

1-1-1980

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1 Miss. C. L. Rev. 471 (1978-1980)

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TORTS—PROPER PARTY IN WRONGFUL DEATH ACTION AFTER DEATH OF STATUTORY BENEFICIARY—*Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646 (Miss. 1979).

On April 21, 1978 while driving in their car, Mr. and Mrs. Eugene F. Hall III were struck by a vehicle of the defendant corporation. Mrs. Hall succumbed to her injuries approximately thirty minutes after the death of her husband. The Halls had no children. The appellant, Mrs. Partyka, is the mother of the deceased Mr. Hall and the executrix of his will. She brought suit for his death and the defendants filed a plea in bar. They alleged that because the deceased left a wife who survived him, the administratrix of the wife's estate and not the appellant was the proper party to bring the suit under Mississippi's wrongful death statute.¹

Following a hearing, the trial court sustained the defendant's motion and the suit was dismissed. On appeal Mrs. Partyka alleged that the deferred class of statutory beneficiaries, consisting of the father, mother, brothers and sisters, should be entitled to the cause of action and damages for the wrongful death of their blood relative when the only member of the preferred class, consisting of the husband, wife and children, is not living at the time of suit or of recovery.²

ORIGINS AND APPLICATION OF WRONGFUL DEATH ACTIONS

Following the English decision of *Baker v. Bolton*,³ the common law rule was established that torts ceased to carry liability with the death of either party, *acto personalis moritur cum persona*.⁴ This situation was remedied in 1846 by the passage of Lord Campbell's Act⁵ which was actually entitled "an act for compensating the families of persons killed by accidents."⁶ The avowed purpose of Lord Campbell's Act and the acts of the various states patterned after it⁷ was to give a

¹MISS. CODE ANN. § 11-7-13 (Supp. 1979).

The statute reads in pertinent part:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; . . . if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death.

Id.

²*Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646 (Miss. 1979).

³170 Eng. Rep. 1033 (K.B. 1808).

⁴M. BIGELOW, THE LAW OF TORTS § 9, para. 107 (7th ed. 1901).

⁵Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.

⁶*Id.* See also, 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:8 (2d ed. 1975).

⁷The original Lord Campbell's Act has been the paradigm for many American federal and state death statutes as well as for statutes of political divisions in Australia, Canada and other foreign nations. 2 S. SPEISER, *supra* note 6, at § 15:3 n. 17.

Mississippi is among those states with wrongful death acts patterned after Lord Campbell's Act. See *Byars v. Austin*, 218 So. 2d 11, 15 (Miss. 1969); 34 B.U. L. REV. 535, 536 n.8 (1954). For a discussion on classification of state wrongful death statutes, see 2 F.

new statutory cause of action to the decedent's administrator⁸ for the benefit of the surviving dependents of the person wrongfully or negligently killed in order to compensate the dependents for the pecuniary loss they suffered due to the death.⁹ The original act provided that such actions should be for the benefit of the wife, husband, parent or child,¹⁰ and many statutes still limit it to a similar group.

Section 11-7-13 of the Mississippi Code provides a preferred class of beneficiaries and a deferred or secondary class of beneficiaries entitled to recover in the event of the wrongful death of a relative. The husband, wife, and children make up the preferred class and the secondary class consists of the parents, brothers, and sisters of the deceased or such as may be living at the time of his death.¹¹

Determining the result when a preferred statutory beneficiary dies after the wrongfully killed relative has been a problem for those jurisdictions like Mississippi which fail to provide for such an occurrence by specific statutory provisions.¹² There is a disagreement among the jurisdictions as to whether the action survives¹³ to the beneficiary's estate, is revived to other beneficiaries or abates entirely.¹⁴

HARPER & F. JAMES, JR., *THE LAW OF TORTS* § 24.2 (1956); 1 S. SPEISER, *supra* note 6, at §§ 1:8-1:13; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 127 at 902-05 (4th ed. 1971).

