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Issues Complicating Rights of Spouses, Parents, and Children to Sue For Wrongful Death

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ISSUES COMPLICATING RIGHTS OF SPOUSES, PARENTS, AND CHILDREN TO SUE FOR WRONGFUL DEATH

INTRODUCTION

In 1846 Lord Campbell's Act was passed into English law. The Act provided a civil remedy against those who negligently caused the death of another.[1] Prior to that time, wrongful death could only be addressed in the criminal courts. If the defendant was merely negligent, he was not criminally liable and the defendant would go free. If, on the other hand, the defendant had only injured the victim, he would be liable for battery. The anomalous result was that it was more beneficial for defendant to kill his victim. All fifty states plus the federal government have adopted some form of Lord Campbell's Act.[2] The statutes are relatively straight forward in that they provide a cause of action for "any wrongful act neglect or default which causes death."[3] The difficult questions arise in the application of these laws.

There are two types of wrongful death statutes, the personal representative type, and the beneficiary type. With the personal representative type, the action is brought by the personal representative of the deceased on behalf of all persons statutorily eligible to benefit from the action.[4] In the beneficiary

[1] W. PROSSER, LAW OF TORTS 902 (4th ed. 1971).

[2] *Id.*

[3] *Id.* at 903.

[4] The following states require that a wrongful death action be brought by a personal representative:

State	Citation
Alabama	ALA. CODE tit. 6, § 5-410 (1975) (or by parent if action brought within six months of child's death);
Alaska	ALASKA STAT. § 09.55.570 (1983);
Arkansas	ARK. STAT. ANN. § 27-907 (1979) (or by heirs if no personal representative);
Connecticut	CONN. GEN. STAT. § 52-555 (1958);
Delaware	DEL. CODE ANN. tit. 10, § 3704 (1974) (or by spouse);
D.C.	D.C. CODE ANN. § 16-2702 (1981);
Florida	FLA. STAT. § 768.20 (1985);
Georgia	GA. CODE § 3-505 (1933) (or by spouse, if none, by children);
Illinois	ILL. REV. STAT. ch. 70, § 2 (1958);
Indiana	IND. CODE. ANN. § 34-1-1-1 (West 1983);
Iowa	IOWA CODE § 611.22 (1946);
Kentucky	KY. REV. STAT. § 411.130 (1979);
Maine	ME. REV. STAT. ANN. tit. 18A, § 3-817 (1981);
Massachusetts	MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985);
Michigan	MICH. COMP. LAWS § 600.2922 (1968);
Minnesota	MINN. STAT. § 573.02 (1985);
Nebraska	NEB. REV. STAT. § 25-1410 (1979);
New Hampshire	N.H. REV. STAT. ANN. § 556:12 (1974);
New Jersey	N.J. STAT. ANN. § 2A:31-2 (West 1952);
New Mexico	N.M. STAT. ANN. § 41-2-3 (1978);
New York	N.Y. CIV. PRAC. LAW § 210 (McKinney 1972);
North Carolina	N.C. GEN. STAT. § 28A-18-2 (1984);
Ohio	OHIO REV. CODE ANN. § 2125.02 (Page 1976);
Oklahoma	OKLA. STAT. tit. 12, § 1053 (1961);
Oregon	OR. REV. STAT. § 30.020 (1981);
Pennsylvania	12 PA. CONS. STAT. § 1601 (1965) (or by any person entitled to damages if personal representative does not bring action within six months of death);

type of statute, the statutorily authorized beneficiaries are joined together and bring the action in their own names.[5]

Irrespective of the type of statute, the statutes seem to name clearly the persons who are acceptable beneficiaries. These beneficiaries, at a minimum, include spouses, parents and children. The difficult issues arise when the plaintiff does not exactly fall within the statutory defined class of acceptable beneficiaries (e.g. common law spouses, or illegitimate children). The balance of this paper discusses spouses, parents and children as acceptable beneficiaries within the outer limits of the context of wrongful death statutes.

ABILITY OF SPOUSE TO RECOVER FOR WRONGFUL DEATH

The next several sections discuss the ability of "married persons" to re-

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Rhode Island	R.I. GEN. LAWS. § 9-1-7 (1985) (or by any beneficiary if there is no personal representative or if the representative fails to bring the action within six months of death);
South Carolina	S.C. CODE ANN. § 15-51-21 (Law. Co-op. 1977);
South Dakota	S.D. CODIFIED LAWS ANN. § 21-5-5 (1979);
Vermont	VT. STAT. ANN. tit. 14, § 1492 (1974);
Virginia	VA. CODE § 8.01-50 (1984);
Washington	WASH. REV. CODE § 4.20.010 (1962) (or by father, if no father then by mother);
West Virginia	W. VA. CODE § 55-7-6 (1981);
Wyoming	WYO. STAT. § 1-38-102 (1977).

[5]The following states require that a wrongful death action be brought by those beneficiaries specifically named in the statute:

State	Citation
Arizona	ARIZ. REV. STAT. ANN. § 12-612 (1982) (suit may be brought by spouse, parents, guardian, or personal representative);
California	CAL. CIV. PROC. CODE § 376, § 377 (West 1973) (suit by heirs or personal representative);
Colorado	COLO. REV. STAT. § 13-21-201(1)(1973) (by heirs, father, mother, or dependent next of kin);
Hawaii	HAWAII REV. STAT. § 663-3 (1976) (by dependent or personal representative);
Idaho	IDAHO CODE § 5-311 (1979) (by father, mother, or guardian of minor, by heir or personal representative of adult);
Kansas	KAN. STAT. ANN. § 60-1902 (1983) (by any heir);
Louisiana	LA. CIV. CODE ANN. art. 2315 (West 1972) (by spouse and/or children, by parents, if none, by surviving brothers and sisters);
Maryland	MD. CTS. & JUD. PROC. CODE ANN. § 3-904 (1984) (by spouse, parents, or children, if none by blood or marital dependent);
Mississippi	MISS. CODE ANN. § 11-7-13 (1972) (by personal representative or any beneficiary);
Missouri	MO. REV. STAT. § 537.080 (1953) (by spouse, dependent children, or parents);
Montana	MONT. CODE ANN. § 27-1-512, § 27-1-513 (1985) (by father, mother or guardian of minor, by heirs or personal representative of adult);
Nevada	NEV. REV. STAT. § 41.085 (1979) (by parents, or guardian of minor, or by heirs or by personal representative);
North Dakota	N.D. CENT. CODE § 32-21-03 (1979) (by spouse, children, parents or by personal representative if none, or if proper party fails to sue within thirty days of death);
Tennessee	TENN. CODE ANN. § 20-5-107 (1980) (for death of spouse by spouse, children or personal representative if none, for children by parents);
Texas	TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1940) (by any person entitled to damages, if not brought within three months by personal representative);
Utah	UTAH CODE ANN. § 78-11-6, § 78-11-7 (1977) (parent or guardian of ward, by heirs or personal representative of adult);
Wisconsin	WIS. STAT. § 895.04 (1983) (by any person entitled to recovery, or by personal representative)

cover under wrongful death statutes where one of the partners does not conform to the traditional definition of a "spouse." In many cases the non-traditional "spouse" will face discrimination in favor of spouses traditionally married and be denied recovery. Such discrimination has been found not to violate equal protection nor due process since it is grounded ostensibly upon the important state interest of promoting legitimate births, and family permanence.[6]

While such denial of recovery does not violate constitutional protections, it can operate to impose harsh results.[7] In many cases only the technicality of a marriage license separates a valid marriage from an invalid marriage.[8] In these and other cases the states' interests are already preserved by the intent of the parties. It is, therefore, overly harsh to deny these persons a cause of action since the states' interests could not be better protected even if the parties had been married according to local statutes.

