Florida's Wrongful Death Act: Should Grandparents and Persons Standing In Loco Parentis Be Permitted to Recover Damages?

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I. INTRODUCTION

A young boy and his grandmother approach a crosswalk near the boy’s elementary school. They step off the curb onto a seemingly vacant road, completely unaware of the danger approaching. All of a sudden, a car appears in the distance traveling at a high rate of speed. The grandmother, thinking that the car will slow down before the crosswalk, permits the young boy to cross the road and follows closely behind him. Before reaching the crosswalk, the driver slams on his brakes and loses control of the car. The car then begins to skid on the rain-slicked pavement. Unable to get out of the way in time, the young boy is struck first by the errant car, killing him instantly. The grandmother, on the other hand, is sent airborne by the collision and lands on the sidewalk nearby.

This type of hypothetical relationship, where a grandparent is the sole caregiver of his or her grandchild, is commonplace in the United States today. Unfortunately, as the law exists in Florida today, only the boy’s parents and any blood relatives dependent on him for support and services can recover for...
his wrongful death.\textsuperscript{1} Despite suffering greatly from her grandson’s death, the hypothetical grandmother
cannot maintain an action for pain and suffering damages under the current Florida Wrongful Death Act
[hereinafter FWDA].\textsuperscript{2}

This paper discusses whether grandparents and persons standing \textit{in loco parentis} may recover for
the wrongful death of their grandchildren and wards, respectively. Part II of this paper will discuss
recovery for wrongful death at common law and by statute in the United States and in England. Part II of
this paper will also discuss state statutes that either expressly permit grandparents or persons standing \textit{in loco parentis}
to recover or permit them to recover through intestate succession. Part III will analyze state
case law where grandparents and persons standing \textit{in loco parentis} were either permitted or denied
recovery for their grandchild or ward’s wrongful death. Part IV of this paper will discuss wrongful death
in Florida, including a historical overview of the cause of action in this state, as well as persuasive case
law that discusses recovery by other parties. Part V of this paper will offer recommendations for future
wrongful death legislation and court analysis. Finally, Part VI will conclude with the premise that
grandparents and persons standing \textit{in loco parentis} in Florida should be able to recover for the wrongful
death of their grandchildren and wards in certain circumstances.

II. DEATH BY WRONGFUL ACT

A. \textit{At Common Law}

At common law, “the death of a human being could not be complained of as an injury.”\textsuperscript{3} This
statement, taken from English Lord Ellenborough’s infamous dicta, became the oft-recited American
“rule” that absent statutory authority, a plaintiff could not recover for the wrongful death of another.\textsuperscript{4} It
was not until 1972, over 150 years after the common law rule was first established, that the Supreme
Judicial Court of Massachusetts in \textit{Gaudette v. Webb}\textsuperscript{5} held that there was common law right of recovery
for wrongful death in that state.\textsuperscript{6} Notwithstanding this common law right of recovery, the court in
\textit{Gaudette} was quick to note that wrongful death statutes still govern the common law right of action,
including the amount of damages recoverable.\textsuperscript{7} Despite Massachusetts’s trailblazing, most American
jurisdictions continue to hold that there is no common law right of action for wrongful death.\textsuperscript{8}

Nevertheless, some legal commentators have suggested that a common law remedy could be
implemented in wrongful death actions.\textsuperscript{9} Courts could construe death statutes as permitting a parallel
common law remedy under theories of ordinary tort or negligence.\textsuperscript{10} In particular, “a jurisdiction’s statute
may have been construed for years not to allow recovery for loss of society, etc., whereas the United
States Supreme Court has wholly approved allowance of this important element of damages in its
nonstatutory death action.”\textsuperscript{11} Common law remedies could also be used in wrongful death cases brought

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\begin{itemize}
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Nova Southeastern University – H. Wayne Huizenga School of Business and Entrepreneurship (2007); B.A., Tulane University
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\item 1. \textit{See} \textsuperscript{[\textsuperscript{1}] Fla. Stat. §§ 768.16-.21 (2005).
\item 2. \textit{Id.}
\item 3. 1 \textit{STUART M. SPEISER \& JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 1:2 (4th ed. 2005)
\item 5. 284 N.E.2d 222 (Mass. 1972).
\item 6. \textit{Id. at} 229.
\item 7. \textit{Id. See SPEISER \& ROOKS, supra note 1, § 1:7; See also STEIN, supra note 4, § 15:1.
\item 8. STEIN, supra note 4, § 15:1
\item 9. SPEISER \& ROOKS, supra note 1, § 1:7.
\item 10. \textit{Id. “The problem here would be to convince the courts that a particular death statute did not furnish the
exclusive remedy for wrongful death. Such an approach could have considerable consequences, if successful, in those few states
whose death statutes still contain a maximum dollar limit on recovery.” Id.
\item 11. \textit{Id.}
\end{itemize}
by persons not originally named in the state’s death statute, such as stepchildren, uncles, aunts, cousins, adoptive children, and grandparents.12

B. By Statute

Every state in the United States has a statutory system providing for the recovery of damages in wrongful death actions.13 “Though differing widely in many respects, these statutes either ‘continue’ or actually create a cause of action, and provide a remedy at law for deaths occurring within the jurisdiction of the state courts.”14

1. Lord Campbell’s Act

The state statutes that create a new cause action for wrongful death are generally based on Lord Campbell’s Act,15 the original English wrongful death statute.16 Enacted in 1846, Lord Campbell’s Act provides:

WHEREAS no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him . . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover damages in respect thereof, then and in every such Case the person who would have been liable if Death had not ensued shall be liable to an action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony . . . And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused.17