⁸The wrongful death acts of Mississippi and other states for which Lord Campbell's Act is the prototype are regarded as creating a new cause of action on behalf of the designated beneficiaries, and not an action on behalf of the estate, even though in some states the cause of action must be brought by the personal representative of the deceased. *See Thornton v. Insurance Co. of N. America*, 287 So. 2d 262, 266 (Miss. 1973). *See also* 2 F. HARPER & F. JAMES, JR., *supra* note 7.

In Mississippi no distinction is made in the right to sue as between the personal representative and the survivors. *See Southern Pine Elec. Power Ass'n v. Denson*, 214 Miss. 397, 414, 57 So. 2d 859, 864 (1952); *Mississippi Power & Light Co. v. Smith*, 169 Miss. 447, 466-67, 153 So. 376, 380 (1934); *J. J. Newman Lumber Co. v. Scipp*, 128 Miss. 322, 335-36, 91 So. 11, 11 (1922). *Cf. Thornton v. Insurance Co. of N. America*, 387 So. 2d 262, 266-67 (Miss. 1973) (damages recoverable by the named survivors to be separated from those recoverable by the estate).

⁹RESTATEMENT (SECOND) OF TORTS § 925, Comment a (1977). *See also* W. PROSSER, *supra* note 7; 34 B.U. L. REV. 535, 536 (1954).

¹⁰Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.

¹¹MISS. CODE ANN. § 11-7-13 (Supp. 1979).

¹²Tennessee and Wisconsin are among those states with express statutory provisions for the death of a beneficiary. TENN. CODE ANN. § 20-613 (1956) (survives to "next of kin of such deceased beneficiary"); WISC. STAT. ANN. § 895.04 (West 1966) (the relative next in order is entitled to recover).

¹³Survival statutes preserve the cause of action a decedent had before death and are used to allow the action in wrongful death that a beneficiary had to survive to his estate after his death. The proper plaintiff in an action under survival statutes is the executor or administrator of the decedent's estate. *See, e.g.*, MISS. CODE ANN. § 91-7-233 (1972). *See also* W. PROSSER, *supra* note 7; RESTATEMENT (SECOND) OF TORTS § 926, Comment a (1977).

¹⁴*See, e.g.*, *Freie v. St. Louis-San Francisco Ry.*, 283 Mo. 457, 459, 222 S.W. 824, 826 (1920). *See also* 1 S. SPEISER, *supra* note 6, at 8:19; Comment, *Wrongful Death Damages in North Carolina*, 44 N.C. L. REV. 402, 425 (1966).

It has been held in some jurisdictions that if a statutory beneficiary dies before commencing suit the right abates at his death. Courts upholding this view say that the action vests in the survivor at the time of the wrongful death, but cannot survive to his estate because it is personal to him and is not a property right.¹⁵ *Danis v. New York Central R.R.*¹⁶ is a leading case for this view. In the majority of jurisdictions, however, where damages are measured by loss to the beneficiaries, the action only abates if the deceased beneficiary was the last or sole surviving relative qualified under the statute to recover.¹⁷

Another view concerning survival of the action is that the right vests in the beneficiary immediately upon the wrongful death, becoming his property and surviving to his estate if he subsequently dies.¹⁸ The right of action is considered a property right by the courts which follow this reasoning, since the action is meant to compensate for pecuniary loss to the relatives rather than for direct personal injury.¹⁹ Some courts adhering to this view hold, however, that if the action does survive it survives only to compensate for the loss from the time of the decedent's death until the time of the survivor's death.²⁰

Other jurisdictions adhere to still another view on survival of the action—that after the death of a preferred beneficiary, when there are no other members of that class surviving, members of the more remote class designated by the statute may bring the action or have it brought.²¹ If the statute gives the right of action directly to the survivors, the right is sometimes said to have transferred from them to the secondary class. The supporting rationale for this view is that the right survives the death of the beneficiary, but instead of recovery going to his estate it inures to the benefit of the more remote class. It is said in support of this theory that the action does not vest at the time of death of the victim, but rather at the death of the beneficiary it vests in other surviving beneficiaries to the exclusion of the beneficiary's es-

¹⁵1 S. SPEISER, *supra* note 6, at 8:17 See, e.g., *Carter v. Van Meter*, 495 S.W.2d 583 (Tex. 1973).