Action by Spouse Who Remarries After Death of Decedent

In the case where the surviving spouse remarries after the death of the decedent but before the wrongful death action is litigated, the issue arises as to whether the defendant should be permitted to introduce evidence of the remarriage. A defendant is motivated to introduce such evidence for two reasons: first, the evidence would operate to mitigate damages, and second, the evidence might be necessary at voir dire to determine if any of the potential jurors are associated with plaintiff's new spouse.

The vast majority of courts have held that such evidence is inadmissible for purposes of mitigating damages, but is admissible during voir dire.[9] The

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[6]Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978).

[7]Weyrauch, *Informal and Formal Marriage — An Appraisal of Trends in the Family Organization*, 28 U. CHI. L. REV. 88, 109 (1960).

[8]Comment, *The Rights of Meretricious Spouses To Wrongful Death Actions*, 13 PAC. L.J. 125, 126 (1981).

[9]Bailey v. Southern Pacific Transp. Co., 613 F.2d 1385 (5th Cir.), *cert. denied*, 449 U.S. 836 (1980); Estate of Spinosa, 621 F.2d 1154 (1st Cir. 1980); Plant v. Simmons Co., 321 F. Supp. 735 (D. Md. 1970); Taylor v. Southern-Pacific Transp. Co., 130 Ariz. 516, 637 P.2d 726 (1981); Cavallaro v. Michelin Tire Corp., 96 Cal. App. 3d 95, 157 Cal. Rptr. 602 (1979); Barnhill v. Public Service Co. of Colo., 649 P.2d 716 (Colo. Ct. App. 1982); Seaboard C.L.R. Co. v. Hill, 270 So. 2d 359 (Fla. 1972); Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970); Watson v. Fischback, 54 Ill. 2d 498, 301 N.E.2d 303 (1973) (recognizing rule of inadmissibility to mitigate damages, but ruling that mere fact of remarriage should not be kept from jury); Bloomington v. Holt, 361 N.E.2d 1211 (Ind. Ct. App. 1977); Pape v. Kansas Power and Light Co., 231 Kan. 441, 647 P.2d 320 (1982); McGuire v. East Kentucky Beverage Co., 238 S.W.2d 1020 (Ky. 1951); Whittington v. Sowella Technical Institute, 438 So. 2d 236 (La. Ct. App. 1983); Wood v. Detroit Edison Co., 409 Mich. 279, 294 N.W.2d 571 (1980); Davis v. Liesenfeld, 308 Minn. 1, 240 N.W.2d 548 (1976); Glick v. Allstate Ins. Co., 435 S.W.2d 17 (Mo. Ct. App. 1968) (recognizing rule of inadmissibility to mitigate damages, but ruling that mere fact of remarriage should not be kept from jury); Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968) (recognizing rule of inadmissibility to mitigate damages, but ruling that mere fact of remarriage should not be kept from jury); Luddy v. State, 25 N.Y.2d 773, 250 N.E.2d 581, 303 N.Y.S.2d 522 (1968); Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887); Kimray v. Public Service Co. 562 P.2d 858 (Okla. 1977); Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1978); Evans v. Reading Co., 242 Pa. Super. 209, 363 A.2d 1234 (1976); Wiesel v. Cicerone, 106 R.I. 595, 261 A.2d 889 (1970); Wooten v. Amspacher 279 S.C. 325, 307 S.E.2d 232 (1983); Phelps v. Magnavox Co. of Tennessee, 497 S.W.2d 898 (Tenn. Ct. App. 1972); Stuart v. Consolidated Foods Corp., 6 Wash. App. 841, 496 P.2d 527 (1972).

courts cite several justifications for their holding. First, the cause of action for wrongful death arises at the time of decedent's death and damages are, therefore, to be determined in reference to that time.[10] Second, mitigating damages on account of remarriage is speculative as it would involve a comparison of prospective contributions of the deceased spouse with prospective contributions of the new spouse.[11] Finally, the courts reason that defendant should not be permitted to profit by any possible or actual remarriage of plaintiff.[12]

Although not admissible for purposes of mitigation, other uses are permitted. If evidence of the remarriage was totally inadmissible, several inherent problems would arise. For example, in an action by a wife for the wrongful death of her husband, it is improper to suppress *any* mention of the remarriage.[13] One court reasoned that in the course of the trial it would be virtually impossible to avoid mentioning the remarriage without resorting to untruths or deception.[14] This is especially the case where decedent's widow would change her current name in order to avoid any hint of remarriage, solely for purposes of litigation. Such deception is inconsistent with the integrity that the judicial process strives to maintain.[15]

This problem is best solved by disclosing the remarriage to the jury, with instructions to ignore the remarriage for purposes of calculating damages.[16] This solution also eliminates the problem that may potentially arise in voir dire: the inability to determine if any of the jurors maintain a bias or prejudice that stems from an association with the new spouse.[17]

Procedural problems arise when damages for loss of consortium are claimed in the wrongful death action. In those jurisdictions where evidence of the remarriage is inadmissible for wrongful death, such evidence may be admissible for loss of consortium.[18] In these jurisdictions, it is necessary to sever the loss of consortium action from the wrongful death action.[19]

Finally, evidence of remarriage is inadmissible only if objected to by the plaintiff. If plaintiff fails to object to questioning about the remarriage, then such testimony is admissible. If plaintiff falsely asserts that she has not remar-

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[10]Benwell v. Dean, 249 Cal. App. 2d 345, 57 Cal. Rptr. 394 (1967).

[11]*Id.*

[12]*Id.*

[13]Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968).

[14]*Id.*

[15]Peters v. Henshaw, 640 S.W.2d 197 (Mo. Ct. App. 1982).

[16]*Dubil*, 52 N.J. at 262, 245 A.2d at 180.

[17]Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972).

[18]McGuire v. East Kentucky Beverage Co., 238 S.W.2d 1020 (Ky. 1951) (evidence of remarriage is permitted in cause of action for loss of consortium to show marital difficulties, but not admissible in wrongful death action).

[19]*Id.*

ried, then defendant would be precluded from impeaching that testimony if such evidence were always inadmissible upon the objection of plaintiff. As a solution to this problem, the courts have held that evidence of the remarriage is admissible over plaintiff's objection for purposes of impeachment.[20]

As an alternative solution to the above problems, a small minority has held that evidence of the remarriage is unconditionally admissible in voir dire and in mitigation of damages.[21] The court preferred this result on two theories. First, rules on admissibility of evidence are broad based and should be read in favor of admissibility.[22] Second, evidence showing a change in conditions on which the suit was based is always competent as against the rights of the person asserting the claim.[23]

Action by Putative Spouse

A putative marriage is a marriage contracted in good faith but in ignorance (by one or both parties) that an impediment exists which renders the marriage unlawful.[24] All courts deciding the issue have held that the putative spouse can be the beneficiary of a wrongful death action provided that the beneficiary had a good faith belief that the marriage was valid.[25]

The only possible rationale for denying such recovery would be to encourage compliance with the state's interest in promoting marriage. Denial of putative spouse recovery would not, however, promote this end. By definition, a putative spouse does not know that he is a putative spouse since putative status is lost once he is aware of the marital defect. Accordingly, he is not prompted by legislative or judicial threats (to deny him a cause of action) to rectify any marital deficiency.[26]

Any denial of recovery also generates a windfall for the defendant. The defendant is excused from compensating an innocent plaintiff simply because

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[20]Rayner v. Ramirez, 159 Cal. App. 2d 372, 324 P.2d 83 (1958).

[21]Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967).

[22]Papizzo v. O. Robertson Transport, Ltd., 401 F. Supp. 540 (D. Mich. 1975).

[23]*Campbell*, 195 So. 2d at 90.

[24]Davis v. Davis, 507 S.W.2d 841, 844 (Tex. Civ. App. 1974).

