



## Children (Usually) Have No Claim for Wrongful Death Benefits When A Parent’s Death was Caused by the Negligence of the Surviving Spouse

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On several occasions, I have been contacted by insurance companies prepared to pay wrongful death benefits to the child of a deceased parent who died in a car accident caused by the surviving spouse. Either the case was in suit or the insurance company wanted to negotiate a minor settlement. When this happens, I tell the insurance company that it may not have to pay the claim. In Wisconsin, children do not have a claim for wrongful death benefits when the death of a parent is caused by the negligence of the surviving spouse. This is known as the *Cogger* rule.<sup>1</sup>

With few exceptions, when there is a surviving spouse, the claim for wrongful death benefits belongs exclusively to the decedent’s spouse, even if the spouse allegedly caused the decedent’s death. No other person has a claim for wrongful death benefits under these circumstances (and because the surviving spouse cannot sue him- or herself, nobody is owed wrongful death benefits). While this rule may seem unfair, Wisconsin appellate courts have reaffirmed the *Cogger* rule on several occasions. This article discusses the availability of wrongful death benefits in Wisconsin, the *Cogger* rule and its progeny, as well as the two exceptions to the *Cogger* rule (murder and estranged spouses).

### I. Wrongful Death Benefits in Wisconsin

In Wisconsin, “there is no common law action for wrongful death.”<sup>2</sup> “[T]he right to bring suit is purely statutory.”<sup>3</sup> “Under Wisconsin’s wrongful death statute [sec. 895.04], a person who causes the death of another by a wrongful act is liable for damages whenever the injured party could have maintained

an action and recovered damages had death not ensued.”<sup>4</sup> “The right to bring a wrongful death action is strictly limited to those parties designated by the legislature under Wis. Stat. § 895.04.”<sup>5</sup> Subsection (1) “states that the eligible plaintiffs are the deceased’s personal representative or ‘the person to whom the amount recovered belongs.’”<sup>6</sup>

There are two categories of damages that may be recovered in a wrongful death action: (1) loss of society and companionship<sup>7</sup>; and (2) the reasonable cost of medical and funeral expenses.<sup>8</sup> Damages for the reasonable cost of medical and funeral expenses belong to the decedent’s estate or “any person who has paid or assumed liability for those expenses.”<sup>9</sup> Damages for loss of society and companionship belong to “the spouse, children, or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death.”<sup>10</sup> Under sec. 895.04(4), the amount recoverable for loss of society and companionship in a wrongful death action may “not ... exceed \$500,000 per occurrence in the case of a deceased minor, or \$350,000 per occurrence in the case of a deceased adult.”<sup>11</sup>

Wisconsin courts have interpreted the wrongful death statute as creating a *hierarchy* of persons who may recover damages for loss of society and companionship.<sup>12</sup> If there is a surviving spouse, the claim belongs exclusively to the spouse.<sup>13</sup> If there is no surviving spouse, then the claim belongs exclusively to the decedent’s surviving children.<sup>14</sup> If there is no surviving spouse or children, then the claim belongs exclusively to the decedent’s surviving parents.<sup>15</sup> If there is no surviving

spouse, children or parents, then the claim belongs exclusively to the decedent's surviving siblings (if the siblings were minors at the time of the death).<sup>16</sup> If there is no surviving spouse, children, parents, or minor siblings, then no person may recover damages for loss of society and companionship.<sup>17</sup>

## II. The *Cogger* Rule

In *Cogger v. Trudell*,<sup>18</sup> the Wisconsin Supreme Court was asked to decide whether children have a cause of action for the wrongful death of a parent when it is alleged that a surviving spouse was responsible for the parent's death.<sup>19</sup> In *Cogger*, Darla Trudell was killed in a car accident while she was a passenger in a vehicle being operated by her husband, Joseph Trudell.<sup>20</sup> Darla was survived by her husband, as well as her two minor children, Ronald and September.<sup>21</sup> The two minor children brought an action against Mr. Trudell and his auto insurer for wrongful death benefits.<sup>22</sup> The defendants moved for summary judgment, arguing that the minor children had no statutory right to recover wrongful death benefits.<sup>23</sup> The circuit court denied the defendants' motion and ruled in favor of the children.<sup>24</sup> On review, the Wisconsin Supreme Court reversed, holding that the defendants were entitled to summary judgment and ordering dismissal of the children's wrongful death claims.<sup>25</sup>

