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## Conflict of Laws - Torts - Proper Party Plaintiff in Wrongful Death Actions

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## COMMENTS

CONFLICT OF LAWS — TORTS — PROPER PARTY PLAINTIFF IN  
WRONGFUL DEATH ACTIONS — Although the common law did not  
recognize actions for wrongful death, such actions have been estab-

lished by statute in every state.<sup>1</sup> These statutes commonly specify that the proper party to maintain the action is the personal representative of the deceased. This designation has precipitated many problems where foreign prosecution of the action is sought due to the common law rule that a personal representative's authority does not extend beyond the border of the jurisdiction appointing him.<sup>2</sup> The legislatures and courts of the states, faced with these two partially conflicting ideas, have developed various methods to avoid foreclosing relief because a properly qualified plaintiff could not be produced in a jurisdiction where the defendant could be sued. However, the short statute of limitations commonly attached to such actions makes it imperative to choose correctly the first time, since before a second action can be instituted with the proper plaintiff, it may be barred. The purpose of this comment is to examine the differing solutions and determine the vitality of the common law rule in wrongful death actions.

## I

The original death statute, Lord Campbell's Act in England,<sup>3</sup> gave the cause of action to the personal representative, and the majority of American jurisdictions have followed this example. However, sixteen states and Hawaii have given the right of action directly to the beneficiaries<sup>4</sup> and in Maryland the suit is prosecuted by the state.<sup>5</sup> Partial changes have been made in other jurisdictions. Two states provide for an action by the beneficiaries if the deceased was a nonresident,<sup>6</sup> and the Arkansas statute permits an action by the beneficiaries if there is no personal representative.<sup>7</sup> If the personal representative does not institute an action within

<sup>1</sup> PROSSER, *TORTS*, 2d ed., 710 (1955).

<sup>2</sup> *CONFLICT OF LAWS RESTATEMENT* §507 (1934); *GOODRICH, CONFLICT OF LAWS*, 3d ed., 549 (1949); *TIFFANY, DEATH BY A WRONGFUL ACT*, 2d ed., 240 (1913).

<sup>3</sup> 9-10 Vict., c. 93 (1846).

<sup>4</sup> *California*: Cal. Code of Civ. Proc. (Deering, 1953) §377; *Colorado*: Colo. Rev. Stat. Ann. (1953) §41-1-1; *Delaware*: Del. Code Ann. (1953) tit. 10, §781; *Florida*: Fla. Stat. (1955) §768.02; *Georgia*: Ga. Code Ann. (1937) tit. 105, §105-1302; *Hawaii*: Hawaii Rev. Laws (1945) §10486; *Idaho*: Idaho Code (1948) §5-311; *Louisiana*: La. Civil Code (Dart, 1945) §2315; *Mississippi*: Miss. Code Ann. (1942) §1453; *Missouri*: Mo. Rev. Stat. (1949) §537.070; *Montana*: Mont. Rev. Code Ann. (1947) tit. 93, §93-2810; *Nevada*: Nev. Comp. Laws (Hillyer, 1929) §8554; *North Dakota*: N.D. Rev. Code (1943) tit. 32, §32-2103; *Tennessee*: Tenn. Code Ann. (Williams, 1934) §8237; *Texas*: Tex. Civ. Stat. (Vernon, 1952) art. 4675; *Utah*: Utah Code Ann. (1953) tit. 78, §78-11-7; *Wisconsin*: Wis. Stat. (1953) c. 331, §331.04.

<sup>5</sup> Md. Code Ann. (Flack, 1951) art. 67, §4.

<sup>6</sup> Kan. Gen. Stat. Ann. (Corrick, 1949) §60-3204; Okla. Stat. (1951) tit. 12, §1054.

<sup>7</sup> Ark. Stat. Ann. (1947) §27-904.

six months, Pennsylvania authorizes the beneficiaries to do so.<sup>8</sup> Since the law of the place of the wrong governs the question of who is qualified to sue for the wrong,<sup>9</sup> these various types of statutes solve the problem only when the action is brought for an injury occurring in a jurisdiction having such a statute. The problem must still be met as to a cause of action arising in a jurisdiction which provides for a suit by the personal representative.

