Wrongful Death Actions Based on Medical Negligence: How Long Do Minors Have To Sue for the Death of a Parent?

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COMMENT

WRONGFUL DEATH ACTIONS BASED ON MEDICAL NEGLIGENCE: HOW LONG DO MINORS HAVE TO SUIT FOR THE DEATH OF A PARENT?

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I. INTRODUCTION

Sue Smith was a young woman with one young child, ten-year-old Sally. On December 1, 2000, Sue went into the emergency room complaining of chest pain and shortness of breath. The hospital staff observed Sue sweating. The emergency room doctor examined her and took her history; he discovered that Sue was recently divorced and was laid off from work the previous month. The doctor determined that Sue was suffering from an anxiety attack. He gave Sue a prescription for Xanax and sent her home. Upon arriving home, Sue suffered a massive heart attack. She was returned to the same hospital.
and admitted to the cardiac unit. Sue remained in a coma for one week; on December 8, 2000, she died.

The above hypothetical situation appears to be a clear case of medical negligence. It raises an important question that remains unanswered: How long does Sally have to sue for the wrongful death of her mother? The Texas Supreme Court has not directly ruled on this issue. However, in some wrongful death cases, the court has emphasized that such claims are derivative and has applied an absolute two-year statute of limitations that begins to run on the date of the alleged negligence, not the date of death.1 Following that reasoning, Sally must file an action for wrongful death by December 1, 2002. Alternatively, several courts of appeals have heard wrongful death claims in the medical malpractice setting and have extended the time period for wrongful death claims by minors.2 Those courts have held, only reluctantly, that the tolling provision allowed for in the Medical Liability Act applies to such cases, giving a minor two years after turning twelve to bring a claim.3 Accordingly, Sally may be able to delay bringing a claim for approximately four years—two years after she celebrates her twelfth birthday. Another alternative, advocated by some courts, is that a minor suing for wrongful death should be able to delay filing the claim until two years after reaching the age of majority.4 Under this application, Sally would have almost ten years to file the claim for wrongful death due to medical negligence. The answer to the dilemma is not clear. The issue has been discussed by many in the legal community and by several courts of appeals.5 However, neither the legislature nor the Texas Supreme Court has decisively resolved the problem.

The Texas Supreme Court should take the position that an action for wrongful death is derived from the decedent’s right to sue for any injury, and as such, the plaintiff, even though a minor, should inherit the statute of limitations from the decedent. In other words, children suing for the wrongful death of their parent due to medical malpractice should have two years from the date of the negligence in which to bring their claim. Part II of this Comment outlines a brief history of

3. See Povolish, 905 S.W.2d at 67; Hogan, 889 S.W.2d at 336; Bangert, 881 S.W.2d at 566.
4. Povolish, 905 S.W.2d at 68; Hogan, 889 S.W.2d at 340.
the ability of a minor to sue in the State of Texas. Next, this Comment
discusses the derivative nature of the wrongful death claims and re-
views Texas Supreme Court cases, which, because of the derivative
nature of the claims, impose a strict two-year statute of limitations.
Finally, this Comment addresses whether the minority tolling provi-
sion in the Medical Liability Act can be severed from its common law
application so that the provision is constitutional as applied to minors
in wrongful death actions. This Comment concludes by advocating
that the legislature or the Texas Supreme Court should treat wrongful
death actions like other derivative claims and impose the strict two-
year limitations period that is inherited from the decedent.

II. HISTORY OF MINOR'S ABILITY TO SUE IN TEXAS

A. Controlling Law Governing a Minor's Ability to Sue for
Medical Negligence Prior to 1975

Before Texas became a state, statutes of limitations were typically
tolled for minors until they reached the age of majority plus two
years.6 After becoming a state, the Texas Constitution tolled statutes
of limitations for minors for seven years after reaching the age of ma-
jority.7 Before 1975, medical malpractice claims had to be pursued
under either contract or tort theories, such as oral contracts to cure,
breach of warranty, assault, battery, and negligence. Such claims had
to be brought within two years from the accrual of an action. Texas
law allowed limitations to be tolled for all tort actions by minors until
they reached majority.8 However, it is important to note that cases for
wrongful death were not permitted; such claims were not allowed at
common law.9

B. The Underpinnings of the Medical Liability and
Insurance Improvement Act

The 1970s brought crisis in the malpractice insurance field, which
severely and negatively impacted the cost, accessibility, and availab-
ility of health care. The Texas Legislature was spurred into action by
the urging of insurance companies, physicians' organizations, and
other health care providers; there was a strong opinion that tort re-
form was the solution required to end the crisis. As a short term solu-
tion to the problem, the legislature enacted the Physicians, Podiatrists,
and Hospitals Act in 1975; the Act was designed to expire by its own