First, the *Cogger* court reiterated that the wrongful death statute does not create a cause of action in surviving children for the death of their parent when the decedent is survived by his or her spouse.<sup>26</sup> The court began by examining the language and history of sec. 895.04.<sup>27</sup> It noted that "[a]t common law no such right [a cause of action for wrongful death] existed."<sup>28</sup> "The cause of action ... came into being only when the legislature passed the first of a series of 'wrongful-death' acts leading down to our present statute."<sup>29</sup> The wrongful death statute "designate[s] the beneficiaries and also designate[s] preferences according to the relationship to the deceased. The beneficiaries and their preferred status are as follows: First, the spouse; second, a child or children; third, the parents."<sup>30</sup> "Each class of beneficiaries has a new and independent right to

sue for its own pecuniary loss if no prior beneficiary exists."<sup>31</sup> "Thus the nonexistence of the preferred beneficiary or beneficiaries is essential to a right of action by or in behalf of other beneficiaries."<sup>32</sup> "The action must be brought by or for the wrongful death in the order of preference fixed by the statute."<sup>33</sup>

Next, the *Cogger* court rejected the children's argument that an amendment to the wrongful death statute altered the order of priorities of the beneficiaries.<sup>34</sup> In 1961, the legislature amended sec. 895.04 to allow for a set aside of up to 50 percent of any award to a surviving spouse for the benefit of surviving minor children.<sup>35</sup> The express purpose of the set aside is to protect the children "in recognition of the duty and responsibility of a parent to support his minor children."<sup>36</sup> The children in *Cogger* argued "that by virtue of the 1961 amendment both the surviving spouse and the surviving children are of the first priority."<sup>37</sup> The supreme court disagreed, holding "that no change was intended insofar as the priorities with regard to ownership of a cause of action for wrongful death are concerned."<sup>38</sup> While sec. 895.04 allows for a set aside for surviving children, "[a] careful reading of the entire section makes it clear that the trial court in an attempt to protect the children must work *from the amount recovered by the spouse ...*"<sup>39</sup> Thus, if the spouse makes no recovery (for example, "[i]f the surviving spouse's claim were defeated by reason of his [own] negligence"), then there is nothing to be set aside for the children.<sup>40</sup>

Finally, the *Cogger* court ruled that the beneficiary priority order does not change even when the surviving spouse is responsible for the parent's death. The children in *Cogger* argued that they should have an independent cause of action and that any recovery should belong wholly to them because their mother's husband was responsible for her death.<sup>41</sup> The Wisconsin Supreme Court rejected this argument as "contrary to the express statutory language" of sec. 895.04.<sup>42</sup> Under sec. 895.04, the children are "not of the first priority because [their] mother's spouse, Joseph R. Trudell, remains alive."<sup>43</sup> To allow the children to recover "would be a violation of [the statute]."<sup>44</sup> Because the right to

claim wrongful death benefits “is solely dependent upon statute for its existence,” and the wrongful death statute does not bestow any rights on the children because their mother’s spouse survived her death, the children had no basis for recovery.<sup>45</sup>

### III. *Cogger’s Progeny*

The *Cogger* rule has been invoked several times by appellate courts to bar a child’s recovery for the wrongful death of his or her parent when the surviving spouse was allegedly responsible in some way for the parent’s death. For example, in *Hanson v. Valdivia*,<sup>46</sup> the Wisconsin Supreme Court ruled that the special administrator of the estate of Leon Shada could not maintain a wrongful death action for the benefit of Mr. Shada’s surviving minor children because his wife, June Shada, survived him.<sup>47</sup> It was alleged that Mrs. Shada had caused her husband to commit suicide.<sup>48</sup> Citing *Cogger*, the court explained why the claims were barred, notwithstanding Mrs. Shada’s alleged participation in her husband’s death:

[*Cogger*] . . . expressly holds that pursuant to sec. 895.04(2), Stats., surviving children do not have a cause of action for the wrongful death of one of their parents when the decedent is survived by his or her spouse, and the fact that the surviving spouse was responsible for the death does not create a new cause of action in the children. When there is a surviving spouse the action must be brought by or on behalf of that spouse, and the only special protection afforded the children is that the court may, in its discretion, impose a lien in favor of the children on the amount recovered, not in excess of 50 percent of the recovery. And if the surviving spouse is barred from maintaining a claim by reason of his negligence or other wrongful conduct, any award to the children, by whatever means it is accomplished, would necessarily violate sec.