Although a number of state legislatures used Lord Campbell’s Act as a guide for enacting their own death statutes, many states chose to either broaden or narrow the original test as stated in the original English version of the Act.18 Many state statutes “are essentially the same as that of Lord Campbell’s Act,” despite using slightly different terminology.19 The most important difference (at least for purposes of this discussion) between Lord Campbell’s Act and modern death statutes is the type of beneficiary who can recover under the state’s wrongful death statute.20

12. Id. “[A]n illustration that comes to mind is stepchildren, held to be included in the federal nonstatutory death remedy, although always held excluded under state wrongful death statutes.” SPEISER & ROOKS, supra note 1, § 1:7.
13. SPEISER & ROOKS, supra note 1, § 1:9; STEIN, supra note 4, § 15:2.
14. SPEISER & ROOKS, supra note 1, § 1:9.
15. Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.) [hereinafter Lord Campbell’s Act]. “Lord Campbell’s Act was the progenitor, both in the United States and in Canada, for death statutes modeled after it. The first wrongful death statute in the United States was enacted in New York in 1847.” SPEISER & ROOKS, supra note 1, § 1:11; SAWAYA, supra note 4, § 16.4.
16. See SPEISER & ROOKS, supra note 1, §§ 1:9–1:11; See also SAWAYA, supra note 4, § 16.3.
17. Lord Campbell’s Act, §§ I-II. “It is evident that the Act was intended to make an exception to the common law rule by creating a new statutory right of action in favor of the family of the decedent that would allow them to recover for the wrongful death of the victim.” SAWAYA, supra note 4, § 16.3.
18. STEIN, supra note 4, § 15:2.
19. Id. Some states have gone so far as to expressly include provisions in their constitutions providing for a right of action for wrongful death. See KY. CONST. § 241. Other state constitutions forbid the abrogation of the cause of action in their jurisdiction. See ARIZ. CONST. art. 18, § 6; N.Y. CONST. art. I, § 16; OKLA. CONST. art. 23, § 7; UTAH CONST. art. XVI, § 5. Apart from protecting the right to bring a wrongful death action, some states constitutionally prohibit a limitation on the amount of damages recoverable. See id.; KY. CONST. § 54; OHIO CONST. art. I, § 19A.
20. STEIN, supra note 4, § 15:2. Some state courts have held that the wrongful death statutes should be strictly construed since they are in derogation of the common law. Limbaugh v. Woodall, 175 S.E.2d 135, 137 (Ga. Dist. Cl. App.)
2. Grandparents’ and Other Parties’ Right of Recovery

Through the use of the words “husband,” “wife,” “parent,” and “child,” Lord Campbell’s Act expressly provided that grandparents, included in the term “parent,” should be able to recover as beneficiaries to a wrongful death action.\(^{21}\) Even the successor to Lord Campbell’s Act, the Fatal Accidents Act of 1976,\(^{22}\) provides that the “ascendant” of the decedent may recover damages for the decedent’s death.\(^{23}\) Unlike Florida and other states, Indiana, Louisiana, Michigan, and North Dakota provide for grandparents’ exclusive recovery by statute.\(^{24}\) Apart from statutes that expressly confer the right of recovery to grandparents, certain states permit recovery by persons entitled to the decedent’s property through intestate succession.\(^{25}\) At least two states, Arkansas and Delaware, expressly permit persons standing\(\textit{in loco parentis}\) to recover for the wrongful death of a minor child.\(^{26}\)

III. PERSUASIVE CASE LAW

Since neither the Florida Legislature nor the Florida Courts have specifically addressed whether grandparents or persons standing\(\textit{in loco parentis}\) may recover for a minor child’s wrongful death, an analysis of case law outside of Florida is required.\(^{27}\) To that end, many of the cases from other states will be analyzed within the ambit of their individual wrongful death statutes.

A. Recovery Permitted

1. California: \textit{Fraizer v. Velkura}

1970). The FWDA, however, provides that the Act is “remedial and [should] be liberally construed.” FLA. STAT. § 768.17 (2005).

\(^{21}\) Lord Campbell’s Act, § II; SPEISER & ROOKS, supra note 1, § 3:11.


\(^{23}\) Id. §§ 1(2), (3)(c). An “ascendant” is anyone “who precedes in lineage, such as a parent or grandparent.” BLACK’S LAW DICTIONARY 121 (8th ed. 2004) (emphasis added). The Fatal Accidents Act also permits recovery by “any person who was treated by the deceased as his parent.” Fatal Accidents Act, §§ 1(2), (3)(d).


\(^{27}\) To date, only a federal court, sitting in Florida and applying Florida law, has faced a situation where grandparents sought to recover in a wrongful death action. See In re Air Crash on December 20, 1995 Near Cali, Columbia, No. 96-MD-1125, 1998 WL 1700590, at *5 (S.D. Fla. May 5, 1998) (grandparents, aunts, uncles, and siblings brought a consolidated wrongful death action against an airline on behalf of minor decedents) [hereinafter Air Crash]. The court held that since “[n]one of the claimants were dependent on the decedent[s] for support or services . . . [they did] not qualify as statutory survivors.” Id. Clearly the court was strictly construing the FWDA in its determination, and, thereafter, it granted summary judgment for the defendant airline. Id. With regard to the persons standing\(\textit{in loco parentis}\) issue, the Second District Court of Appeal of Florida has only held that “a minor child that is neither the natural child or legally adopted child of a decedent simply has no claim under the Florida Wrongful Death Act.” Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978) (stepchild not permitted to recover).
Unlike Arkansas, California does not specifically permit grandparents or persons standing in loco parentis to recover for the wrongful death of their grandchildren or wards.\(^{28}\) Instead, California’s wrongful death statute provides for recovery, “[if] there is no surviving issue of the decedent, [by] the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.”\(^ {29}\) California’s probate code provides that “[i]f there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents,” the estate passes to them.\(^ {30}\)

