Wrongful Death: Assignment Of Right To Potential Proceeds

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Wrongful death statutes generally create a cause of action in the personal representative of a decedent for the exclusive benefit of persons designated by such statutes as beneficiaries. Courts have reached conflicting results when a beneficiary of a wrongful death action has attempted to assign his right to the potential proceeds of the action.

In the recent case of *Totten v. Parker*, a gasoline solution, used in the cleaning of a service station, exploded causing the death of two boys. The explosion was apparently caused by the ignition of the fumes by the pilot light of a hot-water heater. An action was commenced by the personal representatives of the children under the Kentucky Wrongful Death Statute against the lessor of the service station, his tenant, and the water-heater installer to recover damages for their alleged negligence. The respective parents, who were the statutory beneficiaries, assigned "any interest" they had in their sons' estates to the siblings of the decedents. The purpose of assigning "any proceeds" to which the parents might have been entitled was to circumvent a defense of contributory negligence.

The Court of Appeals of Kentucky affirmed the trial court's decision in holding the assignments to be invalid. The court reasoned that the test for determining whether the beneficiaries could assign their rights of action was whether the beneficiaries had rights of action which

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1. *E.g.*, OHIO REV. CODE ANN. § 2125.02 (Baldwin 1964) provides:
   
   An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of decedent...


3. *428 S.W.2d 231* (Ky. 1968).

4. KY. REV. STAT. § 411.130(1) (1963) provides that:

   Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

5. Contributory negligence, if proven, would have barred the parents from recovery. KY. REV. STAT. § 411.130(1) (1963). The alleged contributory negligence was permitting the children to be employed in violation of the Child Labor Act. It was held, however, that there was no contributory negligence. *428 S.W.2d at 237.*
would survive them if they die. It then determined that while any recovery the beneficiaries might receive would become part of their estates if they die, the beneficiaries did not have "rights of action" which would survive them if they died. It should be noted, however, that the exact terminology of the assignment discloses that it was not an assignment of a cause of action but was an assignment of the right to the proceeds from a potential recovery.\(^6\) At common law it was impossible for a beneficiary to assign his right to the potential proceeds from any action as courts originally refused to recognize assignments of contingent interests of any kind.\(^7\) Later, however, courts of equity became more liberal and began allowing assignments of mere future possibilities.\(^8\) Consequently, judges presiding in courts of law agreed to uphold assignments of contingent interests which at the time of the assignment possessed a potential realization.\(^9\) Under this rationale, it has been argued that

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The theory behind allowing assignments of future possibilities is:

The existence of the cause of action gave a potential existence to the proceeds; the potential existence of the proceeds gave an equitable existence to the assignment.

'The fact that there was no fund then in existence, or any claim which could then be enforced by action, did not prevent the instrument taking effect as an equitable assignment.'


It must be noted that Richard involved a personal injury action. However, the distinction between the effect of an assignment of a cause of action and right to proceeds would be the same in personal injury and wrongful death actions, in the absence of survival statutes in both cases. In both situations the cause of action abates with the death of the assignor of the cause of action and in both situations the right to proceeds has a separate existence. Compare Richard v. National Transp. Co., 158 Misc. 324, 285 N.Y.S. 870 (New York Mun. Ct. 1936) (personal injury) with Rice v. Postal Telegraph-Cable Co., 174 App. Div. 39, 160 N.Y.S. 172 (1916) (wrongful death action). See also In re Behm's Estate, 117 Utah 151, 215 P.2d 657, 659 (1950) where the court upheld an assignment of proceeds in a wrongful death action, while basing its opinion on several personal injury cases including the Richard case.

\(^8\) Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N.W. 265 (1915).

An equitable assignment maintains the basic elements of an assignment at law in that it is a transfer of some right or interest in property from one person.
assignments of proceeds in wrongful death actions be allowed.\(^{10}\) Furthermore, at common law, assignments of causes of action and rights to proceeds were generally subject to the defense of maintenance and champerty, which were directed toward the prevention of unnecessary litigation and the intermeddling in a law suit by someone with no right or interest.\(^{11}\) Arguments against assignments which seemed overwhelming to common law judges have today lost most of their persuasive force.\(^{12}\) Maintenance and champerty are no longer considered as causing flooding and unnecessary litigation.\(^{13}\) The trend toward legislation which provides for the survivorship of tort claims recognize that most tort claims can be litigated between the tortfeasor and someone other than the original plaintiff.\(^{14}\) Although this recognition has been utilized to argue that even a cause of action should be made assignable, most courts are not prepared to go that far.\(^{15}\) Some courts, however, are prepared to permit assignments of proceeds.

_Totten_ could have made the distinction made by some courts between an assignment of a cause of action and an assignment of the right to the potential proceeds of that cause of action.\(^{16}\) The right to the cause of action itself is generally nonassignable as it is strictly a personal right which does not survive the death of the assignor.\(^{17}\)

The difference between the personal right of the personal representative and the property right of the beneficiary is based upon the

\(^{10}\) In re Behm's Estate, 117 Utah 151, 213 P.2d 657, 662 (1950).