895.04 (2) which specifically limits the amount which the court may set aside for the children.

In the instant case the appellant’s action would be barred no matter which theory he uses to support it. If he is bringing the action on behalf of the children, then it is barred because the decedent’s spouse, June A. Shada, is still living. If he is bringing it on behalf of the surviving spouse, then it is barred because the complaint alleges on its face that June A. Shada was a participant in the conduct which allegedly caused Leon Shada’s wrongful death.<sup>49</sup>

Accordingly, the Wisconsin Supreme Court affirmed the circuit court’s order dismissing the special administrator’s wrongful death action.<sup>50</sup>

Similarly, in *Bowen v. American Family Insurance Company*,<sup>51</sup> the Wisconsin Court of Appeals held that the *Cogger* rule applies regardless of whether the surviving spouse pursues his or her right to bring a wrongful death claim.<sup>52</sup> In *Bowen*, the plaintiffs’ mother died while a passenger in a car driven by her husband.<sup>53</sup> The husband declined to bring a wrongful death action against the other driver involved in the accident.<sup>54</sup> The court recognized that the husband’s own “contributory negligence may prevent [him] from prevailing on a wrongful death claim.”<sup>55</sup> The children argued that because the husband “disclaimed” his right to recover, the right should pass to the next lineal heirs, citing § 852.13 of the probate code, which provides that “[a]ny person to whom property would otherwise pass under s. 852.01 may disclaim all or part of the property as provided under s. 854.13.”<sup>56</sup> The court of appeals rejected this argument and ruled that “a surviving spouse cannot disclaim a wrongful death claim . . .”<sup>57</sup> It stated that the probate code provisions “have no direct bearing on the issue of who owns the right of recovery in a wrongful death action” and “are therefore inapplicable.”<sup>58</sup> Because there was a surviving spouse, the children in *Bowen* were precluded from bringing a wrongful death action.<sup>59</sup>

Finally, *Xiong ex rel. Edmondson v. Xiong* addressed whether *Cogger* applied if the parties were not truly married.<sup>60</sup> There, Mai Xiong died as a passenger in a vehicle being operated by her husband, Nhia Xiong.<sup>61</sup> Mai Xiong and Nhia Xiong were married according to traditional Hmong ceremonial rites in Laos in 1975 and shortly thereafter fled to Thailand.<sup>62</sup> When they immigrated to the United States in 1980, they told immigration authorities that they were married.<sup>63</sup> After living for three years in Pennsylvania (a common law marriage state), they moved to Wisconsin and continued to live together as husband and wife and raised five children.<sup>64</sup> After Mai Xiong's death, the children commenced a wrongful death action against their father and argued that the marriage was not valid.<sup>65</sup> The marriage had not been validated under the laws of Laos, Thailand, or Wisconsin. The circuit court was not persuaded and dismissed the action pursuant to *Cogger*.<sup>66</sup> On review, the court of appeals affirmed the lower court's decision, holding that equitable considerations permitted the court to rule that the marriage was valid based on the unique facts surrounding the relationship.<sup>67</sup> Under the circumstances of the case, the court of appeals was satisfied that Mai Xiong was Nhia Xiong's lawful spouse, and concluded that the Xiong children could not recover because a surviving spouse existed,<sup>68</sup>

#### IV. Exceptions to *Cogger*

There are two exceptions to the *Cogger* Rule. The first is when the surviving spouse intentionally killed the decedent. The second is when the surviving spouse and decedent were estranged. In both cases, the Wisconsin Supreme Court ruled that the surviving spouse does not qualify as a "surviving spouse" for purposes of the wrongful death statute.

The first exception was adopted in *Steinbarth v. Johannes*.<sup>69</sup> There, Patricia Johannes' children brought a wrongful death action against her husband alleging that he intentionally shot and killed her.<sup>70</sup> The circuit court dismissed their complaint, "conclud[ing] that the wrongful death statute does not allow adult children a cause of action for wrongful death of a parent when there is a surviving

spouse."<sup>71</sup> On review, the Wisconsin Supreme Court reversed and held "that a spouse who feloniously and intentionally kills his or her spouse is not a surviving spouse for purposes of the wrongful death statute, but instead is treated as though having predeceased the decedent."<sup>72</sup> The court observed that "the wrongful death statute does not expressly define who is a surviving spouse, [... but] does refer to sec. 852.01, [... which] expressly provides that an heir who feloniously and intentionally kills the decedent is treated 'as if the killer had predeceased the decedent,' with the net estate passing to the next heir."<sup>73</sup> The court incorporated this language into the wrongful death statute to promote "the strong and pervasive legislative policy of prohibiting a killer from benefiting from his or her criminal act."<sup>74</sup> Further, the court stated that its holding was "not inconsistent" with the *Cogger* rule, distinguishing intentional conduct from negligent conduct, and stating that "[t]here is no basis under the wrongful death statute or otherwise to bar a surviving spouse, who unintentionally but negligently causes his or her spouse's death, from seeking recovery for the loss of that spouse from a more negligent tortfeasor."<sup>75</sup>