6. Sax v. Votteler, 648 S.W.2d 661, 663 (Tex. 1983) (citing Act approved Feb. 5,
1841, 5th Cong., R.S., § 11, 1841 Repub. Tex. Laws 166, reprinted in 2 H.P.N.Gam-
mel, THE LAWS OF TEXAS 1822–1897, at 630 (Austin, Gammel Book Co. 1898)).
7. Id. (citing Tex. Const. of 1869, art. XII, § 14).
at TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon Supp. 2001)).
terms on December 31, 1977. The statute of limitations and tolling provision, Section 4 of Article 5.82 of the Act provided:

Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensure Law, as amended (Art. 4437f, Vernon’s Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

The Sixty-Fourth Texas Legislature responded to the medical crisis and established the Texas Medical Professional Study Commission to study the crisis, collect data, compile a report, and make suggestions for the best resolution to the Sixty-Fifth Texas Legislature. As a result, the Medical Liability and Insurance Improvement Act was enacted. The stated purposes of the Act included: reducing the number of health care actions, limiting the amounts of the awards to reflect actual damages, and making health care more accessible to the citizens of Texas. The Act included such provisions as: limiting damages awards, providing a blanket two-year statute of limitations for health care claims, limiting the use of the theory of res ipsa loquitur, and tolling the statute of limitations for minors until the age of twelve. The statute of limitations provision, section 10.01 of article 4590i, states:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as

10. Sax, 648 S.W.2d at 663.
11. Id.
13. This Act is commonly referred to as “4590i” or “MLIIA” or “Medical Liability Act.” See id. at 135–37.
15. Id. § 11.02.
16. Id. § 10.01.
17. Id. § 7.01.
18. Id. § 10.01.
herein provided, this subchapter applies to all persons regardless of minority or other legal disability.\textsuperscript{19}

Essentially, the current Act retained the two-year statute of limitations, counted from the completion date of the subject treatment, and changed only the age trigger in the tolling provision from six to twelve years of age, thereby extending the time for minors to bring a health care liability claim. The question remains: Does the tolling provision of the Act apply to health care liability claims resulting in the wrongful death of a minor's parent?

III. A TWO-YEAR STATUTE OF LIMITATIONS SHOULD APPLY TO A MINOR'S CLAIM FOR WRONGFUL DEATH OF A PARENT BASED ON MEDICAL NEGLIGENCE

A. Wrongful Death Claims Are Derivative and Should Be Treated Like Other Derivative Claims

A derivative action is "[a] lawsuit arising from an injury to another person."\textsuperscript{20} The Texas Supreme Court has recognized many such actions, including: survival claims,\textsuperscript{21} wrongful death actions,\textsuperscript{22} and claims for loss of parental consortium.\textsuperscript{23} In determining what the statute of limitations should be for minors suing for the wrongful death of a parent because of medical negligence, it may be helpful to evaluate such a claim in light of other derivative actions.

The Texas Supreme Court first recognized the right of a child to bring a claim for loss of parental consortium in \textit{Reagan v. Vaughn}.\textsuperscript{24} In so doing, the court noted that parents were able to recover damages stemming from the death of a child, including "loss of the companionship and society."\textsuperscript{25} The court also noted that children have "the right to recover damages for the loss of companionship and society resulting from the death of a parent."\textsuperscript{26} The court went on to state that a debilitating permanent injury may place a hardship on the child similar to that of the death of a parent.\textsuperscript{27} The court outlined what a plaintiff must prove to be successful; "the plaintiff must show that the defendant physically injured the child's parent in a manner that would subject the defendant to liability."\textsuperscript{28} Finally, the court stated that "de-

\textsuperscript{19} Id.
\textsuperscript{20} \textsc{Black's Law Dictionary} 455 (7th ed. 1999).
\textsuperscript{21} Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992) (holding that survival actions are derivative of decedent's rights).
\textsuperscript{22} Id.
\textsuperscript{23} Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990) (holding that "children may recover for loss of consortium"). Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 464–65.
\textsuperscript{26} Id. at 465 (citing Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551 (Tex. 1985)).
\textsuperscript{27} Id. at 466.
\textsuperscript{28} Id. at 467.
fenses which bar all or part of the injured parent’s recovery have the same effect on the child’s recovery.”29 In other words, if the parent’s claim was prohibited because the statute of limitations had expired, then the child’s claim would also be barred.

