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*Virginia
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Association*

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THE LOSS OF THE NEXT GENERATION

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Mr. Hastings called late on Friday afternoon. His family had experienced a horrific loss. A drunk driver had hit his wife's car head-on, killing his twelve year old son, Josh. His wife, their yet to be adopted child, and their six year old daughter survived the crash. His wife was to be released from the hospital soon, but his daughter was still in the hospital, and the whole family was in a state of shock. They didn't know what to do, and they didn't know who to call.

Mr. Hastings had only used a lawyer twice, once during the purchase of his home and again when he got a divorce. In this case, he thought that the family should seek legal advice before returning the insurance company's calls. They had only one car left, the medical bills were piling up, and the funeral home had already sent him the bill for his son's memorial service. Mr. Hastings asked around the community, and several people advised him to seek a lawyer who had experience handling wrongful death cases. Even the attorney that helped him with his real estate settlement advised him to get a specialist.

The call causes you to immediately feel anxious. How do you respond to such a loss? First, you express your sympathy to Mr. Hastings. He has informed you that he is trying to handle the legal affairs of the family while they are in the hospital. You let him know that you must ask a few preliminary questions so that you can perform some research and properly advise the family. You must find out how and where the accident happened, who is at fault for the accident, and run a conflict of interest check on any potential defendants prior to agreeing to the appointment.

Mr. Hastings tells you that the accident occurred at the intersection of Routes 28 and 606 in Loudoun County, Virginia. The drunk driver, Herman Davies, ran a red light and T-boned the

Hastings' vehicle in the right rear passenger door, where Josh was seated. You run a quick conflict check and find that your firm has not represented Herman Davies before, so you have no conflict and can represent the Hastings' family.

You ask Mr. Hastings a few more questions. Did anyone in the family yet qualify to be the personal representative of Josh's estate? No. Who were the members of the Hastings' family? The following persons survived Josh: his grandparents, Mr. & Mrs. Jones; his father, John Hastings; his mother, Sandra Hastings; the Hastings' "to be" adopted child; his six year old sister, Sarah Hastings; and Sandra's college age son, Stuart Wilson, from a previous marriage. Did they have insurance on their vehicle? Yes. You ask Mr. Hastings to bring all insurance policies that apply to any of the drivers living with them as well as the college-aged child's policy. You set up the appointment and take a deep breath.

Who Will Speak for the Deceased?

Who will be your client in the wrongful death case of Josh Hastings? Someone needs to hire you as the lawyer, finance the case (or ultimately be responsible for any costs associated with prosecuting the case), make the ultimate decisions in the case, and represent the interests of the class of beneficiaries. Under the wrongful death statute, the action must be brought in the name of the personal representative of the deceased person.¹ Other than a preference that a custodial parent be appointed the personal representative of a deceased infant, anyone can qualify for the purposes of bringing a wrongful death claim. Parents can qualify jointly as personal representatives of their child's estate, as "[e]ither or both parents may sue on behalf of a minor as his next friend."² In this case, should the parents wish to become Personal Administrators of the Estate of Josh Hastings, they would present themselves to the Clerk of Court in the Circuit Court of his residence, and the Clerk would appoint them. Under the statute, no bond or surety is required since the purpose of

the appointment is to file a wrongful death claim on behalf of the statutory beneficiaries.

Who are the Beneficiaries of the Deceased's Estate?

A wrongful death case is a creature of statute.³ The estate of the wrongfully killed person does not benefit from the death.⁴ Only provable solace damages are available to the statutory beneficiaries of the deceased, as well as lost income, medical expenses related to treatment of the deceased, funeral expenses and punitive damages.⁵ Unlike the laws of intestate succession, the beneficiaries in a wrongful death case are set out by the statute. The relevant part of the Virginia Code states:

A. The damages awarded pursuant to § 8.01-52 shall be distributed as specified under § 8.01-54 to (i) the surviving spouse, children of the deceased and children of any deceased child of the deceased or (ii) if there be none such, then to the parents, brothers and sisters of the deceased, and to any other relative who is primarily dependent of the decedent for support or services and is also a member of the same household as the decedent or (iii) if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents or (iv) if there are survivors under clause (i) or clause (iii), the award shall be distributed to those beneficiaries and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent....⁶