[25]Wagner v. County of Imperial, 145 Cal. App. 3d 980, 193 Cal. Rptr. 820 (1983) (wife who did not participate in a marriage ceremony was given putative status and permitted to sue for husband's death since she believed in good faith that the marriage was valid); Kunakoff v. Kunakoff 166 Cal. App. 2d 59, 332 P.2d 773 (1958) (wife given putative status for purposes of wrongful death statute where marriage was void simply because a marriage license had not been issued); Babineaux v. Pernie-Bailey Drilling Co., 261 La. 1080, 262 So. 2d 328 (1972) (wife not given putative status for purpose of wrongful death statute where she entered into a bigamous marriage with decedent with the knowledge that the marriage was legal nullity); King v. Cancienne, 303 So. 2d 891 (La. Ct. App. 1975) (appellate court agreed that good faith husband be permitted to recover for death of putative wife when wife failed to obtain a divorce from a previous marriage. The court, however, refused to find for husband believing that the issue should be decided by the Louisiana Supreme Court).

[26]*King*, 303 So. 2d at 895-96.

of a defect in the victim-plaintiff marriage.[27] The defendant "escapes liability for a serious wrong on the basis of circumstances totally unrelated to the tortious act and over which the putative spouse had no control."[28]

Action by Common Law Spouse

A common law marriage is a marriage without solemnization or formalities but created by an agreement to marry followed by cohabitation.[29] Where recognized, common law marriages are given legal effect for all purposes including spousal standing to sue for wrongful death.[30] A slight majority of states either recognize common law marriages[31] or give legal effect to a common law marriage contracted in another state if recognized as valid in that state.[32] A minority of states give no legal effect to common law marriages con-

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[27] *Id.*

[28] *Id.* at 896.

[29] BLACK'S LAW DICTIONARY 251 (5th ed. 1979).

[30] Chivers v. Couch Motor Lines Inc., 159 So. 2d 544 (La. Ct. App. 1964).

[31] The following jurisdictions recognize common law marriages contracted within the state:

State	Citation
Alabama	Skipworth v. Skipworth, 360 So. 2d 975 (Ala. 1978);
Colorado	In re Peters' Estate, 73 Colo. 271, 215 P. 128 (1923);
D.C.	Johnson v. Young, 372 A.2d 992 (D.C. App. 1977);
Georgia	Brown v. Brown, 234 Ga. 300, 215 S.E.2d 671 (1975);
Idaho	IDAHO CODE § 32-201 (1979);
Iowa	In re Estate of Malli, 260 Iowa 252, 149 N.W.2d 155 (1967);
Kansas	Cairns v. Richardson, 457 F.2d 1145 (10th Cir. 1972);
Montana	MONT. CODE ANN. § 40-1-403 (1985);
New Hampshire	N.H. REV. STAT. ANN. § 457:39 (1974);
Ohio	U.S. v. Goble, 512 F.2d 458 (6th Cir. 1975);
Oklahoma	In re Estate of Bouse, 583 P.2d 514 (Okla. Ct. App. 1978);
Pennsylvania	In re Estate of Garges, 474 Pa. 237, 378 A.2d 307 (1977);
Rhode Island	Holgate v. United Elec. Ry. Co., 47 R.I. 337, 133 A. 243 (1926);
South Carolina	Jeanes v. Jeanes, 255 S.C. 161, 177 S.E.2d 537 (1970);
Texas	TEX. FAM. CODE ANN. § 1.91(A)(2) (Vernon 1940).

[32] The following jurisdictions do not recognize common law marriages contracted within the state but will give legal effect to a common law marriage validly contracted within another state:

State	Citation
California	CAL. CIV. CODE § 4100 (West 1973);
Connecticut	Catalano v. Catalano, 148 Conn. 288, 170 A.2d 726 (1961);
Delaware	Cook v. Carolina Freight Carriers Corp., 299 F. Supp. 192 (D. Del. 1969);
Hawaii	HAWAII REV. STAT. § 572-3 (1976);
Illinois	Peirce v. Peirce, 379 Ill. 185, 39 N.E.2d 990 (1942);
Kentucky	Brown v. Brown, 308 Ky. 796, 215 S.W.2d 971 (1948);
Maryland	Madden v. Cosden, 271 Md. 118, 314 A.2d 128 (1974);
Missouri	Pope v. Pope, 520 S.W.2d 634 (Mo. Ct. App. 1975);
Nebraska	Bourelle v. Soo-Creet, Inc., 165 Neb 731, 87 N.E.2d 371 (1958);
Nevada	Ponina v. Leland, 85 Nev. 263, 454 P.2d 16 (1969);
New York	Merritt v. Chevrolet Tonawanda Division, General Motors Corp., 50 A.D.2d 1018, 377 N.Y.S.2d 663 (1975);
Oregon	Garrett v. Chapman, 252 Or. 361, 449 P.2d 856 (1969);
Tennessee	Shelby County v. Williams, 510 S.W.2d 73 (Tenn. 1974);
West Virginia	State v. Bragg, 152 W. Va. 372, 168 S.E.2d 685 (1968).

tracted either within or outside of the state[33] and would accordingly preclude common law "spousal" recovery for wrongful death.

Action by Spouse Who Married Decedent After the Injury

This situation arises when the victim and plaintiff marry after the injury and the victim ultimately dies as a result of the injury. In the few jurisdictions to have decided the issue, plaintiff is permitted to recover for the wrongful death of the victim-spouse.[34] The courts justify this holding on the theory that wrongful death statutes provide a cause of action for the plaintiff-spouse which arises upon the death of victim-spouse. The courts further reason that since the ability to recover for wrongful death was not available at common law and is only available as a statutory creation, such statutes must be closely followed. Since the statutes do not contain language requiring that the victim and plaintiff be married at the time of the injury, the courts are reluctant to impose such a restriction.[35]

In these cases, an issue arises as to how damages should be calculated. A defendant argues that damages should be calculated based upon the worth of victim's life as of the date of the marriage. The defendant makes this argument since victim's life is already impaired as a result of the injury and is, therefore, worth a proportionately less amount.[36] The defendant supports his argument by claiming that the plaintiff-spouse entered into the marriage with fewer ex-

[33]The following states do not recognize common law marriages whether contracted within, or outside of the state:

State	Citation
Alaska	Hager v. Hager, 553 P.2d 919 (Alaska 1976);
Arizona	ARIZ. REV. STAT. ANN. § 25-111 (1982);
Arkansas	U.S. v. White, 545 F.2d 1129 (8th Cir. 1976);
Florida	FLA. STAT. § 741.211 (1985);
Indiana	IND. CODE § 31-1-6-1 (1983);
Louisiana	Mintz & Mintz, Inc. v. Color, 250 So. 2d 816 (La. Ct. App. 1971);
Maine	ME. REV. STAT. ANN. tit. 19, § 61 (1981);
Massachusetts	Peck v. Peck, 155 Mass. 479, 30 N.E. 74 (1892);
Michigan	MICH. COMP. LAWS § 551.2 (1968);
Minnesota	Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977);
Mississippi	Stutts v. Estate of Stutts, 194 So. 2d 229 (Miss. 1967);
New Jersey	Torres v. Torres, 144 N.J. Super. 540, 366 A.2d 713 (1976);
New Mexico	In re Gabaldon's Estate, 38 N.M. 392, 34 P.2d 672 (1934);
North Carolina	Shankle v. Shankle, 26 N.C. App. 565, 216 S.E.2d 915 (1975);
North Dakota	Woodward v. Blake, 38 N.D. 38, 164 N.W. 156 (1917);
South Dakota	S.D. CODIFIED LAWS ANN. § 25-1-29 (1979);
Utah	In re Vetas' Estate, 110 Utah 187, 170 P.2d 183 (1946);
Vermont	Stahl v. Stahl, 136 Vt. 90, 385 A.2d 1091 (1978);
Virginia	VA. CODE § 20-13 (1983);
Washington	Lewis v. Department of Labor and Industries, 190 Wash. 620, 70 P.2d (1937);
Wisconsin	In re Van Schaick's Estate, 165 Wis. 364, 162 N.W.2d 588 (1949);
Wyoming	WYO. STAT. § 20-1-101 (1977).