The second exception was adopted in *Force v. American Family Mutual Insurance Company*,<sup>76</sup> There, Linda Force (the deceased's spouse) was separated from her husband with no communication or financial support from 1997 until his death in 2008.<sup>77</sup> "The circuit court concluded that the unique facts of the [...] case demonstrate[d] that the deceased's spouse had no claim for damages for her husband's wrongful death under the wrongful death statutes."<sup>78</sup> Because the surviving spouse was estranged from the deceased and was precluded from recovering for the wrongful death, the deceased's minor children argued they should be allowed to recover for the wrongful death of their father.<sup>79</sup> The Wisconsin Supreme Court agreed.<sup>80</sup> The court wrote that "[i]n enacting Wis. Stat. § 895.04(2) ... the legislature envisioned an intact marriage."<sup>81</sup> "[T]he legislature did not anticipate the fact scenario presented in the instant case in which a long-time estranged spouse does not obtain a divorce, has no recoverable damages on the death of the deceased husband, and has no legal obligation to support

nonmarital minor children of the deceased.”<sup>82</sup> While “*Cogger* and its progeny at first blush seem to preclude the children’s recovery in *Force*,” the court construed the wrongful death statutes under the unique facts of the case to allow minor children to recover even though the deceased’s spouse was alive but estranged “in order to avoid an absurd, unreasonable result contrary to the legislative purposes of the wrongful death statutes.”<sup>83</sup>

## V. Conclusion

Children rarely sue their own mother or father for the death of the other. Many of the cases discussed above involved nonbiological children who the surviving spouse had no legal obligation to support. When the children are minors, the surviving spouse may lose custody of the children after the death of their parent, yet be the recipient of sizeable life insurance proceeds. The children’s new custodian may feel that they are entitled to the money, as well as feel that it is unfair that the surviving spouse is profiting from the death of the children’s parent. Although this seems inequitable, these children usually have no recourse under Wisconsin’s wrongful death statutes. Unless the case involves murder or an estranged spouse, children do not have standing to bring a wrongful death claim arising out of the death of their parent if a surviving spouse is living. This is true even when the surviving spouse negligently caused the parent’s death.

