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Death - Death of Sole Next of Kin Will Not Abate a Pending Wrongful Death Action - Wrongful Death Action Is a Property Right under Survival Statute of Illinois

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DISCUSSION OF RECENT DECISIONS

DEATH—DEATH OF SOLE NEXT OF KIN WILL NOT ABATE A PENDING WRONGFUL DEATH ACTION—WRONGFUL DEATH ACTION IS A PROPERTY RIGHT UNDER SURVIVAL STATUTE OF ILLINOIS.—The Illinois Supreme Court, in *McDaniel v. Bullard*, 34 Ill. 2d 487, 216 N.E.2d 140 (1966), was again confronted with the question of whether the death of the sole next of kin would abate a pending wrongful death action[1] or whether the sole next of kin's estate would be entitled to prosecute her claim under the Survival Statue.[2] The Supreme Court, by Chief Justice Klingbiel, held that the death of the next of kin would not abate the pending wrongful death action but that the wrongful death action would survive as a property right under the Survival Statute.

A wrongful death action was originally brought on behalf of the minor child, Yvonne Ann McDaniel, for the death of her parents and sister killed in an automobile collision. Before the case could be tried, Yvonne died from causes unrelated to the deaths of the other members of her family. The defendants thereupon moved for dismissal on grounds that her death left no next of kin entitled to relief under the wrongful death action. Dismissal was granted and the plaintiffs, administrators of the estate of Yvonne's parents and sister, appealed directly to the Supreme Court of Illinois. They contended that if the Wrongful Death Statute and the Survival Statute were construed as to bar their cause of action, there would be a denial of a remedy for a wrong, contrary to § 19 of article II of the Illinois Constitution, and there would be a denial of their right of equal protection under the law.[3] In reversing the decision of the Circuit Court of Sangamon County, the court overruled an earlier Illinois decision[4] and held that the wrongful death action did not abate but became a property right of the sole next of kin's estate.

Historically, at common law, the survival of tort actions was unknown. The general rule of the common law that *ex delicto* actions abated on the death of either party was modified by the statute of 4 Edward III, ch. 7, which was construed to permit actions for the loss, damage or conversion of personal property to survive to the personal representative of the de-

1 Ill. Rev. Stat. ch. 70, § 2 (1963). The pertinent part of this statute is herein cited:

> Every such action shall be brought by and in the names of the personal representatives of such deceased and . . . the amount recovered in every such action shall be for the exclusive benefit of the widow and nxt of kin.

2 Ill. Rev. Stat. ch. 3, § 339 (1963). The pertinent part of this statute is herein cited:

> In addition to the actions which survive by the common law, the following also survive: . . . actions to recover damages for an injury to real or personal property. . . .

3 Under § 5 of article IV of the Illinois Constitution, a constitutional issue may be appealed directly to the Supreme Court as a matter of right.

4 Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928).

ceased. This statute became a part of our common law and was enlarged upon by both the Wrongful Death Statute and the Survival Statute.[5]

The Illinois courts, in construing the Wrongful Death Statute, have stated that if there is no surviving spouse or next of kin there can be no recovery for the benefit of anyone.[6] However, what happens—as in the *McDaniel* case—when the next of kin survives for a short period? Does not her right of action become vested? In *Union Steamboat Co. v. Chaffin's Adm'rs*,[7] a federal court interpreting Illinois law held that a right of action for wrongful death accrued immediately upon that death, hence becoming an asset of the next of kin and the right of action was not affected by the next of kin's subsequent death.

However, the later case of *Wilcox v. Bierd*[8] tended to generate a conflict in law. Without citing *Union Steamboat Co. v. Chaffin's Adm'rs*, the court in the *Wilcox* case stated, "The Survival Act does not provide for the survival or further continuance of the action in case of the death of the sole next of kin,"[9] as the Survival Act only applies to tangible property. One writer in an earlier edition of this law review speculated as to the reason for this decision:

> It is worthy of notice that since the infant lived only thirty minutes longer than the decedent, the pecuniary loss suffered was negligible so the court, for practical reasons, may have decided to disallow the claim rather than award nominal damages.[10]

The plaintiffs in the instant case argued for a reversal of the *Wilcox* decision. In their brief,[11] it was urged that "the great weight of authority and the broader, more liberal view in our country is to the effect that where a suit for wrongful death is pending, subsequent death of all surviving next of kin of the decedent will not abate the pending action." The plaintiffs cited as their principal authority *Van Beeck v. Sabine Towing Co.*[12] Justice Cardozo, in holding for the plaintiff in that case, declared:

> When we remember that under the death statutes, an independent cause of action is created in favor of the beneficiaries for

5 For a fuller discussion of the history of wrongful death and survival statutes, see Prosser, Torts § 120 (1964).

6 McDavid v. Ficar, 342 Ill. App. 673, 97 N.E.2d 587 (3d Dist. 1951); Polion v. State, 5 Ill. Ct. Cl. 353 (1927). The conclusion reached by these cases is not conclusively true, as the Wrongful Death Statute, Ill. Rev. Stat. ch. 70, § 2 (1963), provides recovery for persons furnishing hospitalization and medical services and to the personal representative for administering the estate, even if there is no next of kin.

7 204 Fed. 412 (7th Cir. 1913), *cert. denied*, 229 U.S. 620, 33 Sup. Ct. 778 (1913).

8 330 Ill. 571, 162 N.E. 170 (1928).

9 *Id.* at 585, 162 N.E.2d at 170.

10 32 Chi.-Kent L. Rev. 325, 329 (1954).

