



51 EST. PLAN. 23

**Estate Planning**

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**Wrongful Death**

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HOW WRONGFUL DEATH STATUTES CAN KILL AN ESTATE PLAN: PART 1

A study of considerations for minor beneficiaries and guardian choice.

**\*23** This article will appear in two parts. Part 1 is below and Part 2 will appear in next month's issue.

Parents do numerous things for their minor children - both tangible and intangible. Parents provide minor children with food and shelter and do what they can to keep them in good health. They also do all they can to ensure their children are educated. Beyond these tangible things, parents try to pass on their values and teach their children their religious beliefs. When only one parent dies or becomes incapacitated, the surviving parent generally carries on this role. When both parents either die or become incapacitated while their child is still a minor, the child needs a substitute parent. A guardian assumes the responsibilities of the parent in such situations. A minor child guardianship occurs when an adult (the 'guardian') is named by a state court judge to care for an unemancipated minor (the 'ward' or 'minor child') whose parents are unable or unwilling to care for the child.<sup>1</sup> Once appointed, the guardian has the same rights and obligations under the law as a parent.

However, a guardianship of an unemancipated minor does not become effective until the occurrence of some event renders both parents unable to serve as the guardian (usually death or disability of the parents<sup>2</sup>). Thus, it is critical for parents to name a guardian, and perhaps one or more alternative guardians in both their will (in the event of their death) as well as in a durable power of attorney (in the event they become incapacitated while living).<sup>3</sup>

The U.S. Supreme Court has repeatedly held that it has no jurisdiction under the United States Constitution to consider the issue of minor guardianship (essentially making the issue an issue reserved to the States).<sup>4</sup> While each State's laws vary, they all use the same guiding principle in naming a guardian of a minor child - best interest of the child. When a minor child is left parentless (whether by death or incapacity of both parents), a state court judge decides who will be the guardian of that minor child. If the parent(s) left a will or durable power of attorney that names a preferred guardian, the judge typically gives the parents' preferences great weight. That said, the judge will always consider the best interest of the child in naming a guardian - even one chosen by the deceased parents - and can override the guardian named in the will or durable power of attorney if the judge deems someone else to be better for the child.

**\*\*2** While not legally binding on a court deciding guardianship of a minor child, most estate attorneys advise their clients to name guardians for any minor children upon their death (in a will) or upon their incapacity (in a durable power of attorney). When naming a guardian, parents typically, and rightfully, consider who would be the best person to raise the minor child if they were not here. Parents also typically set up one or more trusts to pass property to for the benefit of a minor child (or

minor children). What most parents do not think of, or maybe do not realize, is that there are certain categories of property that pass outside of probate and not pursuant to the will (or pursuant to intestate succession if the parent dies without a will). In some states, for example, wrongful death lawsuit recoveries pass not pursuant to the testator's will or pursuant to intestate succession laws, but instead pass outside of probate to a list of potential takers decided upon by State legislators.<sup>5</sup> If the parents of minor children die in such a manner to give rise to a wrongful death lawsuit in such a State, any recovery from that lawsuit will not pass pursuant to the testator's will or pursuant to State law intestate succession. Instead, a state court judge or jury will ultimately decide who among the potential takers will receive part or all of the wrongful death recovery. Moreover, and importantly, the guardian(s) of the minor children will be responsible for overseeing those monies until the minor children reach the age of majority.

This 2-part series explores state minor guardianship law and state wrongful death law in general before taking a closer look at the laws of a few select states. Importantly, state wrongful death laws allow recoveries, which can be sizable, to pass outside the probate estate (any portion of the recovery for the benefit of a minor child are held by the guardian of the minor child until the child reaches majority). Part 2 then offers recommendations to state legislatures to amend wrongful death statutes to allow testators certainty with respect to their estate plans in the event of a wrongful death recovery. Finally, the series will offer recommendations to estate planners when drafting an estate plan to consider a potential wrongful death recovery before concluding.