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## References

- 1 Named after *Cogger v. Trudell*, 35 Wis. 2d 350, 151 N.W.2d 146 (1967).
- 2 *Force v. Am. Family Mut. Ins. Co.*, 2014 WI 82, ¶ 32, 356 Wis. 2d 582, 850 N.W.2d 866.
- 3 *Id.*
- 4 *Bowen v. Am. Family Ins. Co.*, 2012 WI App 29, ¶ 10, 340 Wis. 2d 232, 811 N.W.2d 887.
- 5 *Id.* ¶ 11.
- 6 *Id.*
- 7 Wis. Stat. § 895.04(4).
- 8 Wis. Stat. §§ 895.04(4), (5). In addition, the decedent’s estate may bring a survival claim to recover damages for conscious pain and suffering experienced by the decedent prior to his or her death. This is not considered a “wrongful death claim.” “There is a difference between a wrongful death claim and a survival claim.” *Force*, 356 Wis. 2d 582, ¶ 45. “A wrongful death claim ... compensates the deceased’s relatives for the damages they suffer as a result of the deceased’s death.” *Id.* “A survival claim compensates the estate of the deceased (or persons who paid expenses on behalf of the estate) for damages suffered by the deceased between the time of the injury and the time of death.” *Id.* A full discussion of survival claims is beyond the scope of this article.
- 9 Wis. Stat. § 895.04(8).
- 10 Wis. Stat. § 895.04(4).
- 11 *Id.*
- 12 *Bowen*, 340 Wis. 2d 582, ¶¶ 11-12; *Force*, 356 Wis. 2d 582, ¶ 43.
- 13 *Bowen*, 340 Wis. 2d 582, ¶¶ 11-12; *Force*, 356 Wis. 2d 582, ¶ 43.
- 14 *Bowen*, 340 Wis. 2d 582, ¶ 12; *Force*, 356 Wis. 2d 582, ¶ 43.
- 15 Wis. Stat. §§ 895.04(2), 852.01.
- 16 Wis. Stat. § 895.04(2).
- 17 *Id.*; *Bowen*, 340 Wis. 2d 582, ¶ 20 (“under § 895.04(4)’s plain language, only a person entitled to bring a wrongful death action may recover pecuniary damages”).
- 18 35 Wis. 2d 350, 151 N.W.2d 146 (1967).
- 19 *Id.* at 353-360.
- 20 *Id.* at 351-52.
- 21 Ronald Cogger was not the biological child of Mr. Trudell. *Id.* The court recognized this fact, but conceded that he “is afforded the same protections under the law as the decedent’s natural child.” *Id.* at 359.
- 22 *Id.* at 351-52. The other driver, Paul Jensen, as well as the owner of Mr. Trudell’s vehicle, Michael Salerno, were also made defendants in the action. *Id.*
- 23 *Id.*
- 24 *Id.*
- 25 *Id.* at 360.
- 26 *Id.* at 356.
- 27 *Id.* at 356-57.
- 28 *Id.* at 360 (citing *Milwaukee v. Boynton Cab Co.*, 201 Wis. 581, 229 N.W. 28 (1930); *Krause v. Home Mut. Ins. Co.*, 14 Wis. 2d 666, 112 N.W.2d 134 (1961)).

- 29 *Id.*
- 30 *Id.* at 355 (quoting *Cincoski v. Rogers*, 4 Wis. 2d 423, 425, 90 N.W.2d 784 (1958)).
- 31 *Id.* at 355-56 (quoting *Nichols v. United States Fidelity & Guaranty Co.*, 13 Wis. 2d 491, 497, 109 N.W.2d 131 (1961)).
- 32 *Id.* at 355 (quoting *Cincoski*, 4 Wis. 2d at 425).
- 33 *Id.*
- 34 *Id.* at 356-57.
- 35 *Id.*; see also Wis. Stat. § 895.04(2).
- 36 Wis. Stat. § 895.04(2).
- 37 *Cogger*, 35 Wis. 2d at 356.
- 38 *Id.*
- 39 *Id.* at 358.
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 *Id.* at 359.
- 44 *Id.* at 358.
- 45 *Id.* at 360.
- 46 51 Wis. 2d 466, 187 N.W.2d 151 (1971).
- 47 *Id.* at 475-76.
- 48 *Id.* at 466, 475.
- 49 *Id.* at 475-76.
- 50 *Id.* at 476.
- 51 2012 WI App 29, 340 Wis. 2d 232, 811 N.W.2d 887.
- 52 *Id.* ¶¶ 13-19.
- 53 *Id.* ¶ 1.
- 54 *Id.*
- 55 *Id.* ¶ 19.
- 56 *Id.* ¶¶ 1, 13.
- 57 *Id.* ¶1.
- 58 *Id.* ¶ 14.
- 59 *Id.* ¶¶ 13-19.
- 60 2002 WI App 110, 255 Wis. 2d 693, 648 N.W.2d 900.
- 61 *Id.* ¶ 2.
- 62 *Id.* ¶¶ 3, 7.
- 63 *Id.* ¶ 9.
- 64 *Id.* ¶ 10.
- 65 *Id.* ¶ 12.
- 66 *Id.*
- 67 *Id.* ¶¶ 20-23. The court also noted that the marriage could be recognized under Pennsylvania's common law marriage laws. *Id.* ¶ 24.
- 68 *Id.* ¶ 25.
- 69 144 Wis. 2d 159, 423 N.W.2d 540 (1988).
- 70 *Id.* at 161-62.
- 71 *Id.* at 161.
- 72 *Id.*
- 73 *Id.* at 166.
- 74 *Id.*
- 75 *Id.* at 168.
- 76 2014 WI 82, 356 Wis. 2d 582, 850 N.W.2d 866.
- 77 *Id.* ¶ 5.
- 78 *Id.*
- 79 *Id.* ¶ 3.
- 80 *Id.* ¶ 8.
- 81 *Id.* ¶ 49.
- 82 *Id.* ¶ 48. *Id.* ¶¶ 8, 89.