¹⁶160 Ohio St. 474, 117 N.E.2d 39 (1954).

¹⁷See, e.g., *Wilcox v. Bierd*, 330 Ill. 571, 581, 586-87, 162 N.E. 170, 175, 177 (1928); *Freie v. St. Louis-San Francisco Ry.*, 283 Mo. 457, 465-66, 222 S.W. 824, 826 (1920); *Danis v. New York Cent. R.R.*, 160 Ohio St. 474, 117 N.E.2d 39 (1954). See generally 40 MINN. L. REV. 94 (1955-56).

¹⁸See, e.g., *Sharp's Adm'r v. Sharp's Adm'r*, 284 S.W.2d 673 (Ky. 1955).

¹⁹See, e.g., *Meekin v. Brooklyn Heights R.R.*, 164 N.Y. 145, 58 N.E. 50 (1900).

²⁰See, e.g., *Van Beeck v. Sabine Towing Co.*, 300 U.S. 343 (1937) (applying Merchant Marine Act of 1920 which provides for an action for wrongful death in admiralty cases).

²¹See, e.g., *Garrard v. Mahoning Valley Ry.*, 100 Ohio St. 212, 126 N.E. 53 (1919); *Miller v. Pennsylvania R.R.*, 256 Pa. 142, 148-49, 100 A. 654, 655-56 (1917); *Rushton v. Smith*, 233 S.C. 292, 104 S.E.2d 376 (1958); *Johns v. Blue Ridge Transfer Co.*, 199 Va. 63, 67-69, 97 S.E.2d 723, 724-25 (1957) (applying statutory provision which makes the administrator for the benefit of the deceased's estate a third class of beneficiaries).

tate.²² There appears to be a general rule that if one or more of a number of beneficiaries in a particular class designated by a death act dies before judgment, the surviving members of the same class are entitled to have the action continued on their behalf.²³ Mississippi and a few other states provide that if there are no beneficiaries surviving, the right of action vests in the estate of the wrongful death deceased.²⁴

WRONGFUL DEATH DECISIONS IN MISSISSIPPI

The Mississippi Supreme Court in *Partyka v. Yazoo Development Corp.*²⁵ was faced with a question it had not been squarely faced with before. The court had to decide whether the mother of the deceased, being a member of the secondary classification of relatives entitled to recover under section 11-7-13,²⁶ had a right to bring a death action when the only member of the preferred class of beneficiaries died shortly after the wrongful death victim and prior to the filing of the suit. A few court decisions had touched upon the problem. *Southern Pine Electric Power Ass'n v. Denson*²⁷ held that Mississippi's statute vested the right of action in the survivors to be asserted by the personal representative for the benefit of all persons entitled to recover or by the survivors themselves. The court also said the cause of action was not abated by the death of the survivors. The case has been cited as authority for the rule that the action may be continued for the benefit of the beneficiaries of the next succeeding class if the preferred beneficiaries die before a suit is commenced,²⁸ but this was not actually the holding of the case nor was this conclusion reached in dictum. The decision in *Southern Pine* was to allow suit by the administrator of the wrongful death decedent rather than by the estate of his wife who was killed in the same disaster. The court, however, based its decision on two factors not present in *Partyka*. First, in *Southern Pine* there were no surviving statutory beneficiaries of any class, unlike the situation in *Partyka*. The victim's wife died in the same occurrence and he had neither children nor any living relatives qualified to recover. Section

²²See, e.g., *Little v. Ireland*, 30 F. Supp. 653, 655 (D. Idaho 1939); *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 693-97, 66 S.W.2d 920, 926-29 (1933); *Walsh v. Bressette*, 51 R.I. 354, 356-57, 155 A. 1, 3 (1931); *Arendt v. Kratz*, 258 Wis. 437, 46 N.W.2d 219 (1951).