## II

The *Restatement of Conflict of Laws* sets forth the common law rule as follows:

"If the death statute of the state of wrong provides that suit for the death shall be brought by the personal representative of the deceased, recovery can be had only by a person qualified to sue at the forum as personal representative of the deceased."<sup>10</sup>

It also notes that statutes in some states permit foreign representatives to sue.<sup>11</sup> These statutes vary from state to state in requirements, effect, and interpretation.

Three states have defined the term "personal representative," as used in the death statute, to include any person to whom letters testamentary have been granted by a competent authority in any state.<sup>12</sup> However, since it appears in the death statute, this provision has been limited by the New York court to cases where the cause of action arose in that state and does not allow suit by a foreign representative on a cause arising in a foreign jurisdiction.<sup>13</sup>

On the other hand, Maryland and Missouri have made provision for suits by foreign personal representatives when the cause of action arises out of the state.<sup>14</sup> Further, twenty jurisdictions have passed statutes empowering foreign representatives to sue generally.<sup>15</sup> Although these statutes are commonly held to give

<sup>8</sup> Rule 2202, Pa. Rules of Civil Procedure, Pa. Stat. Ann. (Purdon, 1953) tit. 12. For other wrongful death acts modifying the strict common law rule as to who may sue, see the statutes cited in note 12 *supra*.

<sup>9</sup> CONFLICT OF LAWS RESTATEMENT §§391, 394 (1934).

<sup>10</sup> *Id.*, §396.

<sup>11</sup> *Id.*, §396, comment *b*.

<sup>12</sup> Ariz. Code Ann. (1939) §31-102; 13 N.Y. Consol. Laws (McKinney, 1944) §130; R.I. Gen. Laws (1938) c. 477, §1.

<sup>13</sup> *Baldwin v. Powell*, 294 N.Y. 130, 61 N.E. (2d) 412 (1945), reh. den. 294 N.Y. 840, 62 N.E. (2d) 393 (1945). *Accord*, *Wiener v. Specific Pharmaceuticals, Inc.*, 298 N.Y. 346, 83 N.E. (2d) 673 (1949).

<sup>14</sup> Md. Code Ann. (Flack, 1951) art. 67, §3; Mo. Rev. Stat. (1949) §507.020.

<sup>15</sup> *Alabama*: Ala. Code (1940) tit. 61, §151; *Arkansas*: Ark. Stat. Ann. (1947) §27-805; *Delaware*: Del. Code Ann. (1953) tit. 12, §1561; *District of Columbia*: D.C. Code (1951) tit. 20, §20-505; *Florida*: Fla. Stat. (1955) §734.30; *Georgia*: Ga. Code Ann. (1937) tit. 113,

foreign representatives the right to sue on death actions,<sup>16</sup> two courts have rejected that construction because of the statutory language. The Wisconsin statute authorizes the foreign executor to "exercise any power over such estate."<sup>17</sup> The Wisconsin court has held that since the death action is not part of the "estate," the quoted provision does not authorize a foreign representative to sue thereon.<sup>18</sup> However, since the action was brought on the Wisconsin death statute, the court allowed the suit by construing the designation "personal representative" as used therein as broad enough to include a foreign representative. The Kentucky statute gives the foreign representative power to recover "debts due to such decedent."<sup>19</sup> In an early decision the Kentucky court said that the term "debt" could not be construed to include actions for torts.<sup>20</sup> However, recently the court, while finding the requirements of the statute had not been met, expressly refused to pass on the question of whether the statute applies to death actions.<sup>21</sup>

Some of these statutes place limitations on the type of foreign representative authorized to sue. Four states limit the right to the representative of a deceased who was a nonresident<sup>22</sup> and three require the foreign representative to be appointed in the deceased's domicile.<sup>23</sup> Five statutes expressly condition the right on the absence of a locally appointed representative.<sup>24</sup>

If the foreign representative's right to sue depends on a statute, he must comply with the requirements established thereby. Al-