The 14th District Court of Appeals has also spoken about loss of parental consortium based on a medical malpractice claim in Nash v. Selinko.30 Gary Nash fell at work and was taken to Sun Belt Regional Medical Center for a CT scan, which was interpreted as normal by Dr. Selinko.31 Three years later, Mr. Nash learned that Dr. Selinko’s diagnosis was wrong, and in fact, he had a brain tumor.32 Approximately five years later, Mr. Nash’s sons sued the hospital and doctor for loss of parental consortium because of medical negligence in the treatment and diagnosis of their father.33

In Nash, the court again recognized the derivative nature of an action for loss of parental consortium—that such a claim “owes its existence to the parent’s underlying personal injury claim.”34 In a successful claim for loss of parental consortium, the plaintiff must demonstrate that “the defendant is liable to the parent for the personal injuries.”35 In other words, any defenses available to the defendant against the parent (in a claim for personal injury) are also available against the child suing for loss of parental consortium.36 Thus, the child would not be successful in such an action if the defendant could successfully demonstrate that “the parent could not recover on his personal injury claim due to the expiration of limitations or some other affirmative defense.”37 The court finally concluded that the statute of limitations for the consortium claim was the same as the statute of limitations that applied to the parent’s claim for personal injury.38 Because the minors’ claim was filed after the two-year statute of limitations had lapsed on the underlying medical malpractice claim, the defendants “established the limitations defense against the father’s claim . . . [which] served to extinguish the minors’ loss of parental consortium claim.”39

At common law, claims for wrongful death were not allowed; “an individual’s action for personal injuries did not survive his death.”40 However, the law in Texas has long allowed claims for wrongful

29. Id. at 468.
31. Id.
32. Id.
33. Id.
34. Id. at 317 (citing Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990)).
35. Id.
36. Id.
37. Id.
38. See id. at 318.
39. Id. at 319.
Such claims are based on the decedent’s rights and “are creatures of statute abrogating the common law rule that no cause of action may be brought for the death of another person.” The present provision allowing such actions instructs that a decedent’s beneficiary may maintain an action “only if the individual injured would have been entitled to bring an action for the injury if he had lived.”

The words of the statute, as well as Texas Supreme Court decisions, clearly indicate that the right to bring an action for wrongful death is derivative of the decedent’s rights. Because of the nature of the action, any defense that the defendant could have asserted against the decedent, had he survived, is valid against a wrongful death plaintiff, including the defense of statute of limitations.

B. Because Wrongful Death Claims Are Derivative, a Strict Two-Year Statute of Limitations Should Apply to All Such Claims Based on Medical Negligence

In Bangert v. Baylor College of Medicine, the minor son of the decedent brought a wrongful death action after his mother died from complications that arose after surgery. The trial court granted summary judgment for the defendants, but the Houston Court of Appeals reversed the summary judgment portion concerning the son’s wrongful death claims. The reason the majority reversed the lower court’s decision was because the defendants failed to establish that “the minor’s wrongful death claims were extinguished or never accrued, or that once accrued, they were barred by limitations.” While the majority did not determine that the minor actually had a viable claim, the language of the opinion indicates that the tolling provision provided in 4590i may have factored into the decision.

A stinging dissent followed the majority opinion, which directly addressed what statute of limitations should apply in wrongful death claims based on medical negligence and whether the minority tolling provision in the Medical Liability Act is applicable in such cases. The dissent began by noting that a claim for wrongful death is derivative in nature and dependent on the ability of the injured to bring an

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42. Russell, 841 S.W.2d at 345.
43. TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(a) (Vernon 1997).
44. Russell, 841 S.W.2d at 345.
45. Id. at 347.
47. Id. at 565, 567.
48. Id.
49. See id. at 566–67.
50. Id. at 568 (Hutson-Dunn, J., dissenting).
action if he had survived.51 Furthermore, the dissent argued that the tolling provision contained in the statute of limitations of the Medical Liability Act does not apply to the wrongful death minor.52 The pertinent portion provides that the statute of limitations for health care liability claims is two years from the date of the negligence and that period is tolled for minors until they reach the age of twelve.53 The Act also provides that a “[h]ealth care liability claim’ means a cause of action . . . which proximately results in injury to or death of a patient.”54

The dissent concluded that “[t]he wrongful death minor is not the injured person and therefore, the statute of limitations applicable to health care claims cannot be used to extend the statute of limitations.”55 The dissent infers that the wrongful death plaintiff, even if a minor, inherits the “two-year statute of limitations applicable to the injured adult in the underlying cause of action.”56 In Bangert, the dissent closed by asserting that because the claim was not “filed within two years of the injury sustained . . . as required by the medical liability act . . ., the minor’s wrongful death action is barred by the two-year statute of limitations applicable to the adult injured mother under the medical liability act.”57

The Texas Supreme Court clarified some of the confusion around the claim for wrongful death based on medical negligence in Bala v. Maxwell.58 The Maxwell family brought a wrongful death action against Dr. Bala for failing to properly diagnose cancer, which led to Fred Maxwell’s death.59 The claim was filed more than two years after Maxwell’s death and almost four years after the date of the alleged malpractice.60 The supreme court provided several important guidelines to all plaintiffs pursuing wrongful death actions based on medical malpractice.