[34]Lovett v. Garvin, 232 Ga. 747, 208 S.E.2d 838 (1974); Radley v. Le Ray Paper Co., 214 N.Y. 32, 108 N.E. 86 (1915); Gross v. Electric Traction Co., 180 Pa. 99, 36 A. 424 (1897).

[35]*Lovett*, 232 Ga. at 748, 208 S.E.2d at 840.

[36]*Radley*, 214 N.Y. at 34, 108 N.E. at 87.

pectations due to the existing impairment.[37]

This argument has not prevailed for two reasons. First, courts desire to strictly adhere to statutory language and wrongful death statutes do not provide for this type of alternate calculation of damages.[38] Second, it is illogical to allow defendant to mitigate his liability by asserting that the life he ultimately destroyed is worth less as a result of his wrongful act.[39]

Action by Spouse Divorced at Time of Injury

An action by a spouse who is divorced at the time the victim is injured arises when a dependent divorced spouse relied on the deceased ex-spouse for either child support or alimony. Absent contrary provisions, the vast majority of states have decided that the right to collect child support or alimony from the payor terminates with the death of the payor.[40] Accordingly, the dependent ex-spouse is prohibited from collecting continuing payments from the estate of the deceased.[41] Nevertheless, these holdings are not necessarily controlling in cases where the dependent sues the tortfeasor for wrongful death.[42]

This is a novel issue decided only by the Wyoming Supreme Court. Initially that court held, in *Saffels v. Bennett,* that an ex-spouse did not qualify as an acceptable beneficiary under a statute which authorizes "every person . . . to prove his respective damages."[43] The court supported its holding by reasoning that "every person" means any person falling within the categories specifically set out by the statute.[44] The court believed that any other interpretation would violate legislative intent, provide a strained reading of the statute, and "open the floodgates to imaginative and innovative claims."[45]

Four years later the Wyoming Supreme Court overruled part of its *Saffels* decision and held that the language "every person" did include persons not specifically named within the statute.[46] The *Wetering* court then permitted brothers and sisters of the deceased to recover under the statute.[47] While the *Wetering* court did not directly authorize a remedy for an ex-spouse, its decision destroyed the *Saffels* reasoning for denying such a remedy.

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[37] *Id.*

[38] *Id.* at 35, 108 N.E. at 87.

[39] *Id.* at 36, 108 N.E. at 87.

[40] 24 Am. Jur. 20 *Divorce and Separation* § 676 (1983).

[41] *Id.*

[42] Saffels v. Bennett, 630 P.2d 505, 512 (Wyo. 1980) (Raper, J., 1980).

[43] WYO. STAT. § 2-14-202(c) (1980).

[44] *Saffels,* 630 P.2d at 510.

[45] *Id.*

[46] Wetering v. Eisele, 682 P.2d 1055, 1062 (Wyo. 1984).

[47] *Id.*

Action by Meretricious Cohabitant

A meretricious spouse is one who illicitly cohabits with another with knowledge that the relationship does not comply with the requirements of marriage (or common law marriage) as a result of a legal incapacity to marry.[48] There is no United States jurisdiction that provides a meretricious spouse with standing to sue for the wrongful death of a victim with whom such relationship exists.[49]

In support of denial of recovery, the courts assert two justifications: (1) official recognition of cohabitation without the formalities of marriage would legitimate promiscuity,[50] and (2) official recognition of unmarried cohabitants results in confusion of public records and possible clouding of land titles.[51] These rationales are not convincing. These justifications do not outweigh the harshness that results from denying a dependent a cause of action.

Case law no longer supports the proposition that a remedy should be denied if it would operate to contravene morality. In *Marvin v. Marvin,*[52] the California Supreme Court refused to label cohabitation as an illicit union reasoning that "the mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."[53] The court explained that in earlier decisions a meritricious relationship was regarded as tantamount to prostitution. The court asserts that this belief is no longer valid, as evidenced by an 800% increase in the number of meretricious relationships from 1960 to 1970.[54]

While it is true that cohabitation may add confusion to the system of public records, it is doubtful that this interest can outweigh the harshness of denying a remedy to a dependent meritricious spouse.[55] Denying a remedy on this basis is possibly an equal protection violation. Confusion of public records occurs when the female cohabitant retains a property interest in the same name as her partner, though the two are in fact unmarried. In cases such as this, where the state is discriminating for purposes of administrative convenience, the state has the burden of proving that the inconvenience is substan-

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[48] BLACK'S LAW DICTIONARY 891 (5th ed. 1979).

[49] *See supra* note 8.

[50] Weyrauch, *supra* note 7, at 97-98.

[51] *Id.* at 99.

[52] Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

[53] *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[54] *Id.* at 665, 557 P.2d at 109, 134 Cal. Rptr. at 818.

[55] Garcia v. Douglas Aircraft Co., 133 Cal. App. 3d 890, 184 Cal. Rptr. 390 (1982). In this case the deceased and the plaintiff were engaged to be married. Eight days before the scheduled marriage the decedent was killed in an air crash. The plaintiff and decedent lived together, bought a house together and shared expenses and resources. The plaintiff's suit for wrongful death was dismissed following a motion for summary judgment.

tial.[56] States have typically failed to meet this requirement[57] and it is doubtful that this situation should be an exception.

ABILITY OF PARENT TO RECOVER FOR WRONGFUL DEATH

Action for Death of Unborn Fetus

There is conflicting authority as to whether the parents of an unborn fetus should be permitted to recover under wrongful death statutes for the death of that fetus. The District of Columbia[58] plus twenty-eight states[59] authorize such recovery. Ten states have not decided the issue[60], and twelve states deny recovery[61]. Difficult resolution of the issues that arise from the circumstances explain the diversity of holdings.

The majority of jurisdictions which grant a remedy for the wrongful death of a fetus require that the fetus be viable at the time the injury was inflicted.[62] The rationale for this prerequisite is to insure that the fetus would have survived had it not been injured. If the fetus was not viable at the time of the injury, then there is a question of whether the fetus would have survived even if the injury had not been inflicted.[63]

The problem with the viability requirement is that it is an ambiguous stan-

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[56]Wengler v. Druggists' Mutual Ins. Co., 446 U.S. 142 (1980).

[57]J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 725 (2nd ed. 1983).

[58]Simmons v. Howard University, 323 F. Supp. 529 (D.C. Cir. 1971).

[59]Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); Worgan v. Greggo & Ferrar, Inc., 50 Del. 258, 128 A.2d 557 (1956); Shirley v. Bacon, 154 Ga. App. 203, 267 S.E.2d 809 (1980); *Green v. Smith*, 71 Ill. 2d 501, 377 N.E.2d 37 (1978); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971); Hale v. Manion, 368 F.2d 1 (Kan. 1962); Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970); Danos v. St. Pierre, 402 So. 2d 633 (La. 1981); Oldham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E. 916 (1975); O'Neil v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Perhson v. Kistner, 301 Minn. 299, 222 N.W.2d 334 (1974); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hospital, 95 N.M. 150, 619 P.2d 826 (N.M. Ct. App. 1980); Stidham v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974); Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Nelson v. Peterson, 542 P.2d 1075 (Utah 1975); Vaillancourt v. Medical Center Hospital, Inc., 139 Vt. 138, 425 A.2d 92 (1980); Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); TENN. CODE ANN. § 20-5-106 (1980).

[60]States which have not yet decided the issue are: Arkansas, Colorado, Hawaii, Idaho, Maine, Montana, North Dakota, South Dakota, Texas, and Wyoming.