In *Fraizer v. Velkura*,\(^ {31}\) the California Court of Appeal reviewed a lower court’s grant of summary judgment in favor of a defendant physician in a wrongful death and medical malpractice action.\(^ {32}\) The plaintiff in *Fraizer* was the grandmother/guardian of a four year old girl who died from a “serious congenital neurological disorder . . . .”\(^ {33}\) At the time of the young girl’s death, the grandmother was in the process of formally adopting her since the biological mother and father’s parental rights had been terminated.\(^ {34}\) In reversing the lower court’s judgment, the court reasoned that “[t]he purpose behind the wrongful death statute is to provide compensation for the loss of companionship . . . resulting from the decedent’s death.”\(^ {35}\) The court continued, “[Since] [t]he order terminating the parent and child relationship divested [only] the parent and child of all legal rights and powers with respect to each other but made no mention of grandparents[,]”\(^ {36}\) the grandmother was entitled to the proceeds of the action pursuant to the state’s intestacy statute.\(^ {37}\)

2. Kansas: *Shelton v. DeWitte*

The Kansas wrongful death statute provides that an “action may be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death.”\(^ {38}\) In *Shelton v. DeWitte*,\(^ {39}\) the maternal grandparents of an unborn viable fetus sought damages for its wrongful death.\(^ {40}\) The plaintiffs’ daughter, nine months pregnant at the time, was killed in a car accident.\(^ {41}\) On appeal, the Defendant argued that the unborn fetus’s sole heir was its natural father, and therefore, the grandparents did not fall within the class of beneficiaries permitted to recover under the wrongful death statute.\(^ {42}\) Disagreeing with the defendant’s position, the Supreme Court of Kansas held that the maternal grandparents had already been determined to be the fetus’s sole heirs, since the identity of the natural father was unknown.\(^ {43}\) Thus, the court permitted the grandparents, as the fetus’s sole heirs at law, to recover damages for their unborn grandchild’s wrongful death.\(^ {44}\)


29. *Id.*
32. *Id.* at 919. The lower court granted summary judgment after finding that the grandmother did not have standing to sue for her granddaughter’s wrongful death. *Id.*
33. *Id.*
34. *Id.* It is unclear from the facts of the case why the biological parents’ parental rights had been terminated, but the court’s opinion states that the grandmother “was just weeks away from the finalization of adoption proceedings . . . .”
35. *Fraizer*, 110 Cal. Rptr. 2d at 919.
36. *Id.* at 920.
37. *Id.*
40. *See id.* at 651.
41. *Id.* The plaintiffs’ daughter was riding as a passenger in the defendant’s vehicle. *See id.* at 651–52.
42. *See id.* at 653.
44. *See id.* at 654–55.
Perhaps the most persuasive support for permitting grandparents and persons standing in loco parentis to recover damages for the death of their grandchild comes from a case that was not even a wrongful death action. In Fernandez v. Walgreen Hastings Co., a grandmother brought negligent infliction of emotional distress (“NIED”) and loss of consortium claims against a pharmacy and its employees who had improperly filled her granddaughter’s prescription. “In her Complaint, [the] Plaintiff alleged that Defendants’ negligence caused her to lose the companionship, society, love and affection of her granddaughter . . . that she has suffered emotionally, and will continue to suffer emotionally . . .” In defending against the claim, the pharmacy and its employees argued that public policy should prohibit the claim because of the “intangible character of the loss, the difficulty of measuring damages, the danger of double recovery, the danger of increased litigation and multiple claims, and danger of extensive liability and increased insurance costs.” The court was quick to reject these arguments, as they had already been disapproved of in a prior case that permitted a spousal loss of consortium claim. The court concluded by holding that “a plaintiff may recover for loss of consortium due to the death of a minor grandchild where the plaintiff was a family caretaker and provider of parental affection to the deceased.”

4. Ohio: Lawson v. Atwood

Although not exactly analogous to the cases previously analyzed, the reasoning and holding in Lawson v. Atwood is quite persuasive. In Lawson, a care giver who was neither the natural nor adoptive parent of an eighteen year old woman sought to recover damages for the young woman’s wrongful death. The care giver and his ex-wife had taken care of the young woman since she was abandoned by her natural mother as an infant and had treated her as their own child. In analyzing the facts of the case, the court noted that the care giver “loved and treated [the young woman] as if she were his natural child. He received [the young woman’s] society, companionship and filial obedience. He represented [the young woman] to the world as his child and he received the benefits of her love and affection . . .” Liberally construing the Ohio wrongful death statutes, the court concluded that the care giver “is and has been the parent of the [young woman],” and permitted him to recover for her wrongful death.