The first important issue considered by the court in Bala was the apparent conflict in the statutes of limitations contained in the wrongful death provision and in the Medical Liability Act.61 The court noted that wrongful death claims usually have a two-year statute of

51. Id. at 567 (Hutson-Dunn, J., dissenting) (citing Tex. Civ. Prac. & Rem. Code Ann. § 71.003 (Vernon 1986); Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992)).
52. Id. at 568 (Hutson-Dunn, J., dissenting).
55. Id. (Hutson-Dunn, J., dissenting).
56. Id. (Hutson-Dunn, J., dissenting).
57. Id. (Hutson-Dunn, J., dissenting).
58. 909 S.W.2d 889, 892–93 (Tex. 1995) (per curiam).
59. Id. at 890.
60. Id.
61. Id. at 892.
limitations that begins at the date of death. The statute of limitations contained in the Medical Liability Act, however, provides that claims for medical malpractice must be filed within two years of the date of the alleged negligence. The court of appeals determined that the claim should be governed by the wrongful death provision because it "reflects a clear legislative intent to adopt an absolute two-year limitations period for wrongful death actions, and that period is triggered only by the event of death." However, the supreme court noted that such a conclusion disregarded the language in section 10.01 of the Medical Liability Act, which "applies to all health care liability claims notwithstanding any other law." The court interpreted the provision to mean that the statute of limitations contained in the Medical Liability Act governs over any apparently conflicting law, including the wrongful death provision.

The court explained how the statute of limitations should apply in wrongful death actions. The statute of limitations begins running at the date of the alleged negligence. In other words, according to the court, "the statute of limitations expires at the same time it would have for the decedent." Consequently, a person bringing a wrongful death claim may have less than two years from the date of death to bring the claim. Therefore, the court determined that the claim had expired two years after the date of the alleged negligence and was barred by the statute of limitations. The court did not state whether the statute of limitations could be tolled in wrongful death actions. However, it is important to note that the court made an absolute statement about when the statute of limitations begins to run and kept everything in reference to the rights of the decedent.

Important lessons can be learned and extrapolations can be made about wrongful death actions from the decision of the Texas Supreme Court in Diaz v. Westphal. The action was based on the alleged negligent prescription of a medication to Michael Westphal that led to bladder cancer and eventually his death. The claim was filed on behalf of the decedent’s minor child less than two years after Westphal's

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62. Id. (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b) (Vernon 1986)).
64. Id. (quoting Maxwell v. Mani, 892 S.W.2d 146, 154 (Tex. App.—Houston [14th Dist.] 1994), rev’d sub nom., Bala v. Maxwell, 909 S.W.2d 889 (Tex. 1995) (per curiam)).
65. Id. at 892.
66. Id. at 892–93.
67. See id. at 893.
68. See id.
69. Id.
70. Id.
71. Id.
72. See id.
73. Diaz v. Westphal, 941 S.W.2d 96 (Tex. 1997).
74. Id. at 97.
death and almost nine years after his last visit to Dr. Diaz. The trial court granted summary judgment for the defendant based on the running of the statute of limitations, but the court of appeals reversed and remanded the case.

The supreme court examined whether the wrongful death claim had expired or the statute of limitations had been tolled so that the claim was in fact timely. In doing so, the court distinguished between the common law right to sue for personal injuries due to medical negligence and the wrongful death action created by statute. The court noted that the right to bring wrongful death claims "is entirely derivative of the decedent’s right to have sued for his own injuries immediately prior to his death, and is subject to the same defenses to which the decedent’s action would have been subject." Further, the statute of limitations for personal injuries in a medical malpractice case is an absolute two-year period that begins running at the date of the alleged negligence. Therefore, Westphal's claim for medical negligence expired before he died. Because a wrongful death claim is derivative in nature, the right for his survivors to sue for any medical negligence that contributed to his death also expired at that time.

The Westphal family argued that several factors should operate to toll the running of the statute of limitations. Their assertions seemed to be largely based on appeals to fairness and flexibility in suits for wrongful death in the medical malpractice context. Even though the court was not persuaded by any of the arguments, analyzing each point may help elucidate how the court views the statute of limitations in wrongful death cases involving medical negligence.

The first argument presented was that the minority tolling provision in the Medical Liability Act delayed the running of the statute of limitations. The court, however, declined to consider the assertion because it was not mentioned in the court of appeals.

Second, the family contended that the discovery rule should apply, which "suspends accrual, and thus the running of limitations, 'until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury.'" The court was not

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75. Id.
76. Id.
77. Id. at 98.
78. Id.
79. Id. (quoting Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 347 (Tex. 1992)).
80. Id.
81. Id. at 97, 100–01.
82. Id. at 98–99.
83. Id. at 98–100.
84. Id. at 101.
85. Id. at 98.
86. Id.
87. Id. at 99 (quoting S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996) (citing Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 262 (Tex. 1994))).
persuaded to apply the discovery rule, noting that section 10.01 of the Medical Liability Act applied and that it contained an “absolute two-year statute of limitations for health care liability claims.”88 Consequently, the discovery rule, according to the court, has been rendered void in health care liability claims.89 Still, the family contended that there was no way to know that terminal cancer would arise out of the alleged negligent treatment.90 Again, the court refused to apply the discovery rule to toll the running of the statute of limitations, remaining with the idea of a strict two-year limitations period for such claims.91