²³See *Jenkins v. Midland Valley R.R.*, 134 Ark. 1, 203 S.W. 1 (1918); *Elberton v. Thornton*, 138 Ga. 776, 76 S.E. 62 (1912); *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933); *Accord Holt v. Stollenwerck*, 174 Ala. 213, 56 So. 912 (1911).

²⁴MISS. CODE ANN. § 11-7-13 (Supp. 1979); *Smith, Wrongful Death Damages in North Carolina*, 44 N.C. L. REV. 402, 425 & n. 143 (1966).

²⁵376 So. 2d 646 (Miss. 1979).

²⁶MISS. CODE ANN. (Supp. 1979).

²⁷214 Miss. 397, 414, 57 So. 2d 859, 864 (1952).

²⁸Brief for Appellant at 5-6, *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646 (Miss. 1979); 25A C.J.S. *Death* § 40 (1966).

11-7-13 provides that if the deceased has no husband, wife, children, father, mother, sister or brother, "then the damages shall go to the legal representative, subject to debts and general distribution."²⁹ Secondly, the pleadings in *Southern Pine* did not allege the survivorship of the wife. Although her survival for a short period beyond the death of her husband was established by the proof in connection with reducing the amount of damages, it was not averred in the pleadings and, according to the case, the pleadings must conform to the proof. Thus survivorship was not in question and simultaneous deaths were assumed.³⁰

In 1973 the supreme court in *Smith v. Garrett*,³¹ was asked whether recovery for Mrs. Smith's wrongful death should go to her heirs by descent and distribution or be paid out according to her will. There were no statutorily designated relatives living at the time of recovery. Faced once again with no surviving beneficiaries, the court allowed suit by the decedent's representative and determined the meaning of the statutory provision concerning whether damages are to be subject to debts and general distribution.³² The court found the intent of the legislature was that when there were no surviving heirs as specifically named and listed, the damages recovered in a wrongful death action would become an asset of the decedent's estate to be used in the payment of just debts of the estate. Any residue was to be distributed according to the last will and testament of the deceased or by descent and distribution if there were no will.³³ *Smith* contained language to the effect that the legislature did not list cousins of the decedent among those entitled to recover and thus they should not be allowed to recover the benefits of the wrongful death action, especially since they were also not named by the testatrix in her last will and testament.³⁴

*Scott v. Munn*³⁵ involved a suit commenced by a husband for the death of his wife. The husband died before judgment and the administrator of his estate was allowed to continue the action. The court had to determine whether the action to recover for loss of the wife's society and the comforts of that society could survive to the husband's estate. The court decided that the action for medical bills and services of the wife constituted a property right that would survive the death of the husband-beneficiary and pass to his estate, but the claim for companionship and consortium died with him and could not be revived.³⁶

²⁹MISS. CODE ANN. § 11-7-13 (Supp. 1979).

³⁰214 Miss. at 415-16, 57 So. 2d at 865.

³¹287 So. 2d 258 (Miss. 1973).

³²"If the deceased have neither husband, nor wife, nor children, nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution." MISS. CODE ANN. § 11-7-13 (1972).

³³287 So. 2d at 261.

³⁴*Id.* at 260.

³⁵245 Miss. 120, 146 So. 2d 564 (1962).

³⁶*Id.* at 129, 146 So. 2d at 568.

A distinguishing factor in *Scott* was that the suit was actually commenced by the preferred beneficiary before his death. Many courts might reach a different result if the suit had not already been instituted by the beneficiary.³⁷ The justification for allowing the right to survive in such a case is that the action vests upon the death of the injured person and the class of beneficiaries cannot thereafter be enlarged or limited.³⁸

ANALYSIS BY THE COURT

The majority in *Partyka* relied mainly on the case law of other jurisdictions in reaching its decision to allow the right to sue for wrongful death to survive for the benefit of the deceased wife's estate.³⁹ Stating that the Kentucky wrongful death statute⁴⁰ is similar to that of Mississippi, the majority found *Sharp's Adm'r v. Sharp's Adm'r*⁴¹ to be on point. There, a woman with no children was survived by her husband who died twenty-six days after her death. The Kentucky Supreme Court affirmed the award to the husband's estate even though the recipients of the benefits were the children of the husband by a prior marriage.⁴² The decision in *Sharp's Adm'r* adopted language of prior Kentucky cases holding that a beneficiary in being or "in esse" when the victim meets his demise causes the right to attach, and having attached, it descends at his death along with his other personal property.⁴³

