S.W. 967 (1921); *Powell v. Blake*, 161 Tenn. 516, 333 S.W.2d 78 (1930).

## **II. 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. This statutory codification is set forth in Tennessee Pattern Jury Instructions (T.P.I. 14.30) which provides that the first class of damages are those sustained immediately by the injured party and include compensation for 1) reasonable funeral and burial expenses; 2) loss of earning capacity during the period of injury to death; 3) loss of enjoyment of life in the period from

injury to death; and 4) the mental and physical suffering actually endured by the injured party between the injury and death. The second class of damages that may be awarded is the pecuniary value of the life of the deceased. Presently, Tennessee juries are instructed that 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 and health of the deceased; 4) the strength and capacity for work and for earning money through skill in any art, trade profession or occupation or business; and 5) the personal habits of the deceased for sobriety and industry.

The limitations on damages in the current Tennessee wrongful death statute are evidenced in several recent decisions. In *Hutton v. City of Savannah*, 22 TAM 37-10 (Tenn. App., August 22, 1997), two grandparents, Floyd and Lena Hutton, were killed in a car accident. At the time of their deaths, Mr. Hutton was 79 years old and Mrs. Hutton was 70 years old. Mr. Hutton had retired from a manufacturing job and his wife had been a homemaker throughout their marriage. Mr. Hutton had a life expectancy of 6.53 years and had received social security payments of \$428.00 each month. Mrs. Hutton had a life expectancy of 13.37 years and received \$427.00 in social security payments. The parties stipulated that there were \$5,224.00 in funeral expenses and \$157.00 in medical expenses for ambulance service. The trial court awarded \$130,000.00 each for the deaths of Floyd and Lena Hutton, the maximum amount recoverable for a municipality under the damages cap contained in the Governmental Tort Liability Act. The defendant appealed. Because the Huttons were both killed instantly, the damages were limited to the pecuniary value of their lives. The court stated the following:

When a plaintiff's recovery is based upon the pecuniary value of the decedent's life, the trial court must make this determination based upon a

consideration of several factors, including the decedent's life expectancy, age, condition of health and strength, capacity for labor and for earning money through skill in any art, trade, profession and occupation or business.

See *Thrailkill v. Patterson*, 879 S.W.2d 836, 841 (Tenn. 1994). The resulting amount should then be reduced by deducting the decedent's probable living expenses had the decedent lived. *Wallace v. Couch*, 642 S.W.2d 141, 144 (Tenn. 1992).

The City of Savannah argued that the plaintiff had failed to prove the pecuniary value of the Huttons' lives and cited the case of *McClanahan v. Clayton*, slip op., 1994 W.L. 248183 (Tenn. Ct. App., June 10, 1994) in which the court upheld a directed verdict for all elements of damages other than medical expenses and funeral bills because of the lack of proof relating to the pecuniary value of the lives of a retired elderly couple.

The court noted that simply because a deceased had no earning capacity did not lead to the conclusion that there was no pecuniary value for the life of the deceased, citing *Redd v. Lawrenceburg Power Systems*, 1986 W.L. 5034 (Tenn. Ct. App. 1986). The court found the damages should be modified with the award of \$100,000.00 to the value of the estate of Floyd Hutton and \$55,000.00 for the life of Mrs. Hutton. This decision has drawn criticism in the Tennessee Tort Law Letter (October, 1997) with the reference to the hopeful remedy of this wrong by the Tennessee Supreme Court's decision to take the case of *Jordan v. Baptist Healthcare Affiliates, Inc.*, 22 TAM 28-51, S. Ct., January 6, 1997. The following cases are also relevant to this issue:

1. *Thrailkill v. Patterson*, 879 S.W.2d 836, 841 (Tenn. 1994) (damages for the pecuniary value of a decedent's life "is not governed by fixed rules of mathematical precision" but is a matter left to the sound discretion of the finder of fact).
2. *Strother v. Lane*, 554 S.W.2d 631, 636 (Tenn. App. 1976) (noting that there is no set rule by which to measure the value of life).

3. *Crowe v. Provost*, 374 S.W.2d 645, 654 (Tenn. App. 1963) (amount of pecuniary damages is not governed by a precise mathematical formula).

In *Spivey v. Anderson*, 22 TAM 3-18, Tenn. App. Western Section, September 9, 1997, the court held that a hospital lien, pursuant to T.C.A. § 29-22-101, attached to the proceeds of a wrongful death settlement despite the provision in the wrongful death statute that recovery passes to a statutory beneficiary free from the claims of creditors. T.C.A. § 20-5-106.

### III. INITIAL CONSIDERATIONS FOR THE PLAINTIFF

#### A. *Conducting a Thorough Initial Interview.*

\_\_\_\_\_A standard 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.

#### 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

reduction of a \$1.5 million dollar verdict 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].

#### IV. 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. 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 administrating 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.

In *Stockstill v. Weaver*, 1995 W.L. 408690 (Tenn. App. July 12, 1995), plaintiffs filed a wrongful death action against Weaver and Lindsey alleging that Weaver was operating a motor vehicle owned by Lindsey with the express permission and knowledge of Lindsey. Lindsey's counsel was employed by Nationwide Mutual Insurance Company to defend her pursuant to her policy of insurance and an answer was filed denying the allegations. Subsequently, Lindsey's counsel filed a complaint in Anderson County Chancery Court for declaratory judgment on behalf of Nationwide Mutual Insurance Company against the plaintiffs in this cause and Weaver, seeking a determination that the insurance company had no obligation to defend or indemnify Weaver in this action. Plaintiffs then filed a Motion to disqualify Lindsey's attorney, attaching a copy of the Complaint for declaratory judgment, which had appended a copy of Lindsey's policy of insurance. The complaint sought a declaration that Weaver was not entitled to coverage because the vehicle was not owned by the plaintiff's insured nor was it a temporary vehicle. The trial court entered an order disqualifying Lindsey's counsel from representation, finding a conflict of interest under the Code of Professional Responsibility and specifically E.C. 5-14, 5-15 and 5-17.