11 Brief for Plaintiff—Appellant, p. 14.

12 300 U.S. 342, 57 Sup. Ct. 452 (1936). For an inclusive examination of other jurisdictions, see annotations in 13 A.L.R. 225 (1921), as supplemented by 34 A.L.R. 162 (1925) and 59 A.L.R. 760 (1929).

> their pecuniary damages, the conclusion is not difficult that the cause of action once accrued is not divested or extinguished by the death of one or more of the beneficiaries thereafter, but survives, *like a cause of action for injury to a property right*. . . .[13]

The court in the *McDaniel* case overruled *Wilcox* and held that a wrongful death action is a property right of the sole next of kin's estate. In the *Wilcox* case, a narrow construction had been given to the words "personal property" as used in the Illinois Survival Statute.[14] The court in the *Wilcox* case had concluded:

> It is not a suit to recover damages to personal property or to real estate within the meaning of the Survival Act, but is a suit to recover for a loss of increase in money value to the estate of the deceased. . . . It may be said to be a suit for recovery of damage or loss to property right in the most general sense, but it is not a suit to recover loss to personal or real property. . . .[15]

In the *McDaniel* case, the court refused to give such a narrow technical construction to the term "property." In sustaining the more general construction, the court relied on *Hunt v. Ruthier*.[16] In that case, decedent was killed deliberately by one Emphrem Mounsey, who thereafter took his own life. The plaintiffs were the surviving heirs of the decedent. They filed an action for waste and destruction of their property under the California Survival Statute.[17] The case turned on the meaning of the word "property." That court stated:

> . . . . [P]roperty is a generic term and its meaning in any case must be determined by ascertaining the sense in which it is used. When unqualified, the term is sufficiently comprehensive to include every species of the estate.[18]

In declaring that tort actions are a part of the property of an estate, the California court quoted Professor Prosser to the effect that ". . . . The modern trend is definitely toward the view that tort causes of action and liabilities are . . . a part of the estate of either the plaintiff or defendant. . . ."[19]

The Illinois Supreme Court, after summarizing the rules of the *Hunt* case, spoke of the inapplicability of abatement in circumstances as lie in the *McDaniel* case. ". . . . [T]he doctrine of abatement would place a premium on delaying tactics on the part of the defendants . . . who would be relieved of all liability if the case should be prolonged long enough."[20]

13 300 U.S. at 349, 57 Sup. Ct. at 455 (emphasis added).

14 See pertinent parts of Wrongful Death Statute, *supra* note 1, and Survival Statute, *supra* note 2.

15 Wilcox v. Bierd, 330 Ill. 571, 586, 162 N.E. 170, 176-77 (1928).

16 28 Cal. 2d 288, 169 P.2d 913 (1946).

17 Cal. Prob. C.A. Div. III, ch. 8, § 574 (1959).

18 Hunt v. Ruthier, *supra* note 16, at 295, 169 P.2d at 917.

19 *Id.* at 294, 169 P.2d at 916.

20 McDaniel v. Bullard, 34 Ill. 2d 487, 492, 216 N.E.2d 140, 143 (1966). Justice Wey-

The position taken by the Illinois Supreme Court that the wrongful death action does not abate on the death of the sole next of kin would appear to be in accord with the history and development of tort law. At early common law, a tort action was regarded as punitive in character and retaliatory in nature; no action would lie if the victim was dead, as there would no longer be anyone to punish the wrongdoer. However, with time, the purpose of granting damages for tortious conduct became to compensate the victim rather than to punish the wrongdoer, and the courts began to hold that the estate of an individual should not be depleted because of the wrong of another. The trend of allowing compensation for the victims of tortious conduct is reflected in the decision of the Illinois Supreme Court in the instant case.

There is one dissent in the *McDaniel* case. Justice Underwood dissented on the grounds of *stare decisis*. He agreed with the majority in principle but disagreed with the decision, feeling the Illinois law was settled by *Wilcox v. Bierd*, and any change in the law should be left to the legislature.

What is the impact of the *McDaniel* decision upon the law? First, it places Illinois in step with the majority of decisions of this type. Second, it clearly widens the construction given to the Survival Statute in Illinois and in doing so corrects a wrong. The estate which must bear expense for the support of the next of kin may now be reimbursed. Lastly, the *McDaniel* decision suggests that the Supreme Court will be willing to overstep the bounds of *stare decisis*[21] when it believes a change in the law and common justice call for it.

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RELEASE—CONSTRUCTION AND OPERATION—COVENANT NOT TO SUE—COVENANT NOT TO SUE EXECUTED IN FAVOR OF SERVANT EXTINGUISHES MASTER'S LIABILITY WHEN BASIS FOR LIABILITY OF MASTER IS DOCTRINE OF RESPONDEAT SUPERIOR.—In the case of *Holcomb v. Flavin*, 34 Ill. 2d 558, 216 N.E.2d 811 (1966), the Supreme Court of Illinois was asked to decide whether the execution of covenant not to sue the servant extinguished the liability of the master. The court held that when the basis of liability is

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gardt better states this proposition in his minority opinion in *Danis v. New York Cent. Ry.*, 160 Ohio St. 474, 478, 117 N.E.2d 39, 41 (1954). He declared:

> . . . . [T]here is no more effective method for defeating justice than simply to delay it.

Justice Cardozo, in *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350, 57 Sup. Ct. 452, 456 (1936), discussed the ills of abatement by stating:

> Death statutes have their roots in dissatisfaction with the archaisms of the law. . . . It would be a misfortune if a narrow or guilding process of construction were to exemplify and perpetuate the very evils to be remedied.

21 It appears that the only reason the court held against the plaintiff in *Danis v. New York Cent. Ry., supra* note 20, a case with a similar question to the *McDaniel* case, was on the grounds of *stare decisis*. The court stated that if the case had been one of first impression, it would have held otherwise.