### **Minor Guardianship in General**

**\*24** One issue that usually arises in connection with any estate planning advice includes advising parents when nominating in the parents' will a guardian of a minor child upon the parents' death.<sup>6</sup> While courts are not required to honor the parents' wishes regarding who will serve as the guardian of a minor child, most courts do honor the nomination unless the person nominated is unfit to serve.<sup>7</sup> When facing the task of deciding who to name as guardian of their minor child(ren), parents inevitably (and rightfully so) begin to ponder, 'Who has my values and will teach my child the things I would have taught my child, who do I trust to be stable and patient enough to raise my child, who has the resources to assume financial responsibility for my child,' and so on. Parents choose a guardian of their minor children based on who they believe will best teach and nurture their child(ren) in the same manner the parents would have if they had lived. There are many reasons why the sole focus of a guardian for minor children is on the nurturing role of a guardian.

**\*\*3** First, most persons with substantial assets and minor children establish one or more trusts that become effective either during life or upon death to hold the portion of their assets passing to a minor child. These trusts typically become effective either (1) when the parent becomes incapacitated during life or (2) upon death; and name agent (in a durable power of attorney) or a trustee (in a trust) and/or to hold their assets during any incapacity or upon death. The trustee or agent will safeguard and invest those assets until the child reaches an age of maturity decided upon by the parents. Parents feel satisfied that they have provided for both the nurturing guardian to raise their children and teach them as the parent(s) would have and someone to look after the child's assets until the child reaches a given level of maturity (i.e., the trustee or agent). Second, parents may not have substantial assets to pass to a minor child (or to minor children). Third, few estate planners consider and discuss the two very different guardian roles (quite possibly because those same estate planners structure elaborate estate plans with trusts to safeguard any assets passing to minor children upon the parents' death). For these reasons, parents do not contemplate that the guardian of minor children may be responsible for overseeing large sums of money upon their death.

As discussed in more detail below, the best plan will fail, however, where the parent(s) die in such a manner to give rise to a wrongful death recovery and where state law dictates how such recovery will be divided and the recovery passes not pursuant to the decedent's will, but pursuant to a jury decision. Moreover, those recoveries pass not to the trustee named in the parents' trust(s), but to the guardian, or guardians, of the minor children.

### State Wrongful Death Statutes

At common law, there was no right of recovery for the death of a human killed by the negligence or any other wrongful act of another. This law derives from dictum in the landmark case of *Baker v. Bolton*.<sup>8</sup> In this case (decided in 1808), the plaintiff sued the owners of a stagecoach which had overturned, causing the death of his wife. The plaintiff stated that ‘plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind.’ Notwithstanding the plaintiff’s claimed losses, Lord Ellenborough instructed the jury to consider only the loss of society and the grief suffered by plaintiff, and that damages were recoverable for these losses only from the time of the accident to the time of death, which was less than a month. He further stated that ‘in a civil court, the death of a human being could not be complained of as an injury.’ Lord Ellenborough’s off-hand remarks became the basis for the so-called American common law ‘rule’ that there could be no recovery for wrongful death in the absence of statute. Although it was historically dubious and cruelly irrational, his dictum was recited by rote, without any critical examination, by hundreds of decisions in the various courts throughout the United States.<sup>9</sup> Such was the law of England until the passage of Lord Campbell’s Act,<sup>10</sup> which created a cause of action for wrongful death.<sup>11</sup>

**\*\*4** Notwithstanding the passage of Lord Campbell’s Act by England in 1848 overriding the common law rule prohibiting wrongful death recoveries, the United States was very slow to evolve. In the United States, numerous cases cited the English common law rule denying the right to sue for wrongful death long after Lord Campbell’s Act became the law of England.<sup>12</sup> Over time, however, a growing number of United States courts began to criticize the common law rule denying the right to sue for wrongful death<sup>13</sup> and some actually allowed lawsuits for wrongful death.<sup>14</sup> The United States Supreme Court finally rejected outright the holding in *Baker v. Bolton* in a 1970 decision in which the court stated as follows:

Our analysis of the history of the common-law rule indicates that it was based on a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all. Further, regardless of the viability of the rule in 1886 as applied to American land-based affairs, it is difficult to discern an adequate reason for its extension to admiralty, a system of law then already differentiated in many respects from the common law. One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death . . . ; Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical in the two cases: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him—usually spouse and children—seek to recover for their total loss of one on whom they depended. This difference, however, even when coupled with the practical difficulties of defining the class of beneficiaries who may recover for death, does not seem to account for the law’s refusal to recognize a wrongful killing as an actionable tort. One expects, therefore, to find a persuasive, independent justification for this apparent legal anomaly. . . . ; The historical justification marshaled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar a subsequent civil suit.<sup>15</sup>

**\*\*5 \*25** Following the lead of the U.S. Supreme Court, each state that had not already done so enacted a statutory system under which damages may be awarded for wrongful death.

There are typically two distinct actions related to a wrongful death. The first is an action attributable to damages incurred by the decedent during his or her life (‘Survival Action’). A Survival Action cover damages that the decedent incurred from the moment of the injury to the time of their death plus any other expenditures charged against the estate resulting from the

wrongful death. Examples of damages recoverable in a Survival Action include the decedent's pain, suffering, medical bills, and funeral and burial expenses. Recoveries arising from a Survival Action are includible in the decedent's gross estate and, thus, pass pursuant to the decedent's probated will, marital property laws, and/or intestate succession laws, whichever the case may be.<sup>16</sup> The second type of action related to a wrongful death is one brought pursuant to a state wrongful death statute by the representative of the estate on behalf of the persons named in the wrongful death statute as possible takers under the wrongful death claim ('Wrongful Death Action'). Recoveries arising from a Wrongful Death Action pass outside the probate estate and are, thus, excluded from the decedent's estate.<sup>17</sup>

State wrongful death statutes related to the Wrongful Death Action often not only create a right to sue (a property right), but also dictate which person(s) can share in the wrongful death recovery. Under such statutes any recovery passes outside the decedent's will and a state court judge or a jury are given the power to decide which person(s) takes the proceeds of any wrongful death lawsuit. If the potential takers cannot agree on the division of the wrongful death recovery, then a jury will decide how to distribute the recovery between or among persons seeking a share of the recovery.

Below is a summary of a few wrongful death statutes in the U.S. focusing, in particular, on how each statute dictates how a wrongful death recovery will be distributed between or among persons seeking a share of the recovery.

### **California.**

California law allows either the personal representative of a decedent's estate or any one of a list of enumerated parties to assert a Wrongful Death Action<sup>18</sup> and specifically provides that '[t]he court shall determine the respective rights in an award of the persons entitled to assert the cause of action.'<sup>19</sup> In interpreting the statute, California courts have held that '[t]he amount of damages to be awarded in a particular case should be left to the trier of fact and should depend on the circumstances presented'<sup>20</sup> and that '[t]he jury has broad discretion, subject to the usual control where the award is plainly excessive or inadequate, to give such amount 'as under all the circumstances of the case may be just.'<sup>21</sup> Moreover, 'only when the amount of damages awarded is so disproportionate to the injuries received as to suggest passion, prejudice, or corruption on the part of the trier that an appellate court may control the amount of damages awarded.'<sup>22</sup> Thus, a state court judge or jury will dictate how any Wrongful Death Action recovery is distributed among potential takers in California. Importantly, the wrongful death statute controls over any other law (including probate, intestate succession, and marital property division laws) with regard to how proceeds from a Wrongful Death Action recovery will be distributed.