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45. 968 P.2d 774 (N.M. 1998).
46. Id. at 776. The plaintiff claimed “NIED damages for her emotional distress from observing her twenty-two-month-old granddaughter . . . suffocate and die after Defendants negligently misfilled . . . [the child’s] prescription. She also claim[ed] loss of consortium damages because she assert[ed] that she was her granddaughter’s guardian, caretaker, and provider of parental affection.” Id.
47. Id. at 782 (internal quotations omitted). The trial court dismissed the grandmother’s loss of consortium claim since New Mexico had not recognized such a claim. Id.
49. Id. (citing Romero v. Byers, 872 P.2d 840, 847 (N.M. 1994)).
50. Id. at 784.
51. 536 N.E.2d 1167 (Ohio 1989).
52. See id. at 1168. The court frequently referred to the decedent young woman as a “child” throughout its opinion. Id. at 1168–69. It is unclear, however, whether the young woman was considered by the court as a minor child or an adult child.
53. See id. at 1168–69. The natural mother had given the child to the care giver [hereinafter Mr. Lawson] and his ex-wife [hereinafter Mrs. Lawson] after the mother’s boyfriend had beaten the child. Id. at 1168. Immediately after the natural mother abandoned the child, Mr. Lawson contacted his attorney and began adoption proceedings. Lawson, 536 N.E.2d at 1168. The young woman was never formally adopted, but Mrs. Lawson was given sole legal custody of the young woman following the dissolution of her marriage to Mr. Lawson. Id. at 1169. The young woman and the Lawson children continued to live with Mr. Lawson, the appellant in this case. Id.
54. Id.
55. Id.
56. Lawson, 536 N.E.2d at 1170.
The most important holding to be gleaned from *Lawson* is a four-part test, which, if satisfied, permits a person “who is neither a natural nor an adoptive parent . . . to recover [wrongful death damages] from a tortfeasor . . . .”\(^{57}\) The court stated the four-part test as follows:

1. The natural parents of the child have disclaimed or abandoned parental rights to the child;  
2. The one claiming to be parent has performed the obligations of parenthood for a substantial period of time;  
3. The child and the one claiming to be parent have held themselves out to be parent and child for a substantial period of time; and  
4. The relationship between the child and the one claiming to be parent has been publicly recognized.\(^{58}\)

Clearly, this four-part test would be applicable to any person, including grandparents, standing *in loco parentis* to a child, provided that they proffer the appropriate evidence at trial. Moreover, this test provides a functional exception to the harsh rule that wrongful death statutes should be strictly construed.\(^{59}\)

**B. Recovery Denied**

1. **California: *Lewis v. Reg’l Ctr. of East Bay***

   Later distinguished by the Second District Court of Appeal in *Fraizer*,\(^{60}\) the First District in *Lewis v. Reg. Ctr. of East Bay*\(^{61}\) refused to permit the paternal grandparents of a deceased minor child to recover for that child’s wrongful death.\(^{62}\) Relying on a technicality, the court determined that the grandparents were not the child’s heirs, even though the grandparents had legal custody of the child and the child’s biological parents had waived all of their interest in the child’s estate.\(^{63}\)

   Disagreeing in the judgment, the dissenting justice argued that the “[p]laintiffs were more than decedent’s guardians; at all pertinent times they acted as his parents. These three considered themselves a family unit and exhibited the love and affection one would expect from that relationship.”\(^{64}\) The dissenting justice continued by stating that “[s]ince the minor ha[d] been removed from the parents’ care and custody, it follows that the parents could not readily claim the loss of companionship, support or society from the minor’s wrongful death that the plaintiffs can justly assert.”\(^{65}\) The grandparents, he concluded, should be able to prosecute the action as “[t]he bonding and affection that [developed between the grandparents and the child] during this relation is certainly deserving of legal protection.”\(^{66}\)

2. **North Dakota: *Goodleft v. Gullickson***

   The Supreme Court of North Dakota in *Goodleft v. Gullickson*\(^{67}\) reviewed a grandmother’s claim seeking to recover damages for her five year old grandson’s wrong death.\(^{68}\) The young boy and his

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57. *Id.*
58. *Id.*
59. Like the FWDA, the Ohio wrongful death statute “is a remedial law and so must be construed to promote the objectives of the Act and to assist the parties in obtaining justice.” *Id.* at 1168. “The objectives of wrongful death Acts are threefold: (1) to compensate those who have been deprived of a relationship, (2) to ensure that tortfeasors bear the cost of wrongful acts, and (3) to deter harmful conduct which may result in death.” *Id.*
60. *See Fraizer*, 110 Cal. Rptr. 2d at 920–21.
62. *See id.* at 89–90, 92, . . . The young boy was in the care of the defendants and died by drowning. *Id.* at 90.
63. *Id.* at 90. The boy was survived by his paternal grandparents, biological parents, and a half-brother. *Id.* It is unclear from the facts why the parents and half-brother disclaimed their interest in the boy’s estate, and why the grandparents were appointed his legal guardians.
64. *Lewis*, 220 Cal. Rptr. at 92 (Low, J., dissenting)
65. *Id.* at 93.
66. *Id.*
67. 556 N.W.2d 303 (N.D. 1996).
mother were riding in the Defendant’s vehicle, when they were involved in an accident. The boy ultimately died from the injuries sustained during the accident. Following the accident, the grandmother was appointed as the personal representative to the young boy’s estate and entered into a “working agreement” with the parents that directed the grandmother to bring the wrongful death action. After filing the complaint, and after the defendant failed to answer, the grandmother moved the court for a default judgment. In denying her motion, the trial court “treated [her] complaint as an action for the wrongful death of [the boy] and . . . [ruled that] she had failed to satisfy the statutory requirements for bringing a wrongful death action.” The trial court then dismissed her case holding that she “did not have standing to personally bring [the] wrongful death action and, as personal representative, she had failed to make a proper demand on the persons with higher priority for bringing the action.”