§113-2401; *Illinois*: Ill. Rev. Stat. (1955) c. 3, §419; *Indiana*: Ind. Stat. Ann. (Burns, 1953) §7-753; *Kentucky*: Ky. Rev. Stat. (1953) §395.170; *Minnesota*: Minn. Stat. (1953) §573.05; *Mississippi*: Miss. Code Ann. (1942) §622; *Nebraska*: Neb. Rev. Stat. (1943) c. 30, §30-807; *New Jersey*: N.J. Stat. Ann. (1953) §3A:12-7; *New Mexico*: N.M. Stat. Ann. (1953) c. 31, §31-2-9; *New York*: 13 N.Y. Consol. Laws (McKinney, Supp. 1955) §160; *Ohio*: Ohio Rev. Code (Baldwin, 1953) §2113.75; *Oklahoma*: Okla. Stat. (1951) tit. 58, §262; *Pennsylvania*: Pa. Stat. Ann. (Purdon, 1950) tit. 20, §320.1101; *South Dakota*: S.D. Code (1939) tit. 35, §35.1103; *Wisconsin*: Wis. Stat. (1953) c. 287, §287.16.

<sup>16</sup> *Greene v. Goodyear*, (D.C. Pa. 1953) 112 F. Supp. 27; *St. Louis Southwestern R. Co. v. Graham*, 83 Ark. 61, 102 S.W. 700 (1907); *Weaver v. Baltimore & Ohio R. Co.*, 21 D.C. (Mackey 10) 499 (1893); *South Carolina R. Co. v. Nix*, 68 Ga. 572 (1882).

<sup>17</sup> Wis. Stat. (1953) c. 287, §287.16.

<sup>18</sup> *Robertson v. Chicago, St. Paul, Minneapolis & Omaha R. Co.*, 122 Wis. 66, 99 N.W. 433 (1904).

<sup>19</sup> Ky. Rev. Stat. (1953) §395.170 (1).

<sup>20</sup> *Louisville & Nashville R. Co. v. Brantley's Admr.*, 96 Ky. 297, 28 S.W. 477 (1894).

<sup>21</sup> *Vassill's Admr. v. Scarsella*, 292 Ky. 153, 166 S.W. (2d) 64 (1942).

<sup>22</sup> Ala. Code (1940) tit. 61, §151; Ga. Code Ann. (1937) tit. 113, §113-2401; Ill. Rev. Stat. (1955) c. 3, §419; 13 N.Y. Consol. Laws (McKinney, Supp. 1955) §160.

<sup>23</sup> Ga. Code Ann. (1937) tit. 113, §113-2401; N.J. Stat. Ann. (1953) §3A:12-7; 13 N.Y. Consol. Laws (McKinney, Supp. 1955) §160.

<sup>24</sup> Ala. Code (1940) tit. 61, §151; Ga. Code Ann. (1937) tit. 113, §113-2401; Ill. Rev. Stat. (1955) c. 3, §419; Neb. Rev. Stat. (1943) c. 30, §30-807; Pa. Stat. Ann. (Purdon, 1950) tit. 20, §320.1101.

though they vary from statute to statute, they are normally simple, and are established mainly for the protection of local creditors. The two most frequent requirements are the filing of a copy of the foreign appointment and the posting of a bond.<sup>25</sup> Delaware requires a bond only if the deceased was indebted to a resident for a sum of not less than twenty dollars.<sup>26</sup> Two states make the requirement for a bond discretionary with the court.<sup>27</sup> The District of Columbia authorizes the probate court to require a bond on the petition of an interested party.<sup>28</sup> Two states have adopted more detailed requirements. In Pennsylvania, the foreign representative must wait for one month after the death and file an affidavit that a diligent search has revealed no creditors and that he is exercising only the powers permitted in the state of his appointment.<sup>29</sup> New York requires an affidavit averring that the deceased was not indebted to a resident of that state and that six months have elapsed since the death without a petition for ancillary administration being filed.<sup>30</sup>

Not all the statutes are designed to expand the common law jurisdiction of personal representatives. A West Virginia statute provides that "... no person not a resident of this state . . . shall be appointed or act as executor. . . ."<sup>31</sup> Emphasizing the word "act," the federal court of appeals ruled that this precluded a death action by a foreign executor.<sup>32</sup> A similar Virginia statute,<sup>33</sup> which had been interpreted as not affecting the foreign representative's right to sue on a death action,<sup>34</sup> was distinguished on the ground that it lacked the magic word "act." A later amendment to this statute by the Virginia legislature included that word, and, although a district court avoided its effect,<sup>35</sup> the same court of appeals has ruled that a suit by a foreign representative is now foreclosed.<sup>36</sup>

### III

The courts also have been adept in circumventing the common law rule—so much so that it would appear that the exceptions have

<sup>25</sup> E.g., Ala. Code (1940) tit. 61, §151.

