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A Divorced Mother's Right of Action Under the Wrongful Death of Minors Act

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of the decision rather than a justification. It can only be hoped that the probable consequences of this decision will prompt the legislature to recommend to Florida voters a constitutional amendment which will eliminate the inequities of the present homestead provisions.[50]

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A DIVORCED MOTHER'S RIGHT OF ACTION UNDER THE WRONGFUL DEATH OF MINORS ACT

The parents of a minor child were remarried to each other subsequent to a divorce decree which awarded custody to the mother. A second divorce decree made no provision for the child's custody. In an action by the divorced mother for the minor's wrongful death, the trial court rendered a judgment in her favor. On appeal, *held*, reversed: remarriage of the parents voids the custody provisions of a prior divorce decree, and when a second divorce decree contains no custody provision, a mother cannot recover for the minor child's wrongful death under the Wrongful Death of Minors Act.[1] *Eppes v. Covey*, 141 So.2d 747 (Fla. App. 1962).

50. There arises the question of how much freedom the legislature has in enacting a value limitation on homestead property. FLA. CONST. art. X, § 6 states: "The legislature shall enact such laws as may be necessary to enforce the provisions of this Article." The legislature would appear to be restricted from enacting such a law correcting an inequity which has its basis in the constitution.

Constitutional amendment is the answer to the problem and according to some writers an even more drastic approach is needed. "[I]t is doubtful that a state constitution should contain any provisions with reference to the homestead exemption. Experience in other states indicates that the legislative body may be trusted to give adequate protection to homestead rights. If statutes prove to be inequitable, unwise or inadequate, they can be changed . . . . [I]n any revision of the constitution the question of eliminating any reference to the homestead exemption is one serious consideration. Should any mention be considered necessary, it should be limited to a declaration of general policy, leaving to the legislature the task of effective implementation." Woodward, *supra* note 49, at 1047, 1053.

1. FLA. STAT. § 768.03 (1961), reads: "Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or default of any individual, or by the wrongful act, negligence, carelessness or default of any private association or persons, or by the wrongful act, negligence, carelessness or default of any officer, agent or employee of any private association of persons, acting in his capacity as such officer, agent or employee, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any officer or agent, or employee of any corporation acting in his capacity as such officer, agent or employee, the father of such minor child, or if the father be not living, the mother may maintain an action against such individual, private association of persons, or corporation, and may recover, not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess." In Ward v. Baskin, 94 So.2d 859, 860 (Fla. 1957), the Florida Supreme Court recognized that this statute is "peculiar to Florida with no exact counterpart in any other state." It added: "The peculiarity consists in the provision that when suing for the wrongful death of a minor child, the father is authorized to recover damages not only for the loss of

The Florida Wrongful Death of Minors Act was passed in 1899[2] to allow parents to recover directly for the wrongful death of a minor child.[3] It is a statute in derogation of the common law and, as such, must be strictly construed.[4] Consequently, actions arising under the act are maintainable only by the persons authorized therein.[5] The right of action provision declares that "the father of such minor child, or if the father be not living, the mother may maintain an action . . . ." Early decisions construed this provision to grant to the father a precedent right of recovery.[6] A fortiori, a mother could not recover directly for a minor child's wrongful death in the father's lifetime.[7] Later interpretations, consistent with the remedial objectives of the act,[8] have favored a more liberal construction of the mother's right to sue while the father is still living. In *Hadley v. Tallahassee*,[9] a right of action for the wrongful death of an illegitimate minor child was held to accrue exclusively to its mother, since a bastard has no father recognized by law. In the case of *Haddock v. Florida Motor Lines Corp.*,[10] a divorced mother who had been awarded custody of a minor child was allowed to recover for its wrongful death under the act. Such recovery was held consonant with the legislative intent in light of section 4 of the Declaration of Rights of the Florida Constitution,[11] which grants to every person a remedy for injury done him. The court noted that the award of custody to a divorced mother has the effect of granting to her the legal right to the minor child's services.[12] Therefore, it established the rule (hereinafter referred to as the *Haddock* rule) that an award of custody to the mother transfers to her the father's right to sue for loss of services under the act, in addition to her right to be compensated for her mental pain and suffering.[13]

services but also for the mental pain and suffering of himself *and his wife*." Therefore, the court concluded that "the many decisions of other courts dealing with the subject are . . . of little persuasion in Florida."