Finally, the court discussed whether, in this case, the statute of limitations provided for in the Medical Liability Act (section 10.01) “violates the open courts provision of the Texas Constitution.”92 The open courts provision is a Texas constitutional guarantee of due process.93 To establish an open courts violation, the plaintiff must establish “(1) that he has a cognizable common law cause of action, and (2) that restriction of the claim is unreasonable or arbitrary when balanced against the statute’s purpose.”94 However, the minor’s cause of action for wrongful death failed to satisfy the first element of the test because it was a statutory claim and not a common law claim.95 In other words, because the claim was statutory in nature, “the open courts doctrine does not apply to this case.”96

Unfortunately, the Texas Supreme Court has not yet squarely addressed whether the statute of limitations would be tolled in the cases of minors suing for the wrongful death of a parent based on a claim of medical negligence. However, there are lessons to be learned from both Bala97 and Diaz.98 The first important lesson is that the right to bring a wrongful death claim based on medical negligence is created by statute and is completely derivative of the decedent’s ability to have maintained a cause of action for his personal injuries, if he had survived.99 Second, the applicable statute of limitations is contained in section 10.01 of the Medical Liability Act, and it begins to run on

88. Id.
89. Id.
90. Id. at 99–100.
91. Id. at 100.
92. Id.
93. Id.
94. Id.
95. Id. at 100–101.
96. Id. at 101.
98. Diaz, 941 S.W.2d at 96.
99. Id. at 98 (citing Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 346–47 (Tex. 1992)).
the date of the alleged negligence.\textsuperscript{100} Additionally, \textit{Russell} indicates that defenses which would bar the decedent's claim may operate to bar the wrongful death plaintiff's claim, including running of the statute of limitations.\textsuperscript{101} Fourth, in wrongful death cases, the court interprets the statute of limitations in section 10.01 to be an absolute two-year statute of limitations.\textsuperscript{102} Finally, the court has not been willing to toll the statute of limitations with tools like the discovery rule,\textsuperscript{103} even when the result might seem cruel and unfair.

The Texas Supreme Court's treatment of the statute of limitations in wrongful death cases bolsters the dissenting opinion in \textit{Bangert v. Baylor College of Medicine}.\textsuperscript{104} The dissent argued that the absolute two-year statute of limitations governs a claim by a minor for the wrongful death of a parent due to medical negligence because the minor is not the one injured, and therefore, should not benefit from the tolling provision in the Medical Liability Act.\textsuperscript{105} The conclusion to be drawn is that the court would not and should not toll the statute of limitations for wrongful death claims brought by minors under the Medical Liability Act; to do so would contravene the purpose of the Act and the holdings in prior cases.

IV. IF THE SUPREME COURT Chooses to Toll the STATUTE OF LIMITATIONS FOR THE Wrongful Death CLAIMS OF Minors, THE TOLLING PROVISION in the Medical LIABILITY ACT IS CONSTITUTIONAL

If the Texas Supreme Court decides to contradict the strict adherence to a two-year statute of limitations in wrongful death cases due to medical negligence, giving minors an extended period of time in which to sue, it is important to determine whether the existing tolling provision for minors in the Medical Liability Act (section 10.01 of article 4590i) is constitutional. The court has found the tolling provision to be unconstitutional in certain cases,\textsuperscript{106} specifically cases involving claims by minors for their own personal injury caused by medical negligence. The courts of appeals have found the provision to be constitutional in cases brought by a minor for the wrongful death of a parent but have urged the supreme court to visit the topic to provide clarifi-

\textsuperscript{100} See \textit{id.}; \textit{Bala}, 909 S.W.2d at 892–93. However, if the date of the alleged act is not determinable, then the last date of negligent treatment applies. \textit{Tex. Rev. Civ. Stat. Ann.} art. 4590i, § 10.01 (Vernon Supp. 2001).
\textsuperscript{101} \textit{Russell v. Ingersoll-Rand Co.}, 841 S.W.2d 343, 347 (Tex. 1992).
\textsuperscript{102} \textit{Bala}, 909 S.W.2d at 892–93.
\textsuperscript{103} See, e.g., \textit{Diaz}, 941 S.W.2d at 101.
\textsuperscript{104} 881 S.W.2d 564, 567–68 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (Hutson-Dunn, J., dissenting).
\textsuperscript{105} \textit{Id.} at 568 (Hutson-Dunn, J., dissenting).
cation on the subject. A review of the cases demonstrates that if applied to wrongful death actions, the limitations provisions, including the minority tolling provision in the Medical Liability Act, would be constitutional and such actions should not be tolled until the plaintiff reaches eighteen years of age.