<sup>26</sup> Del. Code Ann. (1953) tit. 12, §1561.

<sup>27</sup> Ill. Rev. Stat. (1955) c. 3, §419; Okla. Stat. (1951) tit. 58, §262.

<sup>28</sup> D.C. Code (1951) tit. 20, §20-505.

<sup>29</sup> Pa. Stat. Ann. (Purdon, 1950) tit. 20, §320.1101.

<sup>30</sup> 13 N.Y. Consol. Laws (McKinney, Supp. 1955) §160.

<sup>31</sup> W.Va. Code (1955) §4207.

<sup>32</sup> Rybolt v. Jarrett, (4th Cir. 1940) 112 F. (2d) 642.

<sup>33</sup> Va. Code (1950) tit. 26, §26-59.

<sup>34</sup> La May v. Maddox, (D.C. Va. 1946) 68 F. Supp. 25.

<sup>35</sup> First Nat. Bank of Amherst v. Fulcher, (D.C. Va. 1954) 119 F. Supp. 759.

<sup>36</sup> Holt v. Middlebrook, (4th Cir. 1954) 214 F. (2d) 187.

swallowed up the rule. The basis for the rule preventing suits by foreign administrators was the desire to protect local creditors.<sup>37</sup> It was feared that foreign representatives would enter a state, collect the deceased's assets, and depart from the court's jurisdiction leaving local creditors unpaid. However, since the beneficiaries of the wrongful death action are designated by the statute creating the right of action, the recovery is not generally subject to the deceased's debts.<sup>38</sup> Thus, there is no longer any need for protecting local creditors. The resulting absence of a sound reason for adhering to the rule in death actions has led the courts to seek means of circumventing it.

The usual method of evading the rule is to say that when a personal representative sues on a wrongful death action he is acting in some capacity other than as an officer of a foreign court. The capacity most often accorded recognition is that of a "statutory trustee."<sup>39</sup> The Pennsylvania court has explained this concept as follows:

"He [the personal representative suing for wrongful death] acts, therefore, not by the authority which the probate court gave him when it granted him the power to administer the estate of the deceased, but solely by virtue of the authority vested in him by statute . . . as the representative or trustee of the parties for whose benefit the action was instituted. . . ."<sup>40</sup>

One court has made the administrator the trustee of an express trust.<sup>41</sup> It has also been said that the term as used in the death statute serves only to designate a person entitled to maintain the action.<sup>42</sup> By means of these various formulations, the technical rules usually applied to personal representatives are avoided.

The term "personal representative" as used in the wrongful death statutes has been held broad enough to include domiciliary, ancillary, foreign, or domestic administrators.<sup>43</sup> Thus, by statu-

<sup>37</sup> GOODRICH, *CONFLICT OF LAWS*, 3d ed., 300 (1949).

<sup>38</sup> See, e.g.: Iowa Code (1954) §635.9; Tenn. Code Ann. (Williams, 1934) §8236; *Boulden v. Pennsylvania R. Co.*, 205 Pa. 264, 54 A. 906 (1903). See also Rose, "Foreign Enforcement of Actions for Wrongful Death," 33 MICH. L. REV. 545 at 592 (1935), where the various statutes are collected.

<sup>39</sup> *Siverling v. Lee*, (D.C. Mich. 1950) 90 F. Supp. 659; *Reed v. Shilcutt*, (D.C. Va. 1946) 119 F. Supp. 652; *Henkel v. Hood*, 49 N.M. 45, 156 P. (2d) 790 (1945); *Kerr v. Basham*, 62 S.D. 301, 252 N.W. 853 (1934); *Knight v. Moline, East Moline and Waterton R. Co.*, 160 Iowa 160, 140 N.W. 839 (1913).

<sup>40</sup> *Boulden v. Pennsylvania R. Co.*, 205 Pa. 264 at 270, 54 A. 906 (1903).

<sup>41</sup> *Memphis & Cincinnati Packet Co. v. Pikey, Admx.*, 142 Ind. 304, 40 N.E. 527 (1895).