The *Partyka* court said that according to the Kentucky decisions, the person or persons entitled to benefits under the death statute were to be determined at the time of death of the person wrongfully killed.⁴⁴ The Kentucky statute provides, "If the deceased leaves a widow or husband and no children or their descendants, then the whole to the widow or husband."⁴⁵ (Emphasis added.) According to *Sharp's Adm'r*, a spouse could only leave a surviving widow or husband at the time of death.⁴⁶

The Mississippi Supreme Court, utilizing the rationale of *Sharp's Adm'r*, reasoned that even though recovery would be distributed to persons other than those designated by the statute, the statutory bene-

³⁷1 S. SPEISER, *supra* note 6, at § 8:17.

³⁸*Id.* See also *id.* at § 11:40.

³⁹376 So. 2d at 649-50.

⁴⁰KY. REV. STAT. § 411.130 (1970).

⁴¹284 S.W.2d 673 (Ky. 1955).

⁴²*Id.*

⁴³*Id.* at 674-75 (quoting *Thomas Adm'r v. Maysville Gas Co.*, 112 Ky. 569, 575-76, 66 S.W. 398, 399 (1902)). See also *Kentucky Utilities Co. v. McCarty's Adm'r*, 169 Ky. 38, 183 S.W. 237 (1916).

⁴⁴376 So. 2d at 649-50.

⁴⁵KY. REV. STAT. § 411.130(2)(a) (1970).

⁴⁶284 S.W.2d at 675.

ficiary who died before the recovery would be benefited, even if only through payment to his creditors.⁴⁷ *Partyka* also cited with approval *White v. Atchison T. & S. F. Ry. Co.*⁴⁸ which held that the determining factor was not how long a survivor lived, but just the fact that he did survive the decedent.⁴⁹

Three justices dissented in *Partyka* urging that the legislature had settled the issue when it selected certain beneficiaries by name and by class to recover damages as a result of a wrongful death.⁵⁰ The dissenting judges said the statute prevents recovery by the children of dead brothers and sisters by designating brothers and sisters as a secondary class of recipients, thus a decedent's own nieces and nephews are excluded.⁵¹ Therefore, according to the dissent there certainly could be no legislative intent to allow the remote next of kin of the deceased wife, some of whom probably were never even known by the deceased, to recover for his death in preference to his own near relatives. The dissenting judges relied on *Smith v. Garrett*⁵² and its language regarding legislative intent. Therein it was stated that the wrongful death statute, creating a cause of action unknown to the common law, must be strictly construed.⁵³ *Smith* concluded that it would have been an easy matter for the legislature to have provided for the benefits to accrue to persons other than those named in the event of the death of a named beneficiary as it had done in providing that the damages received would become an asset of the estate when there were no surviving heirs among those listed.⁵⁴

The dissent in *Partyka* stated that the wrongful death "statute is inclusive in itself and sets out the newly created cause of action and the manner in which it should be enforced."⁵⁵ It is a special statute passed in derogation of the common law, and is separate from survival. It does not cause the deceased's right of action to survive or to be revived, but enables designated members of his family to recover damages.⁵⁶ Justice Bowling, speaking for the minority, stated in conclusion that "an interpretation of the wrongful death statute which gives sole

⁴⁷376 So. 2d at 649-50 (quoting *Sharp's Adm'r v. Sharp's Adm'r*, 284 S.W.2d at 675).

⁴⁸125 Kan. 537, 265 P. 73 (1928).

⁴⁹*Id.* at 538-39, 265 P. at 73-74.

⁵⁰376 So. 2d at 652-53 (Bowling, J., dissenting).

⁵¹Miss. CODE ANN. § 11-7-13 (Supp. 1979). The relevant portion of the Mississippi wrongful death statute actually provides: "if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death." *Id.* (emphasis added).