A. Successful Challenges to the Tolling Provision in the Medical Liability Act

The issue of when the statute of limitations begins to run for minors in claims governed by the Medical Liability Act has been hotly debated, but with little consensus. The limitation and tolling provision in 4590i, as well as its predecessor, has been challenged on numerous occasions. In two significant cases, the Texas Supreme Court found the tolling provisions to be unconstitutional.

Sax v. Voteler challenged the statute of limitation and tolling provision for minors in the predecessor to the Medical Liability Act. The provision required that claims for medical negligence be brought within two years of the tort and allowed tolling of the period for minors until the age of six (after which, the minor would have two years to bring the claim). The claim revolved around a surgery conducted on a minor girl, in which her fallopian tube was allegedly mistakenly removed. Almost three years after the surgery, her parents filed suit on her behalf; however, the trial court granted summary judgment for the defendant because the action was barred by the statute of limitations. The court of appeals affirmed the decision, but the supreme court reversed and remanded the case with respect to the claims by the minor for personal injury.

The Sax family urged the court to consider the constitutionality of removing the tolling provision from a minor in claims for medical negligence, claiming that the provision violated the due process and equal protection provisions of both the Texas and United States Constitutions. The court held "that the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of re-

108. Hamrick, supra note 5, at 143–44.
109. Weiner, 900 S.W.2d at 318; Sax, 648 S.W.2d at 667.
110. Sax, 648 S.W.2d at 663–64.
112. Id.
113. Id.
114. Id. at 663, 667.
115. Id. at 663–64.
dress." The court determined that the legislature had legitimate cause to limit the length of time in which plaintiffs could file claims for medical malpractice. The court also recognized that the "statute effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative." Accordingly, the court found the limitations provision violated the Texas Constitution. The effect of so holding was to allow a minor to file a claim for medical negligence up to two years after turning eighteen.

It is important to note that the Act in question in Sax is not the one that is in effect today. The major difference between the two in the area of the tolling provision is the age at which the statute of limitations begins to run. In the earlier version, the limitations period was only tolled until age six; today, the provision allows for tolling until the age of twelve. This point apparently caused some controversy when article 4590i was passed. Many advocated keeping the age at six in order to fulfill the purpose of the act. Others argued for a longer tolling provision. Finally, the committee determined that it was appropriate to toll the statute of limitations for minors until they reached the age of twelve.

In Weiner v. Wasson, section 10.01 of the Medical Liability Act was challenged as violating the open courts provision of the Texas Constitution. The case involved an alleged negligent hip surgery performed on a fifteen-year-old, which required subsequent surgeries to remedy the problem. The suit was filed more than four years after the first hip surgery; thus, the trial court granted the defendant's motion for summary judgment. The court of appeals, however, had reversed the decision based on the supreme court's decision in Sax and held the tolling provision in the Medical Liability Act to be "unconstitutional as applied to minors."

The supreme court ultimately upheld the decision by the court of appeals. The court noted that "the only significant difference be-

116. Id. at 665–66.
117. Id. at 667.
118. Id.
119. Id.
120. See id.
121. See generally id. at 663 n.1 (noting that the Texas Legislature enacted a similar statute but increased the age limit).
122. Id. at 663; Weiner v. Wasson, 900 S.W.2d 316, 317–18 (Tex. 1995).
124. Weiner, 900 S.W.2d at 317.
125. Id.
126. See id.
127. Id.
128. Id. at 321.
tween article 5.82 and section 10.01 is that section 10.01 extends the tolling period from age six to age twelve." The change, however, did not "cure the constitutional infirmity . . . identified in article 5.82 in Sax." The court rejected the argument that Sax should not apply because a parent could have brought the claim within the specified limitations period. Finally, the court determined that minors should have two years after reaching the age of eighteen in which to bring suit for alleged medical malpractice committed during their minority.

The court seemed to be concerned with whether the child could bring suit himself and was persuaded by the fact that even at age twelve, a child is under a legal disability. The court was not satisfied that someone, like a parent, would be available to bring the claim on behalf of the child. The court indicated that the legislature could act to give effect to the tolling provision: "We do not doubt the Legislature's power to remove a minor's legal disabilities and thus lower below eighteen the age at which a person may sue on his or her own behalf, but the Court unanimously agrees that the Legislature did not do so in section 10.01."

B. Unsuccessful Challenges to the Tolling Provision in the Medical Liability Act

Some urge the Texas Supreme Court to extend the holding in Weiner to wrongful death cases. The result sought is that minors would have until two years past turning eighteen in which to sue for the wrongful death of a parent due to medical negligence. The supreme court has stated that the statute of limitations in medical negligence wrongful death cases is an absolute two-year period. The court has declined, even in the face of harsh results, to toll or extend that period. To date, the supreme court has not extended the holding in Weiner to medical negligence wrongful death actions. The courts of appeals have also strictly interpreted Weiner but have urged the supreme court to visit the issue on several occasions.