<sup>42</sup> *McCarty v. New York, L. E. & W. R. Co.*, (D.C. N.Y. 1894) 62 F. 437.

<sup>43</sup> *Ghilain v. Couture*, 84 N.H. 48, 146 A. 395 (1929); *Robertson, Admx. v. Chicago, St. Paul, Minneapolis & Omaha R. Co.*, 122 Wis. 66, 99 N.W. 433 (1904).

tory construction, the foreign representative is allowed to sue. The Rhode Island court allowed the foreign administrator to sue because ancillary letters could not be taken out in that state since the death action does not constitute an "estate."<sup>44</sup>

The federal district court sitting in Virginia, while recognizing these various rationales, stated that it preferred to rest its decision on the fact that there was no reason to deny the right to sue.<sup>45</sup> This was amplified in a recent New York decision:

"The rule barring foreign administrators from our courts is just and reasonable *only* if applied in cases, first, where there are domestic creditors, and, second, where the foreign administrator sues to recover a fund in which such creditors may share. . . . With the primary and, perhaps, only reason for the rule thus removed, the rule itself has no sensible application and should not be invoked in this class of case."<sup>46</sup>

The common law rule has not been totally vitiated in its application to wrongful death actions. Three state death statutes have been interpreted not to allow suits by foreign representatives on the basis that they are intended to give the cause of action only to a locally appointed administrator.<sup>47</sup> Although the North Carolina court recognized the possibility of a suit by the personal representative appointed at the *lex loci delecti*,<sup>48</sup> the South Carolina federal district court has expressly rejected the statutory trustee doctrine and has used language to indicate that a foreign representative would never be allowed to sue.<sup>49</sup> Massachusetts has also so held where suit was brought under a federal statute giving the cause of action to the personal representative.<sup>50</sup> The cause of action is, however, considered sufficient to allow ancillary letters to issue.<sup>51</sup> In one case, a New York appointment was held insufficient to vest a right to sue in Tennessee courts on the Tennessee statute, but the court allowed amendment of the petition so that

<sup>44</sup> Connor v. N.Y., N.H., & H. R. Co., 28 R.I. 560, 68 A. 481 (1908).

<sup>45</sup> Pearson v. Norfolk & W. Ry. Co., (D.C. Va. 1923) 286 F. 429.

<sup>46</sup> Wiener v. Specific Pharmaceuticals, Inc., 298 N.Y. 346 at 351-352, 83 N.E. (2d) 673 (1949), noted in 62 HARV. L. REV. 1233 (1949); 48 MICH. L. REV. 520 (1950) (emphasis by the court). See also Howard v. Pulver, 329 Mich. 415, 45 N.W. (2d) 530 (1951), noted in 50 MICH. L. REV. 148 (1951).

<sup>47</sup> Hall v. Southern R. Co., 146 N.C. 345, 59 S.E. 879 (1907); Monfils v. Hazlewood, 218 N.C. 215, 10 S.E. (2d) 673 (1940); Heath v. Smyther, (D.C. S.C. 1937) 19 F. Supp. 1020; Boutillier v. Wesinger, 322 Mass. 495, 78 N.E. (2d) 195 (1948).

<sup>48</sup> Hall v. Southern R. Co., 146 N.C. 345, 59 S.E. 879 (1907).

<sup>49</sup> Heath v. Smyther, (D.C. S.C. 1937) 19 F. Supp. 1020.

<sup>50</sup> Brown v. Boston & Maine R. Co., 283 Mass. 192, 186 N.E. 59 (1933).

<sup>51</sup> Vance v. Railroad, 138 N.C. 460, 50 S.E. 860 (1905); Boutillier v. Wesinger, 322 Mass. 495, 78 N.E. (2d) 195 (1948).

the plaintiff could claim as the beneficiary even though the statute of limitations had run.<sup>52</sup>

The courts are not likely to extend these exceptions to those cases where recovery will go to the estate and be available to the claims of creditors. Thus, although foreign administrators are generally allowed to sue in Kansas,<sup>53</sup> this is not true when the recovery would benefit the estate.<sup>54</sup> The doctrine announced in New York in *Wiener v. Specific Pharmaceuticals, Inc.*<sup>55</sup> would seem to be limited to those cases where the recovery would not be liable for the deceased's debts. The Iowa court has expressly reserved the question where there are creditors who may be injured by such a suit.<sup>56</sup>