In general, the grandmother argued that she was the child’s “de facto” or “psychological” mother, and because she stood in loco parentis, the court should consider her the “surviving mother” for the purposes of the North Dakota wrongful death statute. The Supreme Court of North Dakota, however, disagreed with her interpretation of the term “surviving mother,” and reasoned that the state legislature did not contemplate a “de facto” or “psychological” mother when it chose the specific language used in the wrongful death statute. Since the young boy’s parents were still alive and able to prosecute a wrongful death action on the boy’s behalf, the court held that the grandmother did not have standing to bring the action.

3. Tennessee: In re Estate of Dobbins

The case of In re Estate of Dobbins involved a grandmother who had legal and physical custody of her grandson when he was accidentally shot and killed. The grandmother brought three wrongful death actions against multiple defendants. Ultimately, the lawsuits were settled for over $100,000 and thereafter, the probate court distributed the proceeds of that settlement to the grandson’s parents. On appeal, the grandmother argued that:

[S]he [was] entitled to recover all of the settlement proceeds because the natural parents of the deceased had legally surrendered his custody to her and her husband by order of the juvenile court prior to his death . . . [and that] due to [the parents] abandonment of the decedent, as well as in recognition of the love, time, and resources which she and [her husband] contributed to the decedent as his sole legal custodians for the last years of his life, it should be held that the parental rights of [the natural parents] were surrendered.

68. Id. at 305.
69. Id.
70. Id.
71. Id.
72. Goodleft, 556 N.W.2d at 305
73. Id.
74. Id. The persons with higher priority were deemed to be the child’s natural parents. Id. Goodleft, however, disagreed with this position, claiming that the parents had abandoned or disclaimed the child. See id. at 308.
75. See Goodleft, 556 N.W.2d at 307.
76. Id.
77. See id. at 305.
78. 987 S.W.2d 30 (Tenn. Ct. App. 1999).
79. Id. at 31. The grandmother received custody of her grandson after his parents divorced. Id. at 32.
80. Id. at 31.
81. Id. at 31–32. Both the grandmother and the grandson’s uncle sought to recover a portion of the settlement, but the probate court excluded them. Dobbins, 987 S.W.2d at 32. After hearing the issue again, the probate court permitted the grandmother to recover net proceeds from the child support payments that were in arrears. Id.
82. Id. at 34–35 (internal quotations omitted).
Disagreeing with the grandmother, the court held that “a legal surrender of parental rights denotes a termination thereof and is totally separate and distinct from the situation where a parent maintains his/her parental rights but has relinquished custody to another.” The court continued by noting that if the parents had in fact abandoned the child, then the grandmother would have standing to sue. In affirming the lower court’s judgment, the court showed sympathy to the grandmother by noting that the “result may seem rather harsh considering that [the grandmother] had loved and provided for her grandson for at least the seven years prior to his death and that the contact and care actually provided by the natural parents after the loss of legal custody remains questionable.”


In State Farm Mut. Auto. Ins. Co. v. Clyde, an insurance company sued its own insureds “seeking a declaratory judgment as to whether the [insureds] were entitled to underinsured benefits for the wrongful death of [their daughter’s] unborn child.” The insureds’ minor daughter, who was pregnant at the time, died from her injuries sustained in a “head-on” collision with another vehicle driven by a third party. Following their daughter and unborn grandchild’s death, the Clydes recovered money from the third party’s insurance company and sought to recover additional damages from State Farm. State Farm agreed to pay additional damages in the amount of $50,000 for the Clydes’ daughter’s death but denied any claims as to the unborn child.

At trial, State Farm argued that “the Clydes were not ‘legally entitled’ to maintain an action for the wrongful death of [their daughter’s] unborn child . . . [because] only a parent or guardian of a minor child may maintain an action for the child’s wrongful death.” The lower court agreed with State Farm and granted its motion for summary judgment. On appeal, the “Clydes assert[ed] that because they provided [the daughter’s] sole means of support, they stood in loco parentis to the unborn child and should be treated as de facto parents or guardians . . . .” Construing Utah’s wrongful death statute strictly, the court declined to extend the meaning of “parent” or “guardian” to encompass persons standing in loco parentis.

IV. WRONGFUL DEATH IN FLORIDA

A. The Original Acts

83. Id. at 35.
84. Id. at 35–36.
85. Dobbins, 987 S.W.2d at 36.
86. 920 P.2d 1183 (Utah 1996) [hereinafter State Farm].
87. Id. at 1185.
88. Id. at 1184. The daughter was not married at the time and the identity of the unborn child’s father was unknown. Id.
89. Id. at 1184–85. The Clydes’ insurance policy provided that “State Farm [would] pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle. State Farm, 920 P.2d at 1185.
90. Id.
91. Id. at 1185.
92. Id.
93. Id. The Clydes argued, alternatively, that they should be able to recover “as the heirs of [the daughter’s] unborn child.” State Farm, 920 P.2d at 1185. The court rejected this contention, however, as the Clydes did not raise that issue in the lower court. Id.
94. See id. at 1186. The court noted that “the legislature’s failure to expressly include persons standing in loco parentis within the class of potential plaintiffs under [the statute] appears to have been an intentional rejection of the concept of de facto parent or guardian in this context.” Id. at 1187.
An action for wrongful death has existed in Florida since 1883. In its original version the wrongful death statute provided:

Whenever the death of any person in this State shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, carelessness, negligence or default of any agent of any corporation, acting in his capacity of agent of such corporation, and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then and in every such case the person or persons who or corporation which would have been liable in damages, if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under circumstances as would make it in law amount to a felony.

The Act permitted certain specified survivors to bring the action:

Every such action shall be brought by and in the name of the widow or husband, . . . and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support . . . .