Hogan v. Hallman was a wrongful death medical malpractice action, which involved the death of a patient due to complications following

129. Id. at 318.
130. Id.
131. Id.
132. Id. at 321.
133. See id. at 318–19.
134. See id. at 319.
135. Id. at 318–19.
136. See, e.g., Hogan v. Hallman, 889 S.W.2d 332, 335 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
surgery. The patient had two minor sons, who were both five at the
time of her death; they filed suit the year they turned eighteen. The
trial court granted the defendants’ summary judgment motions based
on the expiration of the statute of limitations. The dispute on ap-
peal was whether the wrongful death action had been preserved until
the plaintiffs reached the age of majority. It is important to note
that this case was heard prior to the supreme court’s Weiner decision;
nonetheless, the analysis provided by the court is helpful in determin-
ing whether the tolling provision in the Medical Liability Act is con-
stitutional in wrongful death actions.

In Hogan, the court of appeals found that the wrongful death pro-
sion of the Medical Liability Act was the governing statute of limita-
tions for wrongful death actions. Nevertheless, the court went on to
evaluate whether any tolling provisions, including the minority provi-
sion of 4590i, applied to extend the time to file suit. The court
found that under the tolling provision of 4590i, the claim would have
been time-barred as well; to be timely the suit should have been filed
more than four years earlier. However, the appellants challenged
the constitutionality of the tolling provision, claiming that it violated
their rights of due process, equal protection, and access to open courts
because “they were legally barred from pursuing their cause of action
in their own right until their disability was removed.” The court
observed that the open courts provision of the Texas Constitution
“prevents the legislature from restricting or abrogating a common-law
cause of action.” The court referred to the Sax decision to help
guide whether the tolling provision should be unconstitutional, noting
that “it grounded its decision on the rationale that the cause of action
must be a common law cause of action, not a statutory one, as is in-
volved here.” The court concluded by stating that “[a]ppellants
thus were not completely deprived of the opportunity to bring their
suit, but rather they had a shorter period in which to bring it.” The
court noted that other courts of appeals had considered the constitu-
tionality of the limitation provision, as applied to minors, and then
appealed to the supreme court “to revisit the issue of the statute of
limitations imposed here, and its effect on the rights of a limited class
of minors to bring suit.”

139. Hogan, 889 S.W.2d at 335.
140. Id.
141. Id.
142. Id.
143. Id. at 336.
144. Id.
145. Id.
146. Id. at 336–37.
147. Id. at 337.
148. Id.
149. Id. at 338.
150. Id. at 339.
Povolish v. Bethania Regional Health Care Center presented a similar issue to the Fort Worth Court of Appeals.\textsuperscript{151} In Povolish, the appellants' mother suffered a fatal heart attack after seeking medical treatment twice and being released from the hospital twice.\textsuperscript{152} The appellants were sixteen and seventeen at the time of their mother's death.\textsuperscript{153} They sued approximately two-and-one-half years after the death of their mother.\textsuperscript{154} Summary judgment was granted by the trial court because the claim was barred by the statute of limitations; however, the appellants contended that the decision should be reversed because the statute of limitations provision of the Medical Liability Act violated the Texas Constitution.\textsuperscript{155}

The court first evaluated the statute of limitations in light of the due process guarantees of the Texas Constitution.\textsuperscript{156} The court noted that "if a right is not a constitutional right, then there only needs to be a rational relationship between the statute and the legislative purpose for the statute."\textsuperscript{157} Further, the right to bring an action for wrongful death did not exist at common law but was created by legislative invention.\textsuperscript{158} The court found that the time period allowed by the statute was reasonable because "[t]here is a rational relationship between an absolute two year limitation period and the purposes stated for the Medical Liability and Insurance Improvement Act."\textsuperscript{159}

The court also analyzed the statute of limitations period in light of the equal protection clause of the Texas Constitution.\textsuperscript{160} The argument made to the court was that because minors are not allowed to bring suit until the age of eighteen, any provision which effectively required that suit be brought before that time singles out a special group of minors and violates the Texas Constitution.\textsuperscript{161} The court noted that the claims were not entirely prevented in this case, but that the appellants merely had a limited period of time to bring a claim.\textsuperscript{162}

The court reviewed supreme court decisions that had found the limitations period "unconstitutional as it applies to common-law causes of actions."\textsuperscript{163} The court expressed concern about the "narrow exception [in medical malpractice wrongful death cases] to the general pro-

\begin{footnotesize}
\begin{enumerate}
\item Povolish v. Bethania Reg'l Health Care Ctr., 905 S.W.2d 66, 67 (Tex. App.—Fort Worth 1995, no writ).
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. (citing Tex. Rev. Civ. Stat. Ann. art. 4590i, § 1.02(b) (Vernon Supp. 2001)).
\item Id. at 68.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
vision that a minor child has until two years after their eighteenth birthday to bring suit.” The court concluded by asking the Texas Supreme Court “to revisit whether the statute of limitation provision of the Medical Liability and Insurance Improvement Act, as it applies to minor claimants, violates the Equal Protection Clause of the Texas Constitution.”