[61]Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1972) (applying Alaska law); Kilmer v. Hicks, 22 Ariz. App. 552, 529 P. 2d 706 (1974); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); Acton v. Shields, 386 S.W.2d 363 (Mo. 1965); Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Scott v. Kopp, 494 Pa. 487, 431 A.2d 959 (1981); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

[62]Comment, *Torts — The Right of Recovery for the Tortious Death of the Unborn*, 27 How. L.J. 1649, 1660 (1984).

[63]*Id.*

dard. First, it is difficult to predict at what stage a fetus is capable of sustained life outside the womb. Medical experts differ as to whether fetal weight, fetal heartbeat, or fetal age should be considered in determining viability.[64] Second, there is a difference of opinion as to whether viability is a present state or simply the opportunity for future development. Some experts argue that "so long as the fetus is alive in the uterus, connected to the maternal circulation, it is capable of being brought to the age of viability, no matter what its age."[65]

Some jurisdictions have abolished the viability standard, regarding it irrelevant in deciding whether or not the tortfeasor should escape liability.[66] The standard is criticized as "impossible of practical application,"[67] without "real justification,"[68] and an "arbitrary criteria" [sic].[69] In an effort to side-step the problems associated with the viability standard, a minority of jurisdictions require that the fetus be born alive (and then die) before an action for its wrongful death is possible.[70]

Live birth jurisdictions support the standard on the grounds that a fetus is not a "person" within the meaning of the wrongful death statute.[71] These jurisdictions assert that the legislature must have intended to deny a remedy for fetal death since the language of the statute does not expressly provide for such a remedy.[72] This negative inference is defective. There should be no presumption of a legislative intent to exclude a remedy for fetal death, especially in cases where the statute was enacted at a time when there was limited knowledge about the unborn.[73]

Providing a cause of action for fetal death raises the issue of viability. While this issue is difficult to resolve, it is more logical to employ a viability standard than the live birth requirement, which effectively precludes a remedy for fetal death. Determination of viability is necessary to resolve whether the tortfeasor was solely responsibile for the death of the fetus. The use of a live

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[64]Kass, *Determining Death and Viability in Fetuses and Abortuses,* RESEARCH ON THE FETUS. Appendix 11-1, 11-13 (1975).

[65]*Id.* Appendix 11-11.

[66]Kader, *The Law of Prenatal Tortious Death Since Roe v. Wade,* 45 MO. L. REV. 639, 659 (1980).

[67]Smith v. Brennan, 31 N.J. 353, 356, 157 A.2d 497, 504 (1960).

[68]*Id.* at 368, 157 A.2d at 504.

[69]Krimmel & Foley, *Consequences of Legalized Abortion,* 46 CINN. L. REV. 725, 739 (1977).

[70]Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Stern v. Miller, 348 So. 2d 303 (Fla. 1977); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Marko v. Philadelphia Trans. Co., 420 Pa. 124, 216 A.2d 502 (1966); LKawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

[71]Scott v. Kopp, 494 Pa. 487, 431 A.2d 959 (1981). In this case defendant negligently killed an eight month old fetus in a car accident. The court held that plaintiff-mother's cause of action was limited to suffering and mental distress.

[72]Kwaterski v. State Farm Mutual Auto. Inc. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967).

[73]*Id.*

birth standard represents unintended interpretations of some wrongful death statutes.

Action by Parent Where Spouse was Contributorily Negligent

The issue in this case is whether a parent can recover for the death of her child if the death was caused partially by the negligence of the defendant and partially by the negligence of the other parent. In these cases, a defendant will argue that the negligence of the father, for example,[74] should be imputed to the mother and thereby preclude or reduce the remedy available to both parents.[75] To decide the issue the court must determine if imputation of negligence to the mother is proper. The defendant has three arguments at his disposal.

The defendant may argue agency theory. According to this theory, a mother who entrusts a child to the care of the father impliedly desigantes the father as an agent. Under agency law, the negligence of the agent (father) is imputed to the principal (mother).[76] The majority of courts reject this argument on the theory that a marital relationship, by itself, does not give rise to an agency relationship.[77] A minority of courts adopt the opposing view and hold that an agency is inherently formed by virtue of marriage.[78]

If the defendant does not prevail under agency theory he may argue, in community property states, that the wrongful death award would constitute community property and that the negligent father would share in an award intended only for the benefit of the non-negligent mother. There is a split of authority on this issue.[79] Those courts rejecting the argument reason that either a wrongful death award does not constitute community property, or that it would be unfair to totally deny recovery simply because it may operate

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[74]This situation also arises where the father brings the suit and the mother was negligent. The courts do not distinguish cases based on the sex of the negligent party. Accordingly, in an effort to avoid confusion of the parties, this paper will presume the father was contributorily negligent and that the action was brought by the mother.

[75]In a contributory negligence jurisdiction any imputation of negligence would operate to totally deny a remedy to either parent. In a comparative negligence jurisdiction an imputation of negligence would operate to simply reduce the award of the non-negligent party. *Stull v. Ragsdale,* 273 Ark. 277, 620 S.W.2d 264 (1981).

[76]3 Am. Jur. 2d *Agency* § 261 (1964).

[77]Stull v. Ragsdale, 273 Ark. 277, 620 S.W.2d 264 (1981); Flores v. Brown, 39 Cal. 2d 622, 248 P.2d 922 (1952); Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 P. 460 (1912); Atlanta & C.A.L.R. Co. v. Gravitt, 93 Ga. 369, 20 S.E. 550 (1893); Sanfilippo v. Bolle, 432 S.W.2d 232 (Mo. 1968); Los Angeles & S.L.R. Co. v. Umbaugh, 61 Nev. 214, 123 P.2d 224 (1942); Humphreys v. Ash, 90 N.H. 223, 6 A.2d 436 (1939); Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963); Wessels v. State, 194 Misc. 317, 86 N.Y.S.2d 590 (1949); Lakeview, Inc. v. Davidson, 166 Okla. 171, 26 P.2d 760 (1933); MacDonald v. O'Reilly, 45 Or. 589, 78 P. 753 (1904); Missouri K.T.R. Co. v. Hamilton, 314 S.W.2d 114 (Tex. Civ. App. 1958); Danville v. Howard, 156 Va. 32, 157 S.E. 733 (1931).

[78]Kataoka v. May Dept Stores Co., 60 Cal. App. 2d 177, 140 P.2d 467 (1943).

[79]Community property jurisdictions that permit recovery by non-negligent parent: Lewis v. Till, 395 So. 2d 737 (La. 1981); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963). Community property jurisdictions that deny recovery by a non-negligent parent: Cervantes v. Maco Gas Co., 177 Cal. App. 2d 246, 2 Cal. Rptr. 75 (1960); Dartez v. Gadbois, 541 S.W.2d 502 (Tex. Civ. App. 1976); Crevelli v. Chicago M. & S.P.R. Co., 98 Wash. 42, 167 P. 66 (1917).

to benefit an unintended beneficiary.[80] Even those courts that accept the argument permit the mother to recover in cases where the father dies as a result of the same accident.[81] Those courts reason that the negligent father cannot share in the award if he died as a result of the accident.[82]

Even in the absence of community property laws, a defendant may argue that as a practical matter an award to the non-negligent mother would ultimately benefit the negligent father due to the inherent operation of the marital relationship. This argument is accepted by some courts,[83] and rejected by others.[84] Those courts rejecting the argument reason that it would be unfair to negate the liability of the tortfeasor simply because a negligent party may indirectly benefit from the award.[85]

There is a caveat to the decision that allows the non-negligent mother to recover where the father was negligent. In some jurisdictions a defendant who was liable to the non-negligent mother could seek indemnification from the negligent father.[86] As a family, the parents of the child do not receive a net benefit from the suit.

Action by Parent Who Does Not Have Custody of Child

The issue in this situation is whether a parent can sue for the wrongful death of his child if he does not have custody of the child. In all cases resolving this issue, plaintiff-parent was deprived of custody as the result of divorce proceedings.