\(^{11}\) Johanson v. Cudahy Packing Co., 100 Utah 399, 115 P.2d 794, 796 (1941).

\(^{12}\) Champerty involves a division of proceeds of litigation between the owner of a litigated claim and a party supporting or enforcing the litigation. See Sapp v. Davids, 176 Ga. 265, 168 S.E. 62 (1933). Since champerty is a species of maintenance, it also involves an officious intermeddling in the suit. Neff v. State Bank, 33 Ill. App. 2d 53, 128 N.E. 213 (1861).

\(^{13}\) Johanson v. Cudahy Packing Co., 100 Utah 399, 115 P.2d 794, 796 (1941).


fact that the personal representative has the right to the cause of action whereas the beneficiary has the right to potential proceeds from any recovery. At first impression the distinction appears superficial, but in this situation the distinction is functional because the beneficiary is the real party in interest and the personal representative is merely a nominal party, necessary to prosecute the action.\textsuperscript{18} Upon the death of the personal representative the right to the cause of action does not survive him and pass into his estate; consequently, the right is not assignable.\textsuperscript{19}

The Supreme Court of the United States has recognized that the beneficiary's right to proceeds from a potential recovery is a property right and therefore does survive his death.\textsuperscript{20} In \textit{Van Beeck v. Sabine Towing Co.},\textsuperscript{21} the mother-beneficiary died before judgment had been reached in a suit involving the wrongful death of her child. The Court viewed the cause of action as one to compensate the mother for the pecuniary loss caused to her by the negligent killing of her child and stated:

\begin{quote}
[W]e think the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter, the damages when collected to be paid to her estate.\textsuperscript{22}
\end{quote}

Although the cause of action in this case was based on the provisions of the Merchant Marine Act,\textsuperscript{23} the Court stated that this rule is in effect in many of the states in which "like" statutes are in force.\textsuperscript{24} It

\textsuperscript{18}The personal representative acts as a trustee not for the estate but for the sole benefit of persons designated in the statute as the next of kin of the decedent. Fielder v. Ohio Edison Co., 158 Ohio St. 375, 109 N.E.2d 855 (1953).


\textsuperscript{20}See Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937); Williams v. Hoyt, 117 Me. 61, 102 A. 703 (1917).

\textsuperscript{21}The death of one of the beneficiaries does not affect the result of the case since the rights of the beneficiaries vest as of the time of the death, not at the time of bringing suit or recovery. See Keenan Welding Supplies Co. v. Bronner, 100 Ga. App. 400, 111 S.E.2d 140 (1959); Parker v. National Zinc Co., 406 P.2d 493 (Okla. 1965).

\textsuperscript{22}This states include New York, Pennsylvania, Oklahoma, New Jersey, Georgia, Kentucky, North Carolina, and in a somewhat different manner, the statutes of Connecticut and Massachusetts, 500 U.S. at 347, 348. As of 1969, the statutes of these states are still in force. It should be noted that the reference to "like statutes" means statutes based on Lord Campbell's Act of 1846, where a new cause of action is created in the personal representative for the benefit of designated persons, as opposed to survival statutes which allow the cause of action to survive the death of the assignor. See generally W. Prosser, Torts § 121 at 924 (3d ed. 1964).
was the Court's opinion that these cases were of the position that the damages which are awarded result in property rights to the persons for whose benefit the cause of action was created.\textsuperscript{25} When a right is strictly personal, only one person can exercise that right. Such is the case with the right to the cause of action which is vested in the personal representative and therefore cannot be split or brought by another. However, the beneficiary's right to the potential proceeds from recovery, being a separate right, can be split and recovered by another since this right is not a personal right but rather a property right.\textsuperscript{26} Jurisdictions which recognize the beneficiary's right to proceeds from potential recovery as a property right assert that it is capable of assignment.\textsuperscript{27}

The practical effect of the separate existence of the right to a cause of action and the right to the proceeds is significant. The danger of common law maintenance is not present when a beneficiary makes an assignment of proceeds as the absence of the right in the cause of action itself precludes unnecessary intermeddling or interference in the litigation since the right of the assignee to proceeds is not consummated until there is in fact a recovery.

It is possible that even if the separate existence of the right of proceeds is recognized, it may not be allowed.\textsuperscript{28} In at least one instance a court has acknowledged the difference between the cause of action itself and the right to the proceeds but nevertheless refused to validate an assignment of proceeds on the basis that, before judgment, there was nothing which could be assigned.\textsuperscript{29} Furthermore, where the courts fail to recognize that there is a distinction, an assignment of the right of potential proceeds, being treated as an equivalent to the right of action, is never allowed.\textsuperscript{30} In one such case a wrongful death action was brought by the personal representative of the decedent for the exclusive benefit of the statutory beneficiaries.\textsuperscript{31} The right to the