**\*\*6** California amended its wrongful death law in 2021 to permit wrongful death claimants in California to recover damages for the decedent's pain, suffering and disfigurement (a Survival Action).<sup>23</sup>

### **Texas.**

Similar to California, Texas law both provides for a Wrongful Death Action<sup>24</sup> and also dictates a class of potential takers of the wrongful death proceeds.<sup>25</sup> Specifically, Texas law limits the potential takers in a Wrongful Death Action to the surviving spouse, children, and parents of the deceased.<sup>26</sup> The court (or the jury in a case tried before one) has the sole power to divide any damages recovered between the individuals entitled to recover who are alive at the time of such division.<sup>27</sup>

Texas law also provides for a Survival Action.<sup>28</sup>

### **Florida.**

Florida law provides a Wrongful Death Action<sup>29</sup> and also lists those persons who can recover under a Wrongful Death Action.<sup>30</sup> Florida limits takers to ‘survivors.’<sup>31</sup> Florida law defines survivors to mean ‘the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters.’<sup>32</sup> The Florida law also includes ‘the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support.’<sup>33</sup>

Florida law provides that the decedent's personal representative may recover for the decedent's estate (a Survival Action) the following:

- 1 Loss of earnings of the decedent from the date of the injury to the date of death.
- 2 Loss of prospective accumulations of an estate.
- 3 Medical or funeral expenses due to the decedent's injury that have become a charge against the decedent's estate or that were paid on behalf of the decedent.<sup>34</sup>

### **New York.**

\*26 Under New York law, the duly appointed personal representative in New York, or any other jurisdiction, of a decedent who is survived by distributees may maintain a Wrongful Death Action to recover damages for a wrongful act, neglect, or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued (a Wrongful Death Action).<sup>35</sup> Similar to other state's laws, New York law then dictates who shall receive the Wrongful Death Action recovery.<sup>36</sup> Under certain circumstances, the distributees under New York's wrongful death statute can conflict with who would take under other New York laws.<sup>37</sup>

New York law provides a Survival Action and makes clear that any recovery is included in the estate of the deceased (at least for New York estate tax purposes).<sup>38</sup>

### **Pennsylvania.**

\*\*7 Pennsylvania also provides for a Wrongful Death Action<sup>39</sup> and also defines a class of persons (‘beneficiaries’) who can take under the wrongful death statute.<sup>40</sup> Beneficiaries includes only the spouse, children, or parents of the deceased.<sup>41</sup> Any damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person.<sup>42</sup>

Pennsylvania law provides for a Survival Action to recover damages to the decedent between the time of his injury and the time of his death plus any other expenditures charged against the estate resulting from the wrongful death.<sup>43</sup>

### **Illinois.**

Illinois law also creates a Wrongful Death Action.<sup>44</sup> Any Wrongful Death Action under Illinois law shall be brought by the personal representative of the decedent's estate. The amount recovered in a wrongful death suit in Illinois shall be distributed ‘by the court in which the cause is heard or, in the case of an agreed settlement, by the circuit court, to each of the surviving spouse and next of kin of such deceased person in the proportion, *as determined by the court*, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the

deceased person.<sup>45</sup> Thus, similar to other states, the law dictates who can take in a Wrongful Death Action recovery and the court determines what amount each person in that class of people will receive.

Illinois also provides for a Survival Action.<sup>46</sup>

### **Virginia.**

Similarly, under Virginia law, the personal representative of the decedent's estate may maintain a Wrongful Death Action on behalf of potential distributees.<sup>47</sup> Once the lawsuit ends, however, the Wrongful Death Action recovery is not distributed pursuant to the decedent's Will. Instead, Virginia law dictates the potential takers of the Wrongful Death Action recovery.<sup>48</sup>

Virginia law also provides for a survival action.<sup>49</sup>

### **West Virginia.**

Finally, West Virginia law similarly provides a Wrongful Death Action.<sup>50</sup> However, rather than following the testator's Will or intestate succession law, West Virginia law then dictates the potential takers of any Wrongful Death Action recovery. Very surprisingly, the list of potential distributees under West Virginia's wrongful death statute go far beyond who would be allowed to take under intestate succession. Specifically, West Virginia law provides as follows:

In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what portions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents *and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution.*<sup>51</sup>

**\*\*8** The West Virginia statute is incredible in that it allows potentially anyone to recover part of the wrongful death recovery by proving that either (1) they were either financially dependent on the decedent or, even if they were not financially dependent on the decedent, (2) they are otherwise equitably entitled to part of the wrongful death recovery. Moreover, a jury or a judge decides how to divide the wrongful death recovery between or among the potential distributees even if the decedent had a valid Will and/or trust that contained a different distribution scheme.

West Virginia law also provides for a Survival Action.<sup>52</sup>

### **Summary of State Wrongful Death Laws.**

A few things all the Wrongful Death Action laws discussed above have in common include (1) a court, not the decedent's probated will, dictates (i) who can take in a wrongful death recovery and (ii) the amount each person takes, and (2) because the recovery passes pursuant to the wrongful death act and not pursuant to the laws of probate, any wrongful death recovery payable to a minor child would still pass outside the estate as a nonprobate asset directly to the guardian of the minor child's estate.<sup>53</sup> Thus, notwithstanding that a decedent had a valid probated will with an elaborate estate and trust arrangement that entrusted that portion of wealth passing to a minor child (or minor children) to a trustee (likely someone with great financial acumen), a state court judge or jury will decide how wrongful death proceeds are divided. Moreover, because these proceeds pass outside the will, the portion of any such award given to a minor child passes directly to the guardian of the minor child's estate - also chosen by a state law judge. Because wrongful death lawsuits can produce significant sums of money and because minor children will likely be awarded a significant portion of such recovery when it is the death of their parent(s) that gave rise to the recovery, the guardian of the estate of a minor child will be entrusted with a significant sum of money arising from a wrongful death.



Regarding Survival Actions, any recovery will pass pursuant to the decedent's probated will, intestate succession laws, and/or marital property laws, whichever is applicable. Because Survival Action proceeds pass pursuant to the testator's probated will, they will be captured by the decedent's estate plan, including any trust(s) that are established. However, the decedent's will should provide who has the authority to pursue any legal actions on behalf of the estate (a common provision in wills).

Part 1 of this article has introduced the possibility of the guardian of a minor child or of an adult suffering under a disability being entrusted with a large sum of money. Part 2 of this article, in next month's issue, will discuss a possible solution to the issue before taking a deeper dive into minor guardianship law (including a 50-state survey of minor guardianship laws) and recommending that state legislatures change wrongful death statutes to allow the proceeds from a Wrongful Death Action to pass according to existing property <sup>\*27</sup> laws. Part 2 of this article will also offer recommendations to estate planners and family lawyers to address the possibility that a guardian might be entrusted with a large sum of money.

**\*\*9** The guardian(s) of the minor children will be responsible for overseeing those monies until the minor children reach the age of majority.

A Survival Action cover damages that the decedent incurred from the moment of the injury to the time of their death plus any other expenditures charged against the estate resulting from the wrongful death. Examples of damages recoverable in a Survival Action include the decedent's pain, suffering, medical bills, and funeral and burial expenses.

State wrongful death statutes related to the Wrongful Death Action often not only create a right to sue (a property right), but also dictate which person(s) can share in the wrongful death recovery. Under such statutes any recovery passes outside the decedent's will and a state court judge or a jury are given the power to decide which person(s) takes the proceeds of any wrongful death lawsuit.

### Footnotes

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<sup>1</sup> Jasper, GUARDIANSHIP, CONSERVATORSHIP AND THE LAW 7(2008).

<sup>2</sup> A guardian for a minor child may also be appointed if the parent(s) abandon the child or are absent for a prolonged period of time (for example, active military combat). *Id.* at 8.

<sup>3</sup> Guardianship issues also arise with respect to incapacitated adults. This article will focus solely on the guardianship of a minor child.