In determining the ability of a non-custodial parent to recover, the courts have not set forth any specific rules precluding recovery. The mere fact that a parent is denied custody does not of itself divest a parent of a remedy.[87] The

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[80]Lewis v. Till, 395 So. 2d 737 (La. 1981).

[81]Flores v. Brown, 39 Cal. 2d 622, 248 P.2d 922 (1952); Missouri K.T.R. Co. v. Hamilton, 314 S.W.2d 114 (Tex. Civ. App. 1958).

[82]*Id.*

[83]Womack v. Preach, 64 Ariz. 61, 165 P.2d 657 (1946).

[84]Stull v. Ragsdale, 273 Ark. 277, 620 S.W.2d 264 (1981), Atlanta C.A.L.R. Co. v. Gavitt, 93 Ga. 369, 20 S.E. 550 (1893); Illingworth v. Madden, 135 Me. 159, 192 A. 273 (1937); Oviatt v. Camarra, 210 Or. 445, 311 P.2d 746 (1957).

[85]*Id.*

[86]Carter v. Salter, 351 So. 2d 312 (La. Ct. App.), *cert. denied,* 352 So. 2d 1045 (La. 1977), *overruled,* Lewis v. Till, 395 So. 2d 737, 739, 739 n.2 (La. 1981).

[87]Frazzini v. Cable, 114 Cal. App. 444, 300 P. 121 (1931) (Father entitled to remedy where mother was given custody but deserted child to care of father.); Wilson v. Banner Lumber Co., 108 La. 590, 32 So. 460 (1902) (Mother could maintain action for damages where father had custody, however issue of damages arose to determine value of mother-child relationship); In Re Lucht, 139 Neb. 189, 296 N.W. 749 (1941) (Holding that a wrongful death statute which provided a remedy for the next of kin did not provide a remedy to a father who had not contacted child since loss of custody. The court reasoned that the father relinquished his status as next of kin and would suffer no pecuniary loss.); In Re Downs, 248 A.D. 738, 288 N.Y.S. 605 (1936) (Mother was denied a remedy for death of child in father's custody only because she withheld her presence from the child.); Clark v. Northern Pac. Ry. Co, 29 Wash. 139, 69 P. 636 (1902) (Father's failure to

courts are more concerned with the relationship that existed between the parent and the child after the loss of custody. If the non-custodial parent continued to care for and visit the child after the loss of custody, then the vast majority of courts will grant that parent a remedy.[88] Only a small minority of jurisdictions automatically reject the claim of a non-custodial parent.[89]

The overwhelming weight of authority is that a parent's desertion, abandonment, or failure to support his minor child precludes recovery.[90] The courts reason that the parent, by his conduct, had forfeited his right to the child's services and accordingly could not have suffered a loss by virtue of the child's death.[91] In the few cases where a deserting parent was entitled to recovery, the decision was based on the state's intestacy statute.[92] According to these jurisdictions, the deserting parent is entitled to one-half of the childs personalty which includes the value of the wrongful death action.[93] Under this rationale the court will not permit a challenge to the worthiness of the deserting parent as a beneficiary.[94]

A difficult issue arises in determining if the non-custodial parent maintained a meaningful relationship with the child after the loss of custody. Considered as components of a meaningful relationship are the continuation of child support payments and the duration between visits with the child. In some jurisdictions failure to provide support is sufficient to preclude a wrongful death remedy;[95] in other jurisdictions failure to exercise visitation rights is suf-

provide court ordered support for the child after the divorce precluded his right to recover.); Straub v. Schadeberg, 243 Wis. 257, 10 N.W.2d 146 (1943) (Father could recover where he provided child support even though child was in custody of mother.).

[88] *Id.*

[89] Black v. Roberts, 172 Tenn. 20, 108 S.W.2d 1097 (1937) In this case the court reasoned that mother became sole next of kin after divorce decree awarded her custody. Accordingly, only the mother could share in the distribution of the child's personalty which included the wrongful death award.

[90] Crenshaw v. Alabama Freight, Inc., 287 Ala. 372, 252 So. 2d 33 (1971) (denial of remedy by statute); Delatour v. Mackay, 139 Cal. 621, 73 P. 454 (1903) (denial of remedy by statute); Southern Ry. Co., v. Flemister, 120 Ga. 524, 48 S.E. 160 (1904) (denial of remedy by statute); Mortensen v. Sullivan, 3 Ill. App. 3d 332, 278 N.E.2d 6 (1972) (remedy denied by judicial determination that statutes in other jurisdictions would have precluded recovery); Lawrence v. Birney, 40 Iowa 377 (1875) (denial of remedy by statute); Martin v. Butte, 34 Mont. 281, 86 P. 264 (1906) (denial of remedy by statute); Thompson v. Chicago, M. & St. P. Ry. Co., 104 F. 845 (C.C.D. Neb. 1900) (Court applied Nebraska law and held that father forfeited his rights to child's services by abandoning child for ten years.); Re Jordan's Estate, 23 Misc. 2d 1072, 200 N.Y.S.2d 608 (N.Y. Sup. Ct. 1960) (denial of remedy by statute); Winfree v. Northern P. Ry. Co., 227 U.S. 296 (1909) (denial of remedy by Washington statute).

[91] *Id.*

[92] Murphy v. Duluth-Superior Bus Co., 200 Minn. 345, 274 N.W. 515 (1937) (Mother who deserted child for six years could share in wrongful death award since the wrongful death statute provided that the award should be distributed according to intestate succession laws.); Brady v. Fitzgerald, 229 Miss. 67, 90 So. 2d 182 (1956) (Deserting father could recover since wrongful death statute provided for division of award between intestate takers.); Avery v. Brantley, 191 N.C. 396, 131 S.E. 721 (1926) (Deserting father permitted to recover since a wrongful death statute which provides for division of award between intestate takers operates to relieve parent of duty to care for child in order to recover.).

[93] *Id.*

[94] *Murphy*, 200 Minn. at 348, 274 N.W. at 516.

[95] *See, e.g.*, Southern Ry. Co. v. Flemister, 120 Ga. 524, 48 S.E. 160 (1904) (Statute denied recovery to parent

ficient.[96]

In cases where a non-supporting, non-visiting parent is entitled to a remedy for the wrongful death of his child, he will probably only receive a nominal share in the award.[97] In a wrongful death action the plaintiff is entitled only to pecuniary losses. If the parent-plaintiff has ceased to pay child support and has not visited the child, his interest in the child has terminated. Accordingly, such a parent will not be able to establish a pecuniary loss and will be entitled only to a nominal award.

Action by Parent who Marries After Death of Child

This issue is analogous to the situation where a dependent spouse remarries after the death of the supporting spouse. In that case the majority of courts hold that evidence of the remarriage is inadmissible to reduce the damages available to the dependent spouse.[98]

If a single parent is dependent upon his child for support, that parent is entitled to recover from the tortfeasor the loss of that support in a wrongful death action.[99] If the parent marries after the wrongful death of the child, then it is arguable that evidence of the marriage should be admitted to show that plaintiff-parent is no longer dependent, or dependent to a lesser degree.[100] If the evidence is admitted, then the tortfeasor is not liable for the loss of support.[101]

The tortfeasor argues that this case is distinguishable from the case where the dependent spouse remarries after the death of the supporting spouse. In the spousal action the remarriage was in response to the wrongful acts of the tortfeasor; had the victim-spouse not been killed the plaintiff-spouse would not have remarried.[102] Marriage of the plaintiff-parent occurs irrespective of the acts of the tortfeasor. Accordingly, evidence of that marriage independently defines the financial dependence of the plaintiff-parent and should be admissible to calculate damages.[103]

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who did not provide child support according to a divorce decree.). *But see* Ford v. Chicago, R.I. & P. Ry. Co., 8 La. App. 584 (1928) (Court permitted father to recover where child support was provided by a third party but where the father continued to visit the child.).