⁵²287 So. 2d 258 (Miss. 1973).

⁵³*Id.* at 260. See also *Logan v. Durham*, 231 Miss. 232, 239, 95 So. 2d 227, 229 (1957); *McNeely v. City of Natchez*, 148 Miss. 268, 114 So. 484 (1927).

⁵⁴287 So. 2d at 261-62.

⁵⁵376 So. 2d at 651.

⁵⁶*Id.* at 653 (quoting *Thomas v. State*, 117 F.2d 949 (5th Cir. 1941)).

recovery to remote in-laws, rather than the father, mother, brother and sister cannot be reconciled with justice and right."⁵⁷

ANALYSIS

The problem presented in *Partyka* is one that has plagued legislators and litigators whenever it has arisen. Because an action for wrongful death is a statutory creature, unknown to the common law, the need for clarity and definitiveness is greater, yet the possibility of achieving it more remote. In *Partyka* three justices vigorously dissented and Justice Lee felt compelled to write a concurring opinion,⁵⁸ thus verifying that an array of opinion and theory exists in this field and on this problem in particular.

Legislative intent

The purpose of wrongful death acts of the Lord Campbell type⁵⁹ is to create a cause of action for the wrongful death of a decedent and to specify exactly who is to recover the damages.⁶⁰ Recovery is designated for the exclusive benefit of certain members of the victim's family, not for members of a deceased beneficiary's family.⁶¹ The Mississippi Supreme Court held in *Scott v. K-B Photo Service, Inc.*,⁶² that the type of damages recoverable include those that the decedent's heirs might have suffered because of their personal relationship with him, such as support and loss of companionship.⁶³ It seems unrealistic to say that the estate of the wife and her relatives suffers damages in the way of lost support and companionship. It would appear that the legislative intent was to limit the persons benefited to those statutorily delineated and to compensate them for their loss of the decedent's companionship and support. Payment to a beneficiary's creditors hardly qualifies as serving such a purpose. Since the legislature did not intend for the benefits to go to the estate of the wrongfully deceased, it is highly unlikely that it intended a recovery should go to the estate of a deceased survivor.

Other states' approaches

A majority of the *Partyka* court compares Mississippi's wrongful death statute with that of Kentucky.⁶⁴ However, the wording of the

⁵⁷*Id.* at 653.

⁵⁸*Id.* at 651.

⁵⁹The statutes for which Lord Campbell's Act is the prototype are those cast in like language or interpreted as creating a new cause of action for the surviving relatives. See The Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.

⁶⁰Brief for Appellant at 4 *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646 (Miss. 1979).

⁶¹*Smith v. Garrett*, 287 So. 2d at 260-61.

⁶²260 So. 2d 842 (Miss. 1972).

⁶³*Id.* at 844.

⁶⁴KY. REV. STAT. § 411.130 (1970).

Kentucky statute appears significantly different. The majority places great emphasis on the meaning of the word *leave*,⁶⁵ as used in the Kentucky statute and concludes that one can only leave a surviving spouse at the time of his death. Therefore, the beneficiary is determined at the moment of the victim's death. The Mississippi statute provides, in its equivalent portion that, "if the deceased *has* no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters . . ."⁶⁶ (Emphasis added.) Use of the word *has* could more easily mean that beneficiaries are to be determined at the time of the suit or of recovery.

The *Partyka* court relied heavily on the rationale of a line of Kentucky cases culminating in *Sharp's Adm'r* in holding that the right of action vested in the beneficiaries at the moment of the wrongful death.⁶⁷ Other state courts, however, have strongly contended otherwise.⁶⁸ These authorities have used different theories to conclude that the beneficiaries are determined at the time of suit.