<sup>4</sup> See, e.g., *Barry v. Mercein*, 46 U.S. 103 (1847); *De Krafft v. Barney*, 67 U.S. 704 (1863); *In re Burrus*, 136 U.S. 586 (1890); and *Perrine v. Slack*, 164 U.S. 452 (1896).

<sup>5</sup> See, e.g., [W.V. Code section 55-7-5](#) (creating the right to sue) and [W.V. Code section 55-7-6\(a\)](#) (providing that '[i]n every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to

it may seem fair and just, and, may direct in what portions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and *any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution.*’ Emphasis added.)

- 6 In fact, the only time the issue of naming a guardian for minor children does not arise in connection with an estate plan is when the client does not have minor children.
- 7 Randolph, *THE EXECUTOR'S GUIDE* 213 (Nolo 8th ed. 2018) [hereinafter *THE EXECUTOR'S GUIDE*].
- 8 *Baker v. Bolton*, 1 Campb. 493, 170 Eng. Reprint. 1033 (1808).
- 9 Speiser and Rooks, *Recovery for Wrongful Death* section 1.2, n.2 (4th ed. Thomson Reuters) (citing numerous cases) [hereinafter *Speiser & Rooks*].
- 10 Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.).
- 11 See Smedley, *Wrongful Death: Bases of the Common Law Rules*, 13 *Vanderbilt L. Rev.* 605, 617 (1960).
- 12 See, e.g., *Borer v. American Airlines, Inc.*, 563 P.2d 858 (Cal. 1977) (the court, in concluding that it should not recognize a cause of action by a child for loss of parental consortium where the parent was injured and not killed, whereas such rights are afforded under the wrongful death statute, distinguished between the child whose parent is killed and one whose parent is disabled, stating that one distinction relates to the historical purpose of the wrongful death statutes); *Nolan v. Moore*, 88 So. 601 (Fla. 1920); *Sharrow v. Inland Lines*, 108 N.E. 217 (N.Y. 2015); *Chrisafogeorgis v. Bradenberg*, 304 N.E.2d 88 (Ill. 1973); *Frazier v. Oil Chemical Co.*, 179 A.2d 202 (Pa. 1962); and *Ramirez v. Autobuses Blancos Fleche Roja, S.A. De C.V.*, 486 F.2d 493 (5th Cir. 1973) (‘separate statutorily created cause of action unknown to the common law.’).
- 13 See, e.g., *Salsedo v. Palmer*, 278 F. 92 (C.C.A. 2d Cir. 1921); *Van Amburg v. Vicksburg, S. & P.R. Co.*, 37 La. Ann. 650 (La. 1885); *James v. Christy*, 18 Mo. 162 (Mo. 1853); *Bedore v. Newton*, 54 N.H. 117 (N.H. 1873); and *Rowe v. Richards*, 151 N.W. 1001 (S.D. 1915).
- 14 See, e.g., *Ford v. Monroe*, 1838 WL 308 (N.Y. Sup 1838) and *Shields v. Yonge*, 1854 WL 1606 (Ga. 1854).
- 15 *Moragne v. States Marin Lines, Inc.*, 398 U.S. 375, 90 (1970) (citations omitted).
- 16 See, e.g., Rev. Rul. 69-8, 1969-1 C.B. 219; Rev. Rul. 75-127, 1975-1 C.B. 297.
- 17 See, e.g., Rev. Rul. 75-127, 1975-1 C.B. 297; Rev. Rul. 75-126, 1975-1 C.B. 296.
- 18 Cal. Civ. Proc. Code section 377.60 (Deering 2019).
- 19 *Id.* at section 377.61.
- 20 *Syah v. Johnson*, 55 Cal. App. 2d 534, 547 (1966).
- 21 *Id.*
- 22 *Id.*
- 23 Cal. Civ. Proc. Code section 377.34 (Deering 2021).
- 24 Texas Civ. Prac. & Rem. Code section 71.002 (Vernon 2019).