This statutory scheme of § 8.01-52 of the Virginia Code, as well as *Knodel v. Dickerman*, define the beneficiaries of a deceased's estate.⁷ For Josh, the statutory beneficiaries are:

1. His father, John Hastings;
2. His mother, Sandra Hastings;
3. His sister, Sarah Hastings, age six;
4. His yet to be adopted sibling, should he be adopted prior to the verdict or settlement; and
5. His half brother, Stuart Wilson.⁸

Why is the yet to be adopted sibling a beneficiary? Section 8.01-53(A) of the Virginia Code defines the class of eligible beneficiaries to whom damages may be distributed as the parents, brothers, and sisters.⁹ According to the Supreme Court of Virginia, that class is fixed as of the date of the verdict or at the time judgment is rendered if the court specifies the distribution under section 8.01-53(B) of the Virginia Code.¹⁰ In *Knodel*, a child adopted by the family after the wrongful death of one of the siblings but before the verdict was found to be a statutory beneficiary eligible to receive a distribution fixed by the jury.¹¹

How Do You Measure Damages?

What is the measure of damages to each of the statutory beneficiaries in the case? How does the family's lawyer determine the value of the case? What is the loss of a child or a sibling worth to each statutory beneficiary?

These questions go to the heart of the case. When trying to determine what these types of cases are worth, the lawyer must understand grief and loss and the effect of that loss on each member of the family. Many advocates will advise you to treat one wrongful death case like several "mini" cases, one for each statutory beneficiary. Why? Because when the verdict comes in or a judge approves a compromise, the full amount of the verdict or settlement must be

apportioned to each of the statutory beneficiaries except for amounts set forth for medical and funeral expenses and punitive damages.¹²

What determines the apportionment of the lump sum paid for solace damages? In this case, there are medical expenses and funeral bills the family incurred as a result of the loss.¹³ Those are fairly easy to determine. Evidence of each statutory beneficiary's loss or solace damages suffered is the basis of the rest of the apportionment, and those are difficult to prove. However, what is the loss of a son, the loss of the next generation, worth to a parent? What is the loss worth to Josh's brothers and sisters? What is the loss worth to the family in general? To prove that loss, you must get to know the family and what the relationships were between the mother and son, father and son, siblings, etc. You must get to know Josh, even though he is not here. You get to know him through hearing stories from his family, friends, fellow church members and neighbors. Additionally, experts such as grief therapists or any type of mental health counselors seen by any member of the family since the death can be articulate and objective describers of what the Hastings family experienced in their unique grieving process.

For the parents, the loss of a child can be devastating. It is the wrong order. Life turns upside down because we are supposed to die before our children. With the loss of a child comes the loss of the parents' hopes and dreams for that child. As parents we spend a lot of our time making sure our children will flourish in a complicated and difficult world. Not being able to see that come to fruition is a loss, and difficult for each parent. A father may have very different expectations for a son than a mother has. For example, a father's hope for his son's future athletic performances may be very different from a mother's expectation of her son's academic performance. Each suffers the loss in their own way. Marriages sometimes cannot survive the aftermath of the loss of a child.

Siblings also suffer in their own way. Not only does the sibling lose a playmate and

friend, they usually feel guilty. Guilt can be reinforced by the parents grieving, even though it is not meant to impact the siblings. The survivors automatically feel guilty that they lived.

How Can You Be the Best Advocate for the Family?

To present evidence of the family's loss, you should obtain objective data or evidence of the relationship between the various family members. A visit to the home is essential to fully appreciate the loss from an advocate's point of view. Ask the family's permission to see the child's room, toys, schoolwork, poetry, letters, awards, art work and photographs. Family scrapbooks can be invaluable. Although some of the items you obtain may not ultimately be admissible at trial, the ideas they create may lead you to material and relevant evidence of the loss of Josh to the family. In addition, the "tour" down memory lane will act as a catalyst in the telling of the family's stories of Josh. These stories or "vignettes" are useful at trial, illustrating to the jury the memory of Josh. Neighbors, close friends and relatives are often wonderful sources of testimony of the loss to the family, with an additional benefit of being more objective from the defensive point of view since these witnesses have nothing to gain on the outcome of the case.

Some trial attorneys use video multimedia presentations to pull together the story of the loss of a child to a family. The video may be used for the purposes of evaluation by an insurance company representative or committee prior to resolution of the case by way of a negotiated settlement. Such videos can be helpful tools to both sides. Although many years ago the loss of a child was sometimes not given much value, today that has changed.¹⁴ When juries are presented with the intricacies of the unique grieving process as a result of the loss of a child to a family, large damages have been awarded.