One case holds that if the surviving spouse died without exercising his right, "there is no survival of the spouse's right or transfer of it to his or her personal representative or heirs but a new right is established in the relative of the injured person next in order . . ."⁶⁹ Other cases speak of the right not vesting in any particular class at the time of the wrongful death, but vesting instead in the personal representative of the wrongfully deceased on behalf of the class that is in existence when the right is enforced by suit.⁷⁰ Thus, no right is vested in any one person which can survive to his estate. In *Morris v. Spartanburg Ry., Gas & Electric Co.*⁷¹ the South Carolina court stated that other beneficiaries were contemplated by the statute to recover in the event of the death of a beneficiary of the first class.

The separate survival concept

Survival statutes are sometimes invoked to allow a right to sue in wrongful death to survive to the estate of a deceased beneficiary. Survival is a totally separate concept, however.⁷² Survival of actions serves certain interests and wrongful death certain others. A wrongful death statute is all-inclusive, providing for recovery by other relatives if the

⁶⁵376 So. 2d at 649 (construing KY. REV. STAT. § 411.130(d) (1970)).

⁶⁶MISS. CODE ANN. § 11-7-13 (Supp. 1979).

⁶⁷376 So. 2d at 649-50.

⁶⁸See generally *Kwiatkowski v. Shellhorn & Hill, Inc.*, 57 Del. 458, 201 A.2d 455 (1964); *Garrard v. Mahoning Valley Ry.*, 100 Ohio 212, 126 N.E. 53 (1919).

⁶⁹*Arendt v. Kratz*, 258 Wis. 437, 441, 46 N.W.2d 219, 221 (1951).

⁷⁰See generally *Garrard v. Mahoning Valley Ry.*, 100 Ohio 212, 126 N.E. 53 (1919).

⁷¹70 S.C. 279, 49 S.E. 854 (1904).

⁷²See *Oppenheim, The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386, 386-87 (1942), *Schumacher, Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924).

first class is not in existence and providing for recovery by the victim's estate if none of the listed relatives are in existence. Survival concepts should not be imposed upon a wrongful death action to effect results unintended and clearly excluded by legislators. To allow a wrongful death action to survive to the estate of a beneficiary who died seems clearly contrary to the purpose of wrongful death actions—compensating the designated relatives for their loss caused by the death.⁷³

Nowhere within section 11-7-13 is the personal representative of a deceased beneficiary listed as being empowered to bring the death action.⁷⁴ Only those named in the statute are so entitled. The imposition of survival would have the effect of enlarging the class of those entitled to institute the action and to recover.

Unjust results

If a beneficiary's estate is allowed to recover, outsiders unrelated to the decedent, who suffered no pecuniary loss or loss of companionship would be eligible to benefit from the wrongful death action. The beneficiary's relatives no matter how distant, who may or may not have been known to the wrongful death victim, are allowed to recover in preference to the decedent's own blood relatives. It hardly seems just in *Partyka* that the decedent's in-laws will be able to reap the benefits of the recovery when the deceased left living a mother and father, sisters and a brother. Ironically, if an action for the wife's death is brought subsequently, these same relatives who benefited through her estate may be able to recover again. Such results do not seem consistent with the purpose of creating wrongful death causes of action, nor, as the *Partyka* dissent pointed out, consistent with justice and right.⁷⁵

CONCLUSION

Wrongful death and survival of tort actions are areas wrought with confusion and inconsistencies, in part because of a confusion of the

⁷³*Wrongful Death—Abatement of Causes of Action Upon Death of Sole Beneficiary*, 40 MINN. L. REV. 94, 94-95 (1955).

⁷⁴The action for such damages may be brought in the name of the personal representative of the [wrongful death decedent] for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but (1) suit for the same death which shall ensue for the benefit of all parties concerned . . .

MISS. CODE ANN. § 11-7-13 (Supp. 1979).

⁷⁵376 So. 2d at 653 (Bowling, J., dissenting).

underlying principles and the failure to distinguish between the rights thus given. Undoubtedly adding to the misconceptions is the inclusion by most wrongful death acts of provisions allowing for recovery of damages that would be recoverable in a survival action. *Partyka* presented the court with an opportunity to clarify some of the misunderstandings and to rectify some of the problems regarding death actions and the mistaken mingling of wrongful death and survival. The court instead has only added to the muddle.

Carmen Gettis Castilla