- 25 *Id.* at section 71.004 (Vernon 2019).
- 26 *Id.* at section 71.004(a) (Vernon 2019).
- 27 *Id.* at section 71.010 (Vernon 2019).
- 28 Texas Civ. Prac. & Rem. Code section 71.021 (Vernon 2019).
- 29 Fla. Stat. sections 768.16 to 768.37 (2019). Specifically, Fla. Stat. section 768.19 (2019) creates a cause of action for wrongful death.
- 30 Fla. Stat. section 768.18 (2019). Florida law dictates that ‘survivors’ can take proceeds from a wrongful death lawsuit. See Fla. Stat. section 768.17 (2019) (stating a public policy of the Florida to shift the losses when wrongful death occurs from the survivors of the decedent to the wrongdoer) and Fla. Stat. section 768.18 (2019) (defining ‘survivors’ to mean the decedent’s spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters.’ The Florida law also includes ‘the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child’s support.’). Part 2 will discuss a potential constitutional challenge to wrongful death statutes - in particular ones that attempt to preclude a constitutionally protected class (like illegitimate children) from taking under the statute.
- 31 Fla. Stat. section 768.17 (2019).
- 32 *Id.* at section 768.18 (2019).
- 33 *Id.*
- 34 Fla. Stat. section 768.21(6) (2019).
- 35 N.Y. Est. Powers & Trusts Law section 5-4.1 (Gould 2019).
- 36 N.Y. Est. Powers & Trusts Law section 5-4.4 (Gould 2019).
- 37 See, e.g., Opinion of the New York Surrogate’s Court: *Estate of Fallou Diba*, 24 Quinn. Prob. Law Jour. 37.
- 38 N.Y. Estates, Powers & Trusts Law section 11-3.3 (Consol. 2019).
- 39 42 Pa. Cons. Stat. section 8301(a).
- 40 42 Pa. Cons. Stat. section 8301(b).
- 41 *Id.*
- 42 *Id.*
- 43 For a great discussion of the Wrongful Death Action versus the Survival Action under Pennsylvania law, see Boynton & Sanderson, ‘The Impact of the Pennsylvania Inheritance Tax Upon the Proceeds of Wrongful Death and Survival Actions, Philadelphia Bar Association Probate and Trust Law Section Newsletter, No. 109 p.2 (Spring 2004) available at: <https://s3.amazonaws.com/membercentralcdn/sitesdocuments/phlbar/phlbar/0103/1977103.pdf?AWSAccessKeyId=AKIAIHKD6NT2OL2HNPMQ&Expires=1686113482&Signature=3IQXkRZ9BjP86smP9LshijzcnM0%3D&response-content-disposition=inline%3B%C20filename%3D%22April2004%2Epdf%C22%C3B%C20filename%C2A%3DUTF%2D8%C27%C27April2004%252Epdf&response-content-type=application%2Fpdf>
- 44 740 Ill. Comp. Stat. 180/1 (2019).

- 45 *Id.* at section 180/2(b) (2019) (emphasis added).
- 46 755 Ill. Comp. Stat. 5/27-6 (2019).
- 47 Va. Code Ann. section 8.01-54 (2019).
- 48 Va. Code Ann. sections 8.01-53 and 8.01-54 (2019).
- 49 Va. Code Ann. section 8.01-25 (2019) (Survival of causes of action) and Va. Code Ann. section 8.01-56 (2019).
- 50 W. Va. Code section 55-7-5 (creating the right to sue).
- 51 W. Va. Code section 55-7-6(a) (emphasis added).
- 52 W. Va. Code section 55-7-8.
- 53 Even the Pennsylvania law, which calls for distributions to beneficiaries pursuant to the laws of intestate succession, would still pass pursuant to the wrongful death statute - not the probate laws - and, thus, would be a nonprobate asset passing directly to the guardian of the minor child's estate.

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