Our firm recently settled a case for the loss of a thirteen year old who was killed when a tractor trailer ran over the back of the family's van, literally crushing the young boy in the back seat. No economic losses were attributable to the child because such damages are considered speculative unless the plaintiff can "furnish evidence of sufficient facts or circumstances" to enable the jury to make "an intelligent and probable estimate" of damages.¹⁵ The majority of the evidence in almost every wrongful death claim of a child must necessarily focus on the sorrow, mental anguish and solace damages. This evidence must be tied to the decedent's relationship with the statutory beneficiaries. "Death ends a life, but not a relationship; a survivor will continue to miss the decedent for years to come, regardless of how much time has passed."¹⁶

In our society, families are having fewer children. Children hold a higher social status than in years past. "Children are precious", the old adage goes. Certainly that adage is true today as we strive to be the best possible advocates in cases where we have lost the next generation.

Barbara S. Williams, Esquire received her Bachelor of Science degree from Virginia Polytechnic Institute and State University in 1979. A law reader from 1985 to 1988, Ms. Williams is admitted to practice in the Commonwealth of Virginia, the U.S. Court of Claims, and the U.S. District Court for the Eastern District of Virginia. She is a past President of the Virginia Women Attorneys Association and has served on the Board of Directors since 1994. Ms. Williams is a Governor-At-Large of the Board of Governors of the Virginia Trial Lawyers Association, is the current chair of the Annual Convention Committee, and serves on a number of VTLA committees. She is a member of the Virginia State Bar, the Loudoun County Bar Association, the Winchester-Frederick County Bar Association, and the American Trial Lawyers Association. She was a founding member of the Northern Shenandoah Valley and Loudoun Chapters of the Virginia Women Attorneys Association.



Ms. Williams has a special interest in brain injury and is President of the Board of Trustees of Brain Injury Services, a non-profit corporation in Fairfax, Virginia which provides case management for brain injury survivors and their families. Ms. Williams recently was the recipient of the Special Recognition Award at Brain Injury Services "Celebration of Spirit" for her efforts in advocating for persons with brain injuries. She is also on the Loudoun School-Business Partnership Executive Council, which promotes partnerships between businesses and schools.

¹ See VA. CODE ANN. § 8.01-50(B) (1950, as amended).

² *Id.* § 8.01-8.

³ See *id.* § 8.01-50 (1950, as amended).

⁴ *Cassady v. Martin*, 266 S.E.2d 104, 108 (Va. 1980), *citing* *Conrad v. Thompson*, 80 S.E.2d 561, 566 (Va. 1954).

⁵ VA. CODE ANN. § 8.01-52 (1950, as amended).

⁶ *Id.* § 8.01-53.

⁷ *Knodel v. Dickerman*, 431 S.E.2d 323, 324-26 (Va. 1993).

⁸ *Id.*

⁹ VA. CODE ANN. § 8.01-53(A) (1950, as amended).

¹⁰ *Id.* § 8.01-53(B); *see also* *Knodel*, 431 S.E.2d at 325.

¹¹ *Knodel*, 431 S.E.2d at 324.

¹² VA. CODE ANN. § 8.01-54 (1950, as amended).

¹³ In a personal injury case, the parents of the infant may bring an action against the tort-feasor for any expenses of curing or attempting to cure the infant of injuries from the result of the personal injury. Such action is a joinder. See *id.* § 8.01-36. However, the wrongful death statute gives rise to reimbursement of medical expenses and funeral expenses incurred. See *id.* § 8.01-52.

¹⁴ An old rule of thumb used by the insurance defense bar was \$1,000.00 per year of a child's life. Therefore, a case involving the death of a ten year old child would be valued at \$10,000.

¹⁵ *Gwaltney v. Reed*, 84 S.E.2d 501, 502 (Va. 1994); *see also* *Moses v. Akers*, 122 S.E.2d 864, 865-66 (Va. 1961) (holding that infancy does not necessarily preclude lost future earnings damages, given the standard set forth in *Gwaltney* is met).

¹⁶ Richard D. Lawrence, *Primer on Wrongful Death Claims*, TRIAL, Feb. 2004, at 44.