

December 2019

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V. J. Tidball

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### Recommended Citation

V. J. Tidball, *Probate Jurisdiction in Wrongful Death Actions*, 2 Wyo. L.J. 109 (1948)

Available at: <https://scholarship.law.uwyo.edu/wlj/vol2/iss3/2>

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## PROBATE JURISDICTION IN WRONGFUL DEATH ACTIONS

V. J. TIDBALL\*

When the District Court sits in probate matters pursuant to Article 5, Section 10, of the State Constitution, and statutes enacted pursuant thereto, it sits as a probate court with limited and special jurisdiction to pass only on matters of probate as provided in the Probate Code.<sup>1</sup>

The Wyoming statute giving a right of action for wrongful death is not a part of the Probate Code, but of the Civil Code. However, the statute (3-404 W. C. S. 1945) does provide that the action for wrongful death shall be brought "by and in the name of the personal representative of such deceased person; and the amount received in any such action shall be distributed to the parties and in the proportions provided by law, in relation to the distribution of personal estates left by persons dying intestate." It is undoubtedly this provision that has caused many attorneys to believe that the probate court has jurisdiction to direct such actions, approve settlements of the claim, and compel the personal representative to account to the probate court for the proper distribution of the sum recovered in such actions.

It is the contention of the writer that the only jurisdiction the District Court, sitting as a Probate Court, has in such actions is to appoint an administrator or executor, fix his bond and discharge him when he reports to the Probate Court that he has performed his duties regarding such action and distributed the proceeds to those entitled thereto; and that the Probate Court has no jurisdiction to order or allow the action, approve a settlement if such be made, fix the fees to be retained by such personal representative or his attorney, nor to approve or disapprove his distribution of the sum collected. It is further maintained that where the deceased leaves an estate, (and any sum collected in a wrongful death action is no part of his estate) the personal representative appointed by the Probate Court acts in a dual capacity. He acts as executor or administrator of the estate under the jurisdiction of the Probate Court and he acts as a trustee in the wrongful death action for the heirs at law of deceased entirely outside the jurisdiction of the Probate Court but under the jurisdiction of the court in which the action is begun, and if such personal representative fails in his trust to properly collect damages or to properly distribute what he collects, he and his bondsmen are liable to those who have been damaged by his default, and no approval of his acts by the probate court that he may induce that court to make, will protect him. In other

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\*—Judge of the District Court, Second Judicial District, State of Wyoming.  
 1. *Church v. Quinier*, 31 Wyo. 222, 224 Pac. 1073 (1924).

words the statute imposes upon the administrator or executor the added burden of a trustee for the heirs of decedent in the recovery of damages for decedent's wrongful death and in the distribution of any sum recovered according to the mandate of the state. In an action to recover for wrongful death, while the personal representative appointed by the Probate Court sues as plaintiff, he does not sue in his capacity as administrator or executor, but as a trustee for the heirs at law of decedent. It follows that the defendant in such action cannot recover a judgment on a claim against decedent's estate by way of counterclaim against the plaintiff, because the latter is not representing the estate of deceased in such action but is representing the distributees of the proceeds of such action.

How then is the personal representative, acting as trustee for the beneficiaries, to determine who such beneficiaries are? If there is an intestate estate left by the decedent, and in the course of its administration, the Probate Court makes a valid determination of decedent's heirs, presumably the trustee in the wrongful death action could rely on such determination in distributing the money recovered in the wrongful death action. But, if the decedent left no estate (and the sum recovered in a wrongful death action is no part of his estate) the trustee must resort to other means to determine who the beneficiaries are. It has been suggested in some cases that he should bring an action in equity to determine the matter and also that the Court in which the action for wrongful death is brought might determine the beneficiaries; but, of course, to do so the persons claiming to be such beneficiaries would have to be brought in so as to have their day in court. Just how that might be done is not clear to the writer.

In some states, for example, Kansas, Ohio, New York and Illinois, the statutes provide that the Probate Court, or the Court appointing the personal representative, shall make the distribution. Some of such statutes provide that the Court shall apportion the sum recovered among certain named beneficiaries according to their respective loss; and in some other states it is provided that the jury sitting in the wrongful death action shall determine the amount each claimed beneficiary is to receive. Our statute is silent as to how the personal representative is to determine who the beneficiaries are, but requires that any sum recovered, which may include loss of anticipated support, loss of comfort, care, advice and society of decedent, and funeral expenses, shall be distributed, not in proportion to the loss or expense incurred, but in the proportion provided by Section 6-2501 W. C. S. 1945; the statute of descent.

The case of *Minkin vs. Minkin*<sup>2</sup> is an interesting case from Pennsylvania where the jury by its verdict determines the amount of recovery and to whom and in what proportion the money goes. The

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2. 336 Pa. 49, 7 A. (2d) 461 (1939).

Pennsylvania statute provides that the action in case of the husband's death, shall be brought by the widow, and if no widow, by the personal representative, and that the beneficiaries shall be the husband, widow, children, or parents of deceased, and no other relatives, and that the amount recovered shall go to the above in the proportion they would take decedent's personal estate in case of intestacy and without liability to creditors. In this case it was alleged that the husband had been killed by the negligence of the wife (widow) in driving an automobile. The action was brought by the two minor children, by their next friend, against their mother. The Supreme Court of Pennsylvania held that the action was improperly brought by the children through a next friend, but since the children were the real parties in interest and the action under the statute should have been brought by the widow as trustee for the children (she could not recover on her own behalf because her negligence caused the death) the complaint would be amended in the Supreme Court to make the widow as trustee plaintiff suing herself as tortfeasor for the benefit of the children. During the trial and appeal one of the children had died, and in view of this the Court said that in the new trial ordered the jury should be instructed that if they found for the plaintiff, they should find the value of decedent's life to the widow and surviving child, and having done that (since the widow could recover nothing, and one child was dead) should award the plaintiff, for the surviving child, one-third of that amount, being the proportion of decedent's personal estate passing to the minor in case of intestacy.