It should be noted that there are two situations in which the problem under discussion may arise: first, where the foreign representative is suing on the statute of the forum, and, secondly, where he is suing on a foreign statute, either that of the state in which he was appointed or a third state. In the latter situation, the question of whether the forum must enforce the statute of a foreign jurisdiction<sup>57</sup> was decisively answered in *Hughes v. Fetter*,<sup>58</sup> in which the Supreme Court declared unconstitutional a Wisconsin statute that barred enforcement of the Illinois cause of action. A second problem raised in the case of a suit on a wrongful death statute other than that of the forum is whether a locally appointed representative could sue on the foreign statute. Today it is generally held that he may.<sup>59</sup> The Georgia court found this to be a logical extension of the statute permitting a foreign representative to sue.<sup>60</sup> It was deemed foolish to have to send a local representative to a foreign jurisdiction to qualify before allowing him to sue in the local courts. The Kentucky courts once ruled that a local administrator could have no rights granted by the laws of a state other than that of his official domicile.<sup>61</sup> However, a later decision appears to have held to the contrary.<sup>62</sup> On the other

<sup>52</sup> *Gogan v. Jones*, 197 Tenn. 436, 273 S.W. (2d) 700 (1954).

<sup>53</sup> *Kent v. Kansas Power & Light Co.*, (D.C. Kan. 1954) 123 F. Supp. 662.

<sup>54</sup> *Jones v. Goodman*, (D.C. Kan. 1953) 114 F. Supp. 110.

<sup>55</sup> 298 N.Y. 346, 83 N.E. (2d) 673 (1949).

<sup>56</sup> *Knight v. Moline, East Moline & Watertown R. Co.*, 160 Iowa 160, 140 N.W. 839 (1913).

<sup>57</sup> Compare *Dennick v. Railroad Co.*, 103 U.S. 11 (1880), with *Ash v. Baltimore & Ohio R. Co.*, 72 Md. 144, 19 A. 643 (1890).

<sup>58</sup> 341 U.S. 609, 71 S.Ct. 980 (1951).

<sup>59</sup> See 85 A.L.R. 1231 (1933), and cases cited therein.

<sup>60</sup> *Central R. Co. v. Swint*, 73 Ga. 651 (1884).

<sup>61</sup> *Taylor v. The Pennsylvania Co.*, 78 Ky. 348 (1880).

<sup>62</sup> *Bruce's Admr. v. Cincinnati R. Co.*, 83 Ky. 174 (1885).

hand, Rhode Island, as noted above, allowed the foreign representative to sue because a local representative could not be appointed simply on the basis of a cause of action for wrongful death.<sup>63</sup> The Massachusetts courts allow a local representative to sue on survival type statutes because the deceased was possessed of that action at the time of his death, but a death action, being a new cause of action created in the administrator of the jurisdiction creating the right, cannot pass to a Massachusetts administrator.<sup>64</sup>

#### IV

Generally speaking, it may be said that the legislatures and courts are moving toward a freer enforcement of wrongful death actions, trying to avoid the loss of such actions due to a failure to produce a proper party plaintiff. Their primary concern is the granting of relief to the parties designated by the particular statute.

Today, a court faced with the problem as one of first impression would probably have no trouble granting recovery to a foreign representative if there are no local creditors who would be injured in the case where the recovery goes to the estate. In those few states where a contrary rule has been established, a statute will be necessary. Such a statute need not extend to any action other than wrongful death and may be so limited that local creditors are sufficiently protected where the recovery goes to the estate, either by completely denying recovery in such a situation or, preferably, by requiring a bond conditioned on payment of local creditors. This would have the desired effect without any countervailing weaknesses.

*John M. Webb*

<sup>63</sup> *Connor v. N.Y., N.H. & H. R. Co.*, 28 R.I. 560, 68 A. 481 (1908).

<sup>64</sup> *Richardson v. New York Central R. Co.*, 98 Mass. 85 (1867); *Higgins v. Central New England & Western R. Co.*, 155 Mass. 176, 29 N.E. 534 (1892).