2. Fla. Laws 1899, ch. 4722.

3. Brailsford v. Campbell, 89 So.2d 241 (Fla. 1956); Nolan v. Moore, 81 Fla. 594, 600, 88 So. 601 (1921); Seaboard Air Line Ry. v. Moseley, 60 Fla. 186, 53 So. 718 (1910).

4. Haddock v. Florida Motor Lines Corp., 150 Fla. 848, 9 So.2d 98 (1942); Nolan v. Moore, 81 Fla. 594, 88 So. 601 (1921); Hadley v. Tallahassee, 67 Fla. 436, 65 So. 545 (1914).

5. Florida East Coast Ry. v. Jackson, 65 Fla. 393, 62 So. 210 (1913); Louisville & N.R.R. v. Jones, 45 Fla. 407, 34 So. 246 (1903); Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894).

6. Mock v. Evans Light & Ice Co., 88 Fla. 113, 101 So. 203 (1924); Florida East Coast Ry. v. Jackson, 65 Fla. 393, 62 So. 210 (1913).

7. Mock v. Evans Light & Ice Co., 88 Fla. 113, 101 So. 203 (1924).

8. Latimer v. Sears, Roebuck & Co., 285 F.2d 152 (5th Cir. 1960); Klepper v. Breslin, 83 So.2d 587 (Fla. 1955); Nolan v. Moore, 81 Fla. 594, 88 So. 601 (1921); BURDICK, TORTS § 246 (4th ed. 1926).

9. 67 Fla. 436, 65 So. 545 (1914).

10. 150 Fla. 848, 9 So.2d 98 (1942). The Supreme Court here receded from its opinion in Mock v. Evans Light & Ice Co., 88 Fla. 113, 101 So. 203 (1924), insofar as *Mock* did not allow the mother to maintain a wrongful death action in the father's lifetime.

11. FLA. CONST. DECL. OF RIGHTS § 4 provides: "All courts in this state shall be open, so that every person for any injury done him . . . shall have remedy, by due course of law. . . ."

12. 9 So.2d 98 at 100.

13. *Ibid.*

The effect of a parental remarriage upon the custody provisions of a prior divorce decree presents a question of first impression in Florida. It is uniformly held that when the custody of a minor child is awarded to either parent, their remarriage to each other nullifies the earlier divorce decree and restores to the parents their joint right of custody.[14] This remerger of the parents' several rights of custody into one common right terminates the divorce court's jurisdiction over the parties and their minor child.[15] A fortiori, in a subsequent divorce action custody of the minor can be awarded differently.[16]

Pursuant to the *Haddock* rule, a wife-mother is legally entitled to the minor child's services and may sue to recover therefor only when she has been awarded custody in a divorce decree from the father. Does it follow that when a divorce decree dissolving the parents' remarriage contains no custody provision, a wife-mother has no right, in law, to the child's services? Would her recovery therefor be barred upon the minor's wrongful death? The *Eppes* case answered both questions affirmatively.

In the *Eppes* case, the court first insisted upon a strict construction of the Wrongful Death of Minors Act because it is a statute in derogation of the common law.[17] It recognized that under the act, a divorced mother may sue for the wrongful death of a minor child when she has been awarded custody in a divorce decree from the father.[18] It noted, however, that the parents' remarriage voided the custody provisions of the prior divorce decree.[19] And, since the second divorce decree made no provision for the minor's custody, it held that the divorced mother could not recover for his wrongful death under the act.[20] In denying the plaintiff's right of action, the court specifically refused to expand the *Haddock* rule.[21] Directing attention to the unjust holding, it concluded that: "We are powerless to amend that statute in order to provide for . . . a right of action, such amendment being a matter exclusively for the consideration and action of the legislative branch . . . ."[22]

14. Lockard v. Lockard, 102 N.E.2d 747 (Ohio C.P. 1951); McAlhany v. Allen, 195 Ga. 150, 23 S.E.2d 676 (1942); NELSON, DIVORCE AND ANNULMENT § 15.40 (2d ed. 1961).