[96] *See, e.g.* Adkinson v. Adkinson, 286 Ala. 306, 239 So. 2d 562 (1970) (Remedy denied by statute to parent who ceases visitation of child.). *But see* Murphy v. Duluth-Superior Bus Co., 200 Minn. 345, 274 N.W. 515 (1937) (Remedy was not denied since wrongful death statute distributed award among intestate takers notwithstanding the character of those takers.).

[97] Swift & Co. v. Johnson, 138 F. 867 (8th Cir. 1905) (Nominal damages were proper where there is no substantial evidence of a reasonable expectation of a pecuniary benefit to the father from a continuance of the life of the child.).

[98] *See supra* note 9 and accompanying text.

[99] Fields v. Riley, 1 Cal. App. 3d 308, 81 Cal. Rptr. 671 (1969).

[100] Lawler v. Nucastle Motors Leasing, Inc., 35 A.D.2d 450, 317 N.Y.S.2d 99 (1970).

[101] *Id.*

[102] Riley v. California Erectors, Inc., 36 Cal. App. 3d 29, 111 Cal. Rptr. 459 (1973).

[103] *Id.*

A majority of courts have rejected this argument.[104] The courts cite two reasons for not admitting evidence of the marriage. First, such evidence would operate as a windfall to the tortfeasor. The extent of his liability is lessened for reasons unrelated to his conduct.[105] Second, the courts do not evaluate the financial position of the plaintiff-parent when the suit is litigated but rather when the child is killed.[106] At that time the plaintiff-parent was not married. Any subsequent events that alter the position of the parties cannot be considered as relevant.[107]

A small minority of courts do permit the admission of such evidence in order to mitigate damages.[108] These courts argue that any fact which bears on the status of the parties is competent. Most courts agree that evidence of the marriage is admissible for the limited purpose of determining bias during voir dire.[109]

Action by Parent of Illegitimate Child

In *Glona v. American Guarantee & Liability Ins. Co.*, the Supreme Court held that it is a violation of equal protection to withhold relief for wrongful death from a plaintiff who is plainly the mother of the deceased, simply because the child is illegitimate.[110] The Court reasoned that there is no proof that illegitimacy will be furthered by permitting recovery, and that such denial of recovery would only operate as a windfall to the tortfeasor.[111]

The Supreme Court has treated fathers less favorably. The Court in *Parham v. Hughes,* upheld a Georgia statue that denied the father of an illegitimate child a remedy unless the father had legitimized the child.[112] The Court reasoned that the Georgia statue was enacted to promote judicial economy and did not preclude recovery to a father who proved his relationship by a unilateral act of legitimizing the child.[113]

As a result of *Glona,* all states must provide a remedy for the mother of an illegitimate child. Of the few jurisdictions to have applied *Parham,* there is a split of authority as to whether the father can recover. Five jurisdictions statutorily provide a cause of action for the mother only and preclude any

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[104] *See supra* note 9 and accompanying text.

[105] Benwell v. Dean, 249 Cal App. 2d 345, 57 Cal. Rptr. 394 (1967).

[106] Shields v. Utah Light & Traction Co., 99 Utah 307, 105 P.2d 347 (1940).

[107] *Id.*

[108] Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967).

[109] Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd,* 53 Ill.2d 591, 294 N.E.2d 689 (1973).

[110] Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

[111] "A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to the tortfeasor." *Id.* at 75.

[112] Parham v. Hughes, 441 U.S. 347 (1979).

[113] *Id.*

remedy for the father.[114] Most jurisdictions provide a remedy to the father if the father can prove he provided care for the child.[115]

Those jurisdictions which deny a father a remedy argue that judicial economy is achieved. These jurisdictions believe that wrongful death actions would be protracted if it were necessary to establish the parentage of the child.[116] This same concern is not present where the mother brings the action. Here birth records conclusively establish the identity of the mother. These jurisdictions also reason that legitimacy is promoted by denying a remedy to the non-legitimizing father.[117] Legitimization of children is a favorable objective since it promotes stability of the family and support of the child.

Those jurisdictions granting a remedy to the father believe that it is a violation of equal protection to grant a remedy to the mother but not the father.[118] In cases where the father has provided for the care of the child, the state's interest in protecting the child would not be furthered by denying a remedy to the father. The identity of the father is proved by the support the father has given.

ABILITY OF CHILD TO RECOVER FOR WRONGFUL DEATH

Action by Posthumous Child

Here the court is faced with whether a child can recover for the wrongful death of her father where the father is killed after the child is conceived, but before the child is born. The majority of jurisdictions permit the child to recover.[119] The courts have adopted the position of the medical profession which declares a child to be in existence from the moment of conception.[120]

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[114]GA. CODE ANN. § 51-4-2(F) (Supp. 1985) ("In actions for recovery under this Code section, the illegitimacy of the child shall be no bar to recovery."); MD. CJ CODE ANN § 3-902 (1984) ("Parent" includes the mother and father of a deceased illegitimate child."); MISS. CODE ANN. § 11-7-13 (1972) ("The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates."); S.C. CODE ANN. § 15-51-30 (Law. Co-op. 1977) ("In the event of the death of an illegitimate child or the mother of an illegitimate child by the wrongful or negligent act of another, such illegitimate child or the mother or brother or sister of such illegitimate child shall have the same rights and remedies in regard to such wrongful or negligent act as though such illegitimate child had been born in lawful wedlock."); WASH. REV. CODE § 4.24.010 (1962) (". . . the mother may maintain an action for the . . . death of an illegitimate minor child, or an illegitimate child on whom she is dependent for support.").

[115]*See, e.g.*, Wilcox v. Jones, 346 So. 2d 1037 (Fla. Dist. Ct. App. 1977) (Court held that equal protection of the state and federal constitutions would be violated if only the mother were permitted a remedy.); Moore v. Thunderbird, Inc., 331 So. 2d 555 (La. Ct. App. 1976) (The court reasoned that applying different rules to the father and mother would deprive the father of equality of rights guaranteed by the Federal Constitution.); Cobb v. State Sec. and Ins. Co., 576 S.W.2d 726 (Mo. 1979) (Court held that when the biological father openly acknowledged the child as his own he has a right to maintain a wrongful death action.).

[116]Hughes v. Parham, 241 Ga. 198, 243 S.E.2d 867 (1978), *aff'd*, 441 U.S. 347 (1979).

[117]*Id.*

[118]Holden v. Alexander, 39 A.D.2d 476, 336 N.Y.S.2d 649 (1972).

[119]Herndon v. St. Louis & S.F.R. Co., 37 Okl. 256, 128 P. 727 (1912); Nelson v. Galveston, H. & S.A.R. Co., 78 Tex. 621, 14 S.W. 1021 (1890).

[120]Mikloy v. Legal Anatomy and Surgery, 669-87 (1930).

The courts reason that since the child exists at the death of her father she should be entitled to a remedy.

Action by Illegitimate Child for Death of Parent

Historically courts were split on the issue of whether an illegitimate child could recover for the death of his parent. The courts reasoned that denying such a remedy would promote marriage and legitimization of children born out of the marriage. The United States Supreme Court has since held that legitimacy classifications, which burden the child in an effort to punish the parents for improper behavior, are violations of equal protection.[121] The Court justified its holding by reasoning that since the punishment was vicariously imposed on the illegitimate, such statutes represented unconstitutional discrimination.[122] As such, the Court has ruled that wrongful death statutes are unconstitutional if they deny a remedy to illegitimates in an effort to punish the parents.[123]

Action by Adopted Child

Absent a controlling statutory provision,[124] there are several issues that arise when adopted children seek a remedy for the wrongful death of their parents. The first issue is whether an adopted child can recover for the death of his adoptive parents. There is a split of authority between the courts deciding the issue. Those courts denying a remedy believe that the wrongful death statute provides a cause of action for the "children of the deceased" and that adopted children do not fall within this category.[125] Those courts permitting recovery believe that "children of the deceased" do include adopted children. The latter jurisdictions reason that the adoptive child has no ties with his biological parents and therefore must rely on his adoptive parents for support. If that support has been denied by the wrongful death of the adoptive parent, then the child must be compensated.[126]

Another issue arises when the adoption is legally defective. In this situa-

[121]Trimble v. Gordon, 430 U.S. 762 (1977).