We believe the following authorities support the propositions heretofore set forth herein: That the Probate Court, in the absence of a statute giving it such authority, has no jurisdiction over any sum recovered as damages for wrongful death, and no jurisdiction over the personal representative who recovers the damages, and that in such action the personal representative acts as trustee and not as an administrator or executor. See 17 C.J. 1227; 25 C.J.C. 1127; *Mayer v. Mayer*;<sup>3</sup> *Aetna Casualty & Surety Co. v. Young*;<sup>4</sup> *Re Estate of Egisto Riccomi, Deceased*;<sup>5</sup> *Pearson v. N. M. and S. Corp.*;<sup>6</sup> *Bibson v. Solomon*;<sup>7</sup> *Coliseum Motor Co. v. Hester*.<sup>8</sup> In the *Coliseum Motor Company* case the Wyoming Supreme Court said: "The administrators acts but in the capacity of a trustee".<sup>9</sup>

In the *Riccomi* case the Court said: "The money recovered constitutes no part of the estate of deceased, and where the action is brought or the money recovered by the personal representative of the deceased,

3. 106 Minn. 484, 119 N.W. 217 (1909).

4. 107 Okla. 151, 231 Pac. 261 (1924).

5. 185 Cal. 458, 197 Pac. 97, 14 A. L. R. 509 (1921).

6. 219 N. C. 717, 14 S.E. (2d) 811 (1941).

7. 136 Ohio St. 101, 23 N.E. (2d) 996, 125 A. L. R. 903 (1939).

8. 43 Wyo. 298, 3 Pa. (2d) 105 (1931).

9. *Id.* at 311, 3 P. (2d) at 108.

such personal representative is acting solely as a statutory trustee for the benefit of the heirs on account of whom the recovery is had.

“On word more with relation to the procedure adopted in this matter. The matter was apparently treated as a proceeding in probate, and is entitled, ‘In the matter of the Estate of Egisto Ricconi, Deceased.’ As we have seen, this money constituted no part of the estate of the said deceased, and the proceeding is not one within the probate jurisdiction of the Superior Court. . . . It was one as to the subject matter of which the Superior Court had full jurisdiction . . .”

In the *Pearson* (North Carolina) case cited above the statute appears to be similar to our except that the amount recovered is liable to pay burial expenses of decedent, but no other debts; and it is distributed as is the personal estate of one dying intestate. In this particular case the father and mother of decedent were the beneficiaries; and the action was brought by the administrator of decedent’s estate, the decedent being a child who was killed by an automobile belonging to defendant. A question arose in the case as to whether the alleged contributory negligence of the mother, if proved, would bar recovery. The court held, in setting aside a non-suit entered by the trial court, that contributory negligence of the mother would bar a recovery on her behalf by the administrator but not as to the father’s share of the recovery; the Court arriving at its conclusion by holding that the administrator represented the parents of deceased and not decedent’s estate, and hence contributory negligence of a beneficiary would bar a recovery of any amount that would inure to the beneficiary guilty of contributory negligence.

In the Ohio case of *Gibson v. Solomon* (Supra.) it was held in an action for wrongful death under a statute requiring such action to be brought by the personal representative of deceased, that the personal representative is but a nominal party and the designated beneficiaries for whose benefit the action is maintained are the real parties in interest.

In the case of *Aetna Casualty & Surety Co. v. Young* (Supra.) the syllabus by the Court says: “Moneys recovered by the administrator of the estate of a deceased under the provisions of Section 824 (wrongful death statute) do not belong to the estate of the deceased, and the County Court (the Probate Court) has no jurisdiction over the administrator in the maintenance of such suit, or the settlement of such claims or the distribution of such moneys. Damages recovered under said section belong to the next of kin as therein provided and are in compensation for the losses sustained by such kin on account of the death of deceased.

“When the administrator of the estate of a deceased person receives into his hands moneys collected under the provisions of (the wrongful death statute) and the next of kin and their respective parts

are not disclosed in the judgment itself, he may resort to suit in a court of equity to determine the cestui que trusts and the portion which each is entitled to receive.

In the body of the opinion in that case it is said: "What court has jurisdiction over the administration of this fund? The State Constitution . . . creates the County Court and gives it probate jurisdiction over the estates of deceased persons. . . . We have no statute further extending this jurisdiction. This fund did not arise out of a claim owned by the deceased in his lifetime and does not belong to the estate of the deceased, but belong to certain cestui que trusts. . . . In the State Constitution there is created the District Court. It is made a Court of record and is given general original jurisdiction as a court of law and of equity over all cases where exclusive original jurisdiction is not given to another court. It, therefore, has exclusive original jurisdiction over this official (the administrator bringing the action for wrongful death) in the administration and distribution of this estate created by (the wrongful death statute) . . . . It is the duty of the trustee at his peril to distribute the trust estate to the proper cestui que trusts. To determine to whom and in what proportion it shall be distributed, the trustee may resort to suit in the District Court; and in following the final determination of that court as to its distribution, the trustee is amply protected."

In conclusion it is suggested that our wrongful death statute should be amended so as to provide that only those close relatives of deceased who actually suffer a loss may be beneficiaries in such an action, and the manner in which the amount recovered shall be distributed so as to reimburse those who have been put to expense on account of doctor, hospital and funeral bills, and to reimburse the named beneficiaries in proportion to their loss. The statute should also provide a means by which the personal representative may determine, in a manner that will protect him, under order of court, just how distribution of the money recovered is to be made, and in the payment of his fees and expenses.