In 1899, the Florida State Legislature passed another act, this one pertaining to the death of a minor child by wrongful act. The Act provided:

Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or default of any . . . persons, . . . the father of such minor child, or if the father be not living, the mother, as the legal representative of such deceased minor child, may maintain an action against such individual . . . and may recover not only for the loss of service of such minor child, but in addition thereto such sum for the mental pain and suffering of the parent or parents as the jury may assess.

These versions of the wrongful death statutes remained largely unchanged until 1972 when the statute was completely overhauled. Unlike Lord Campbell’s Act, which formed the basis of the original version of the statute in Florida, neither the original Florida wrongful death statute nor the statute pertaining to the death of a minor child contemplated recovery by grandparents or other persons standing in loco parentis.

B. Florida Wrongful Death Act

In its current version, recently amended in part by the 2003 Regular Session of the Florida Legislature, the FWDA provides:

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96. Ch. 3439, § 1, 1883 Fla. Laws at 59; Fla. Rev. Stat. § 2342.
When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.\textsuperscript{103}

Any action under the FWDA “shall be brought by the decedent’s personal representative, who shall recover for the benefit of the decedent’s survivors and estate all damages . . . caused by the injury resulting in death.”\textsuperscript{104} The statute enumerates certain “survivors” who can recover for the decedent’s wrongful death and defines those “survivors” as “the decedent’s spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters.”\textsuperscript{105} The statute further defines “support” as “contributions in kind as well as money,” while “services” are defined as “tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors . . . .”\textsuperscript{106} In addition, the FWDA provides that “[e]ach survivor may recover the value of lost support and services from the date of the decedent’s injury to her or his death, . . . and future loss of support or services from the date of death . . . .”\textsuperscript{107} Finally, the statute provides that “[e]ach parent of a deceased minor child may also recover for mental pain and suffering from the date of injury.”\textsuperscript{108}

C. Florida Case Law

As the law stands today, neither a grandparent nor a person standing in loco parentis can recover for the death of their grandchild or ward, unless they are dependent on the child for support or services.\textsuperscript{109} Further, only one federal court, sitting in Florida and applying Florida law, has held that a grandparent cannot recover for their grandchild’s wrongful death.\textsuperscript{110} With regard to the in loco parentis issue, neither the Florida Supreme Court nor the Florida Courts of Appeal have held that a person standing in loco parentis cannot recover under the FWDA.\textsuperscript{111} Thus, any arguments advanced towards the grandparents’ or other persons’ ability to recover can only be made by analogy to other beneficiaries.

1. Stepparent-Stepchild Relationship

The issue of whether grandparents or persons standing in loco parentis can recover under the FWDA is best analogized to the stepparent-stepchild relationship. Although not precisely analogous, especially in the case of grandparents who are related by blood, the stepparent-stepchild relationship can have the same emotional involvement as a natural parent-child relationship such as love, care, and affection.\textsuperscript{112} Despite these strong family bonds, the Second District Court of Appeal in Grant\textsuperscript{113} held that “a minor child that is neither the natural child or legally adopted child of a decedent simply has no claim under the Florida Wrongful Death Act.”\textsuperscript{113}

\textsuperscript{103} FLA. STAT. § 768.19 (2005).
\textsuperscript{104} Id. § 768.20.
\textsuperscript{105} Id. § 768.18(1).
\textsuperscript{106} Id. §§ 768.18(3)-(4). “These services may vary according to the identity of the decedent and survivor and shall be determined under the particular facts of each case.” Id. § 768.18(4).
\textsuperscript{107} FLA. STAT. § 768.21(1).
\textsuperscript{108} Id. § 768.21(4).
\textsuperscript{109} See id. §§ 768.18-.21.
\textsuperscript{111} See discussion, supra note 27, regarding the ability of a stepchild to recover under the FWDA.
\textsuperscript{112} See SAWAYA, supra note 4, § 20.4(D)(2).
\textsuperscript{113} Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978).
Seventeen years later in *Nat’l R.R. Passenger Corp. v. Ahmed*, the Fourth District affirmed a lower court’s award of damages to a decedent passenger’s six adult children and one adult stepchild. Although the court did not specifically address whether a stepchild can recover under the FWDA, at least one commentator has suggested that since the jury’s “award to each child was for the same amount[,...] the jury made no distinction between the decedent’s natural children and his stepchild when deciding how much should be awarded for their loss of parental companionship, instruction, and guidance, and for the mental pain and suffering each child endured.”

Commenting on the issue of other beneficiaries’ recovery under the FWDA, Judge Thomas D. Sawaya noted that:

> Compelling arguments can be advanced to allow stepchildren the right to seek recovery for the wrongful death of their stepparent. Stepchildren and stepparents can just as easily form the strong family bonds . . . [between each other] as natural parents and children do. This may be especially true when the stepchildren are taken into the home and cared for by the stepparent at an early age.

On this point, the Supreme Court of Florida has held that the “[k]ey factors that are hallmarks of the *in loco parentis* relationship are the intentional assumption of obligations incidental to the parental relationship, especially support and maintenance, and psychological bonding.” As Judge Sawaya later notes, “[t]he same basic arguments advanced in favor of recovery for stepchildren in wrongful death actions should apply to allow recovery for the stepparent as well.”

### 2. Grandparents’ Dependency on Their Grandchild

Arguably, the one current avenue of recovery available to grandparents is to prove that they are partly or wholly dependent on their grandchild for support or services. “[A] determination of financial dependency is a prerequisite for any adult, non-parent blood relative wishing to bring a wrongful death action in Florida.” “There must be, when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support, or with some reasonable claim to support, from the deceased.” Furthermore, “[t]he state of dependency is determined by factual circumstances existing at the time of death.”