15. *Ex parte* Phillips, 266 Ala. 198, 95 So.2d 77 (1957); Oliphant v. Oliphant, 177 Ark. 613, 7 S.W.2d 783 (1928); Dunlap v. Dunlap, 88 Okl. 200, 212 Pac. 608 (1923); Corbett v. Corbett, 123 Ohio St. 76, 174 N.E. 10 (1930).

16. Jenkins v. Followell, 262 P.2d 880 (Okl. 1953); Oliphant v. Oliphant, *supra* note 15; 27B C.J.S. *Divorce* § 314 (1939).

17. Eppes v. Covey, 141 So.2d 747, 748 (Fla. App. 1962). "Since . . . a statute in derogation of the common law must be strictly construed, in the instant case we must strictly construe section 768.03. . . ."

18. *Id.* at 748. This is merely a reiteration of the *Haddock* rule.

19. See cases cited in Eppes v. Covey, 141 So.2d 747, 748, 749 (Fla. App. 1962), and Corbett v. Corbett, 123 Ohio St. 76, 174 N.E. 10 (1930).

20. Eppes v. Covey, 141 So.2d 747 (Fla. App. 1962).

21. *Id.* at 749. "If we were to uphold the plaintiff's right of action in the unique situation before us on this appeal, we would have to carry a step further the rule recognized in the Haddock case in the construction of a statute. This we are not prepared to do."

22. *Ibid.*

It is submitted that the court was correct in denying recovery for the wrongful death of a minor child to a divorced mother who did not have custody thereof. In the opinion of the writer, an extension of the *Haddock* rule in the instant case would have constituted a judicial amendment of the act. That the result of the *Eppes* case was harshly inequitable is the fault, not of the judiciary, but of legislative recalcitrance to correct the act's grossly inadequate right of action provision. At present, several problem areas remain which can create needless hardships, absent liberal judicial construction. Namely, if the act were *strictly* construed, a mother could not maintain a wrongful death action if the father: (a) abandoned the child and there was no divorce; or (b) was declared mentally incompetent; or (c) was confined for insanity.[23]

It is suggested that a legislative solution in the form of a redrafting of the "right of action" provision of the Wrongful Death of Minors Act is long overdue. The revision should expand the mother's right to sue under the act by allowing her to maintain an action thereunder in case of the father's death or desertion of his family, or if the mother has been awarded custody of a minor child in a divorce decree from the father,[24] or if the father has been declared mentally incompetent, or if the mother was supporting the child at the time of its death.[25] The amendment should also provide that recovery by either spouse shall be a bar to an action by the other, and that the right of action under the act shall include actions *ex contractu* and *ex delicto*.[26]

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THE PROPRIETY OF HOLDING A GRAND JURY IN CONTEMPT OF COURT

A duly empaneled grand jury at the close of its deliberations filed an interim report with the court. While the grand jury was in recess, subject to recall upon order of the assigned judge, a summons was issued to each

23. Although these fact situations have not yet been adjudicated in Florida, it is submitted that in the absence of an extension of the *Haddock* rule, recovery would be denied to the mother if the father were living. Only by deciding, as in *Haddock*, that under section 4 of the Declaration of Rights of the Florida Constitution the mother should have a right of action under the act, and, therefore, it was the intention of the legislature that she have one, would her action be allowed? As evidenced by the instant case, such an extension of the *Haddock* rule is unlikely.

24. This is merely a codification of the *Haddock* rule. See notes 10–13 *supra* and accompanying text.

25. This provision would allow recovery by a divorced mother in a fact situation similar to that presented by the instant case.

26. This provision allowing actions *ex contractu* and *ex delicto* is already a part of the Wrongful Death Act, FLA. STAT. § 768.01 (1961). Its incorporation into the Wrongful Death of Minors Act would prevent inequitable decisions such as Latimer v. Sears, Roebuck & Co., 285 F.2d 152 (5th Cir. 1960). Therein the court held that a wrongful death action by the father of a minor child is not maintainable under the act where such action arose upon a breach of implied warranty, since § 768.03 does not encompass actions *ex contractu*.