\textsuperscript{25}300 U.S. at 348.
\textsuperscript{26}In re Behm's Estate, 117 Utah 151, 213 P.2d 657, 662 (1950).
\textsuperscript{29}Carson v. Gore-Meenan Co., 229 F. 765 (D. Conn. 1916).
\textsuperscript{30}Cf. Sanders' Adm'x v. Louisville & N.R.R., 111 F. 708 (6th Cir. 1901); Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928).
\textsuperscript{31}Sanders' Adm'x v. Louisville & N.R.R., 111 F. 708 (6th Cir. 1901).
proceeds from the potential recovery was assigned by the father, who was the only living statutory beneficiary, to the sister of the decedent in order to create a trust for the mother, brother and sisters of decedent. The court held that the father's rights did not survive his death and therefore the assignment was void. Because no distinction was made, the right to the proceeds was equally vulnerable to the survival test as the right to assign the cause of action itself, causing assignments of all rights to be precluded. The use of the test under these circumstances, where there were no other statutory beneficiaries, precluded any recovery notwithstanding a wrongful death. Thus it can be argued that the result in this case discloses the desirability of relaxing the survival test when an assignment of proceeds is made.

The recognition of a distinction between the nature of the right to a cause of action and the nature of the right to the proceeds from the cause of action usually permits an assignment of the proceeds notwithstanding a refusal to assign the right of action.

Those cases which have recognized the distinction disclose the desirability of allowing an assignment of the right to proceeds from potential recovery under certain situations. In In re Behm's Estate, adjudicated in the Supreme Court of Utah, the husband believed the doctor's negligence was the proximate cause of his wife's death during childbirth. Although he was unwilling to prosecute the cause of action, he did assign any potential recovery to his father-in-law who financed the litigation and who in turn established a trust for the decedent's children. After recovery, the husband unsuccessfully petitioned the court to declare the assignment invalid. The court in allowing the assignment also noted that the assignment was not champertous.

In wrongful death actions the parties in which the right to the cause of action and the right to the proceeds are vested are usually

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3117 Utah 151, 213 P.2d 657 (1950).
different persons. In at least one jurisdiction, however, this distinction has been recognized in a personal injury case where the two rights are vested in the same person.

The necessity for such recognition is realized in cases where the injured party does not possess sufficient funds for hospitalization and consequently assigns his right to any recovery to the hospital. It has been expressly stated that such an assignment is not champertous since the assignee has no right to interfere in the original litigation and that the assignee's right can be enforced only after recovery. In this situation if the injured party should die, giving rise to a cause of action for wrongful death, the beneficiary might be presented with the same need to assign his right to recovery.

It has been argued that if the proceeds were allowed to be assigned in wrongful death actions, this would lead to the assignment of all tort claims. The probability or desirability of such a result is not within the ambit of this comment although the unique situation in a wrongful death action, where the right to the cause of action in the personal representative is separated from the right to proceeds in statutory beneficiaries, would seemingly provide a logical limitation to further extension. However, the mere possibility of such a result, even if assumed to be undesirable, is not a justifiable reason for denying justice in cases where justice can only be attained by permitting the assignment of proceeds.

The Totten case not only failed to recognize this distinction but, paradoxically also indicated that if it had, it might be left no alternative but to allow the assignment. The court acknowledged the survival test as the criterion of assignability and conceded that the recovery would become a part of the beneficiary's estate upon the death of the beneficiary. In effect, it recognized the right of the beneficiary to the proceeds as a property right, which would withstand the court's survival test, yet it would not recognize the right to proceeds as having a separate and distinctive existence from the cause of action.

It is possible that in some instances the underlying refusal to allow assignments of proceeds may be founded on public policy considera-
The prevalence of such consideration is sometimes noted in cases allowing assignments of proceeds. The typical reference usually states that the assignment is valid unless prohibited by public policy. Although reference is made, the consideration apparently is seldom used. The courts, in prohibiting assignments of proceeds, do not ordinarily mention public policy, but rather rely on either the principle that nothing can be assigned which does not exist, or that the right to proceeds is equivalent to the cause of action. Although both of these principles have been cogently refuted, some courts, such as the *Totten* court, still rely upon them. This would tend to indicate that the real reason for denying the assignment of proceeds may, in some instances, be based upon public policy considerations although the opinions as such do not reveal this. In the *Totten* case itself it is more than likely that the court was aware of the distinction between the right to proceeds and the right to a cause of action, but because of the fact that the purpose of the assignment was to circumvent the defense of contributory negligence, the court may have denied the assignment. If there are public policy reasons underlying the refusal to assign, they should be readily acknowledged. They should not be overshadowed by judicially treating the right to proceeds on the same basis as the right to the cause of action. Acknowledging the separate and distinctive existence of the right to proceeds is therefore both justifiable and essential to an equitable solution.

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41 Such public policy considerations are sometimes based on champerty. Johan- son v. Cudahy Packing Co., 100 Utah 399, 115 P.2d 794 (1941) (assignment allowed because not champertous).


46 See Sanders' *Adm’x v. Louisville & N. R.R.* 111 F. 708 (6th Cir. 1901).

47 It should be noted that an assignment of the proceeds as opposed to the cause of action would not have circumvented the defense of contributory negligence, but the court may have believed that the motive of the assignment was to circumvent the defense and therefore found this reason enough to deny the assignment. Note that the court, however, found no contributory negligence. See note 5 supra.