C. Basic Differences in the Cases Allow the Provision To Be Unconstitutional in One Application, Yet Constitutional in Another

The difference between the cases in which the tolling provision was found constitutional and those in which the provision was found unconstitutional is clear. The cases where the statute of limitations was held to be unconstitutional as applied to minors involved cases of a common law right—the right to bring a personal injury suit for medical malpractice. The Texas Supreme Court focused on the operation of the statute of limitations to eliminate the minor’s malpractice claim because the statute of limitations expired before the minor could sue. In fact, the court suggests that removal of legal disability would solve the constitutional questions regarding the statute of limitations; the bottom line is that minors must be able, at some point in time, to bring claims for personal injury because of its common law nature. The cases where the provision was found to be constitutional involved a right that was an invention of statute—the right to bring a cause of action for wrongful death. Such claims are not subject to open court challenges because a common law right is not involved. The legislature created this right, and therefore, has power to limit it. The legislature announced its reasons for limiting actions in the medical malpractice realm when they passed the Medical Liability Act, reasons that the supreme court has found to be legitimate. This result may seem unusual, or even harsh. It does not seem fair to treat some minors differently simply because their right to sue was created by the legislature. However, the decisions by the courts of appeals indicate that this is possible. The Hogan court expressed its dissatisfaction with the result required by precedent; the court asked that the Texas Supreme Court address the issue. The Povolish court also urged the supreme court to revisit the issue in order to avoid such

164. Id.
165. Id.
166. See Weiner v. Wasson, 900 S.W.2d 316, 318 (Tex. 1995).
167. Id. at 318–19.
169. Povolish, 905 S.W.2d at 67; Hogan, 889 S.W.2d at 338.
170. Hogan, 889 S.W.2d at 338.
172. Hogan, 889 S.W.2d at 339.
a harsh result. Guidance can also be found in the Texas Supreme Court's decision in Rose v. Doctor's Hospital. Rose, involving a wrongful death claim, challenged the damages cap provision in the Medical Liability Act. The Rose court found the damages cap to be unconstitutional as applied to common law medical negligence cases as in Lucas v. United States. Rose centered around whether the damages cap could be unconstitutional as applied to common law actions and constitutional in wrongful death actions. The court stated the test developed in Western Union Telegraph Co. v. State to determine whether the whole statute was invalidated by the finding of unconstitutionality of one provision:

When, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected [together] in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.

The court went on to note that the term "health care liability claim[ ]" encompassed both "common law personal injury and wrongful death claims." The provision limiting damages could be applied in wrongful death claims, apart from being applied to common law claims. Therefore, the court held that the statute could be severed and was appropriate and effective in the context of a wrongful death action.

The same reasoning should be applied to the statute of limitations and its tolling provision. The application of section 10.01 to wrongful death suits is not inextricably tied to its usage in common law actions.

173. Povolish, 905 S.W.2d at 68.
174. See Rose, 801 S.W.2d at 841.
175. Id. at 842.
176. Id. (citing Lucas v. United States, 757 S.W.2d 687, 692 (Tex. 1988)).
177. Id.
178. Id. at 844 (quoting W. Union Tel. Co. v. State, 62 Tex. 630, 634 (1884)).
179. Id. at 845.
180. Id. (citing TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(4) (Vernon Supp. 1991)).
181. Id.
182. Id.
In fact, the two applications are independent of each other. Following the reasoning in *Rose*, the statute can be severed, and therefore, applied to wrongful death actions, even though the supreme court has found it to be unconstitutional in common law actions.

V. Conclusion

Much confusion remains about what statute of limitations applies to the wrongful death minor. In fact, the courts in Texas will likely continue to hear such claims until a definitive answer is provided by either the Texas Supreme Court or by the Texas Legislature.

The answer to the debate is that wrongful death claims are derivative actions; if the decedent has no claim upon death, his survivors cannot maintain an action for wrongful death. Because the wrongful death plaintiff obtains his rights from the decedent, he should also inherit the statute of limitations that would have governed the decedent. The defenses that could have been used against the decedent may also be used against the wrongful death claimant. Because the action is derivative, and the wrongful death plaintiff is not actually injured, the limitations period should not be tolled by the minority tolling provision contained in the Medical Liability Act. Although the result may seem harsh and unfair, specifically to minors, the claim for wrongful death is treated differently from common law claims because it is a creation of the legislature. All plaintiffs acting under such rights are treated differently from those plaintiffs that have a common law cause of action; specifically, adult plaintiffs in wrongful death cases have less rights than adult plaintiffs in non-death cases. Therefore, the Texas Supreme Court should continue to employ the absolute two-year limitations period in all wrongful death actions. However, if the decision is made to allow tolling of the statute of limitations for minors under the provisions of the Act, the period should only be tolled until a minor reaches the age of twelve, as clearly embodied in the Medical Liability Act.

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