[122]*Id.* at 774-76.

[123]Levy v. Louisiana, 391 U.S. 68, *reh'g denied,* 393 U.S. 898 (1968). Subsequent case law does permit discrimination against illegitimates for reasons other than to punish the parents. In *Matthews v. Lucas,* 427 U.S. 495 (1976), the Court upheld a Social Security provision which required illegitimate children to prove dependency. The Court reasoned that (1) the illegitimates were being discriminated against in order to achieve administrative convenience, not to punish the parents, and (2) unlike *Levy,* the illegitimates could overcome the burden imposed on them (by showing dependency).

[124]Statutory equality between adoptive and natural children may specifically appear either in the wrongful death statute, or generally in a separate statutory provision.

[125]Kruse v. Pavlovich, 6 La. App. 103 (1927); Barnes v. Red River & Gulf R. Co., 14 La. App. 188, 128 So. 724 (1930).

[126]McKeown v. Argensinger, 202 Minn. 595, 279 N.W. 402 (1938); Omaha Water Co. v. Schamel, 147 F. 502 (8th Cir. 1906).

tion most jurisdictions deny a remedy to the adoptive child for the death of his adoptive parent.[127] The courts reason that the rights of a "child" cannot vest unless the statutory adoption process has been followed. The small minority permitting recovery hold that there is no justification for denying a remedy.[128] The child suffers the same harm as a legally adopted child, and the state's interests are not furthered by denying a remedy.

There is also conflicting authority on whether an adopted child can recover for the wrongful death of his biological parents. To decide the question, the courts must decide two related issues. The court must first determine if the rights of the child, with respect to his biological parents, were terminated as a result of the adoption; and second, was the loss the child sustained so attenuated as to not warrant a remedy. All courts deciding the former issue have held that a child's right to recover does not terminate by virtue of adoption.[129] This right to recover can, however, be undermined in cases where the child is unable to show a continued compensable interest in the biological parent after adoption.[130] In such a case a cause of action cannot exist without a show of damages.

EXPANSION OF CLASS OF ACCEPTABLE BENEFICIARIES

The previous discussion has focused on how the courts have applied wrongful death statutes in novel situations of beneficiary definition. The courts have summarily rejected claims by persons not found to be within the coverage of the statutes. The courts have consistently rationalized their holdings by claiming a need to literally interpret statutory language.[131] The courts feel that since a remedy for wrongful death was not available at early common law the statutes represent an exclusive remedy. But perhaps these interpretations are too narrow.

Early common law provided no cause of action for wrongful death for three reasons: first, pecuniary interests were thought to terminate upon the death of the injured party;[132] second, that a monetary value could not be placed on human life;[133] and third, early law did not view homicide as a civil action but rather as a criminal action.[134] These rationales no longer exist. Pecuniary interests do live on after the death of the injured. The value of human life can be calculated. Civil remedies for homicide do exist. In short, modern common law

[127] Weems v. Saul, 52 Ga. App. 470, 183 S.E. 661 (1936); Smith v. Atlantic Coast Line R. Co., 212 S.C. 332, 47 S.E.2d 725 (1948); Goss v. Franz, 287 S.W.2d 289 (Tex. Civ. App. 1956).

[128] Bower v. Landa, 78 Nev. 246, 371 P.2d 657 (1962).

[129] Smelser v. Southern R. Co., 148 F. Supp. 891 (E.D. Tenn. 1956).

[130] *Id.*; Rust v. Holland, 15 Ill. App. 2d 369, 146 N.E.2d 82 (1957).

[131] Lovett, 232 Ga. at 748, 208 S.E.2d at 840.

[132] Eden v. Lexington & Frankfort R.R. Co., 53 Ky. 165 (1853).

[133] Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R. Co., 25 Conn. 265 (1856).

[134] Smedley, *Wrongful Death — Bases of the Common Law*, 13 VAND. L. REV. 605 (1960).

does not support reasoning for precluding wrongful death actions.[135]

In *Moragne v. States Marine Lines,*[136] the United States Supreme Court did recognize a common law action for wrongful death. Justice Harlan, in his majority opinion, reasoned: (1) the continued denial of wrongful death actions at common law is based on factors that had "long since been thrown into disregard even in England,"[137] (2) American courts have failed to produce any sound justification for precluding a common law right to wrongful death suits,[138] and (3) "the most likely reason that the English rule was adopted in the United States without much question is simply that it had the blessing of age."[139]

The *Moragne* Court held that a common law cause of action for wrongful death could exist since the rationale for its preclusion is no longer valid. The Court held that a common law cause of action for wrongful death could only be precluded by a showing of an affirmative legislative intent to "occupy the field of recovery."[140] The Court then set forth a test to determine if the legislative body had exhibited this intent to "occupy the field of recovery":

> In many cases the scope of a statute may reflect nothing more than the dimensions of a particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations where the mischief is identical. The conclusion is reinforced where there exists not one enactment but a course of legislative dealing with a series of situations.[141]

The *Moragne* Court believed that if the legislative body continued to alter the statute to conform to changing circumstances there was evidence that the legislature did not intend to occupy the field but only exhibited an intent to guarantee certain classes of beneficiaries the right to recover.[142] This is the case with most wrongful death statues.[143] In cases where the statutes are not worded to represent an exhaustive list of acceptable beneficiaries, a common law cause of action should attach to permit an action to be brought by any person suffering a loss as a result of the wrongful death. Applying the statutes to exclude beneficiaries by negative inference is inappropriate where there is no express statutory intent to occupy the field of recovery.[144]

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[135] *Id.* at 606-09.

[136] Moragne v. States Marine Lines, 398 U.S. 375 (1970). (Court recognized common law wrongful death action in maritime law).

[137] *Id.* at 381.

[138] *Id.* at 384-85.

[139] *Id.* at 386.

[140] *Id.* at 393.

[141] *Id.* at 392.

[142] *Id.*

[143] *Id.* at 390.

[144] Justus v. Atchison, 19 Cal. 3d 564, 586, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977) (Tobriner, J., concurring).

CONCLUSION

Those persons which qualify as acceptable beneficiaries within the context of wrongful death statutes differ from jurisdiction to jurisdiction. The diversity of holdings stems from differences among wrongful death statutes in their wording, and from differences in the interpretation of similar statutes. In all cases, however, the courts seek to strictly interpret the statutes. The courts reason that strict interpretation is warranted since wrongful death actions are statutory creations and that the statutes represent a legislative intent to control the area of wrongful death remedies.

The reasoning for strict interpretation is not convincing. There is no proof that legislatures intend to control the field of wrongful death recovery. The statutes could be interpreted to show a legislative intent to guarantee recovery to certain persons, and not as an intent to exclude persons not named within the statute. Additionally, the justifications for precluding a common law action for wrongful death no longer exist.

A more enlightened approach to defining acceptable beneficiaries may be to apply an underlying principle of tort law which provides a remedy to anyone who is injured by the wrongful acts of the tortfeasor. Problems that arise with the application of the theory can be statutorily controlled. Statutes could provide limitations on liability, mandatory joinder of plaintiffs would prevent the opening of the "floodgates of litigation." The courts strike a harsh balance when they deny a remedy to a dependent spouse, parent or child not falling within statutory definitions, in order to preserve antiquated beliefs, which preclude a common law cause of action for wrongful death.

DALE KATZENMEYER