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114. 653 So. 2d 1055 (Fla. 4th Dist. Ct. App. 1995).
115. *Id.* at 1055–56.
116. SAWAYA, supra note 4, § 20.4(D)(1). The author, a judge from the Florida Fifth District Court of Appeal, noted that:

> The decision in *Ahmed* . . . should not be viewed as authority for damages awards to stepchildren under the [wrongful death statute]. The statement by the court in *Grant* . . . is probably the correct rule in cases where stepchildren attempt to recover as survivors under the [wrongful death statute]. Although the issue of whether stepchildren are survivors who may recover under the [wrongful death statute] is one that has not clearly been resolved by the courts, if they are to be permitted the right to recover, the Legislature should amend the [wrongful death statute] and make them survivors with the right to recover. [Nevertheless], there are strong arguments that can be made to allow them the right to recover under the [wrongful death statute].

*Id.*

117. *Id.* § 20.4(D)(2).
118. Nova Univ., Inc. v. Wagner, 491 So. 2d 1116, 1118 n.2 (Fla. 1986).
119. SAWAYA, supra note 4, § 20.5(E).
120. See FLA. STAT. § 768.18(1) (2005). “[I]t is obvious that parents, brothers, sisters and children do fall within this category of survivor. What is unclear is whether uncles, aunts, nieces, nephews, cousins and grandparents should be included in the category of survivors who are entitled to recover under the [FWDA].” SAWAYA, supra note 4, § 20.6(A).
122. Duval v. Hunt, 15 So. 876, 881 (Fla. 1894) (dependent niece permitted to recover for uncle’s wrongful death). “Although . . . Duval indicate[s] that nieces [are] entitled to recover under the predecessor Acts, [this] decision provide[s] at least some support for the proposition that . . . grandparents should also be entitled to recover under the current Act provided they were wholly or partly dependent on the decedent for support.” SAWAYA, supra note 4, § 20.6(A).
123. Cinghina, 647 So. 2d at 290.
V. RECOMMENDATIONS

The Florida Constitution provides that “[t]he courts shall be open to every person for redress of any injury . . . .”\(^{124}\) Moreover, the stated purpose of the FWDA is “to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer.”\(^{125}\) The Act also states that it is “remedial and shall be liberally construed.”\(^{126}\) However, the First District Court of Appeal has held that courts “cannot construe the provision so ‘liberally’ as to create a right of action that is not within the intent as shown by the statutory language used or otherwise reach a result contrary to the clear intent of the legislature.”\(^{127}\) Nevertheless, the Florida Supreme Court in *Garner v. Ward*\(^{128}\) has stated that “all persons who suffer loss as a result of [a] wrongful death and who are entitled to recover are proper parties [in a wrongful death action].”\(^{129}\)

Given the foregoing, it would behoove both the Florida Courts and the Florida Legislature to consider changing the status of wrongful death law in Florida. Preventing grandparents and persons standing *in loco parentis*, irrespective of their love, caring, and affection for the decedent, from recovering for the decedent’s wrongful death provides too harsh a result. In order to avoid cruel judgments and in consideration of the FWDA’s legislative purpose, the following alternative recommendations should be considered.

A. Provide for New “Survivors”

The first alternative would include grandparents and persons standing *in loco parentis* in the statutory list of “survivors.” In Louisiana, for example, the wrongful death statutes were amended to provide recovery for grandparents who raised their grandchildren when their parents had abandoned them, yet were still living.\(^ {130}\) Like the other states mentioned previously, Florida should expressly permit grandparents and persons standing *in loco parentis*\(^ {131}\) to recover under the FWDA, just as natural parents can recover for their minor child’s wrongful death. The sections of the FWDA that differentiate between the type of damages to be recovered when the child is a minor as opposed to an adult should also apply to grandparents and persons standing *in loco parentis*.\(^ {132}\) As suggested in Part IV of this paper, the Florida Legislature might also consider permitting stepchildren or wards to recover for the wrongful death of their stepparent or “de facto” parent.\(^ {133}\)

\(^{124}\) FLA. CONST. art. I, § 21.

\(^{125}\) FLA. STAT. § 768.17 (2005).

\(^{126}\) Id.


\(^{128}\) 251 So. 2d 252 (Fla. 1971).

\(^{129}\) Id. at 257.

\(^{130}\) FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., 1 LOUISIANA TORT LAW § 18. 01 n.12 (2d ed. 2005); See also LA. CIV. CODE ANN. art. 2315.2 (Supp. 2006).

\(^{131}\) The Delaware wrongful death statute provides for mental anguish damages when the decedent is a person who stood *in loco parentis* and also when the claim is brought by the person standing *in loco parentis*: [W]hen mental anguish is claimed as a measure of damages under this subchapter, such claim for mental anguish will be applicable only to the surviving spouse, children and persons to whom the deceased stood in loco parentis at the time of the injury which caused the death of the deceased, parents and persons standing in loco parentis to the deceased at the time of the injury which caused the death of the deceased (if there is no surviving spouse, children or persons to whom the deceased stood in loco parentis), and siblings (if there is no surviving spouse, children, persons to whom the deceased stood in loco parentis at the time of the injury, parents or persons standing in loco parentis to the deceased at the time of the injury which caused the death of the deceased).


\(^{133}\) Judge Sawaya noted that there might be sound reasons for permitting stepchildren to recover under the FWDA: The argument is also usually advanced that if a strong bond is developed between stepparent and stepchild then the natural and obvious result would be adoption; and if the child is not adopted the presumption is that such a relationship never developed.
B. *Follow Ohio’s Lead*

If the Florida Legislature is unwilling to extend the class of survivors to include grandparents and wards, it might consider adding a new provision to the current FWDA that would permit persons standing *in loco parentis* to recover under certain circumstances. Like Florida, the Ohio wrongful death statute provides that “a civil action for wrongful death shall be brought for . . . [the] exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages . . . .”  

Unlike Florida, however, the Ohio courts have developed a test for determining whether a stepparent or persons standing *in loco parentis* may recover under their statute. The Florida Courts or the Florida Legislature could simply require that this new class of survivor satisfy the four-part test from Ohio through clear and convincing evidence:

1. The natural parents of the child have abandoned the child;
2. The one claiming to be parent has performed the obligations of parenthood for a substantial period of time and would have continued to perform these obligations but for the decedent’s death;
3. The child and the one claiming to be parent have held themselves out to be parent and child for a substantial period of time; and
4. The relationship between the child and the one claiming to be parent has been publicly recognized and is worthy of judicial protection.

For the purposes of this test, the word “abandoned” should conform to its current definition in the Florida Statutes:

“Abandoned” means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver responsible for the child's welfare, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent or legal custodian, or caregiver primarily responsible for the child's welfare, to support and communicate with the child are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned.

Furthermore, a court should not consider a parent’s efforts to be marginal if the parent continued to maintain a loving relationship with the child, despite having some good faith reason for not assuming all of his or her parental duties.

C. *Recovery Through Intestate Succession*

However, this argument does not consider that important reasons may exist for the stepparent not to adopt the child. The child may have also formed a strong bond with the other natural parent that both child and natural parent may not want to sever. It is also possible that both the natural parents and the stepparent may not want to see the child’s rights to inheritance from the natural parent eviscerated by adoption. . . . Many times, stepchildren are just as dependent for support and services on the stepparent as natural children are dependent on their natural parents. They are, many times, taken into the home of the stepparent and become a part of his family just as if they were a natural child. To deprive them of the right to recover for the death of their stepparents may, in many cases, frustrate the primary objective of the [FWDA] and deprive these children of rights and remedies they need and deserve as much as natural children.

*SAWAYA, supra* note 4, § 20.4(D)(2).

136. *See id.*
Alternatively, should the Florida Courts or the Florida Legislature not desire to explicitly permit grandparents or persons standing in loco parentis to recover, they could amend the statute to permit beneficiaries’ recovery of their share of the damages through intestate succession. Florida’s Probate Code provides that “[a]ny part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs.” The first survivor entitled to damages would be the surviving spouse, who would receive the full amount of damages awarded if there are no lineal descendants. Following the surviving spouse and any lineal descendants, the beneficiaries would be:

(2) The decedent's father and mother equally, or to the survivor of them. (3) If there is none of the foregoing, to the decedent's brothers and sisters and the descendants of deceased brothers and sisters. (4) If there is none of the foregoing, the estate shall be divided, one-half of which shall go to the decedent's paternal, and the other half to the decedent's maternal, kindred in the following order: (a) To the grandfather and grandmother equally, or to the survivor of them. (b) If there is no grandfather or grandmother, to uncles and aunts and descendants of deceased uncles and aunts of the decedent. (c) If there is either no paternal kindred or no maternal kindred, the estate shall go to the other kindred who survive, in the order stated above. (5) If there is no kindred of either part, the whole of the property shall go to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate.

Although somewhat remote, grandparents would still be able to recover for their grandchild’s wrongful death if the child’s parents were no longer living, or if the parents had disclaimed any rights as to the child or his or her estate, and only if the child had no brothers or sisters. Clearly this option does not provide the most desirable result, but at least with intestate succession, grandparents have a chance to recover.

VI. CONCLUSION

In consideration of these recommendations, it is important to reiterate that the purpose of wrongful death statutes is to compensate a decedent’s survivors for the loss of the decedent’s support, services, companionship, affection, love, and caring. Every survivor cannot be compensated under the wrongful death statutes, since permitting this would impose an undue burden on the Florida and United States legal systems. There can be no doubt that those parties who have suffered the most, i.e., parents, stepparents, “de facto” parents, grandparents, and persons standing in loco parentis should be compensated adequately for their loss.

Lord Campbell’s Act was enacted in England “[i]n order to remedy the injustice that result[ed] from prohibiting recovery for the wrongful death of a human being.” In effect, the current language of the FWDA turns the clock back to the unjust days of wrongful death at common law in England and in the United States. Like their predecessors in England, some wrongful death survivors in Florida simply have no remedy in the state’s courts today. Florida’s survivors, not enumerated in the current FWDA, should have a chance to be compensated for the loss of their loved ones, just like those survivors fortunate enough to live in states where they are already permitted to recover.

In summary, the Florida Legislature has three functional options for broadening the class of survivors who can recover under the FWDA: 1) expressly permit grandparents and/or persons standing in loco parentis to recover as survivors; 2) follow Ohio’s lead and develop a four-part test for determining whether a person standing in loco parentis can recover when the child’s natural parents have abandoned

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140. Id. § 732.102(1).
141. Id. § 732.103(2)-(5).
142. Id. § 732.103(2)-(4)(a).
143. SAWAYA, supra note 4, § 16.3.
the child; or 3) incorporate Florida's Probate Code into the class of survivors, with spouses, parents, children, and blood relatives maintaining their current status as the primary beneficiaries to an action under the FWDA.