Appeal No. 2012AP2402

Cir. Ct. Nos. 2011CV3151
2012CV417

WISCONSIN COURT OF APPEALS
DISTRICT II

HAILEY MARIE-JOE FORCE, A/K/A HAILEY MARIE-JOE DZIEWA, A MINOR, BY HER GUARDIAN AD LITEM, JOSEPH J. WELCENBACH,

PLAINTIFF-APPELLANT,

THE ESTATE OF BILLY JOE FORCE, BY ITS SPECIAL ADMINISTRATOR,

PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, JEFFREY A. BROWN AND REGENT INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

MEHGAN FORCE, A MINOR, BY HER GUARDIAN AD LITEM, JASON OLDENBURG, AND LAUREN FORCE, A MINOR, BY HER GUARDIAN AD LITEM, JASON OLDENBURG,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND JEFFREY A. BROWN,

DEFENDANTS-RESPONDENTS,

REGENT INSURANCE COMPANY,

DEFENDANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Pursuant to WIS. STAT. RULE 809.61 (2011-12),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUES

Can the minor children of a man killed in a car accident recover for wrongful death under WIS. STAT. § 895.04 when there is a surviving spouse, but that surviving spouse has been estranged from the decedent for over ten years, thus precluding any recovery by the spouse from which to set aside the children's share?[2]

If the statute does not allow the children to recover absent a recovery by the surviving spouse, does the statute violate the Equal Protection Clause of the United States Constitution by impermissibly differentiating between minor dependent children by conditioning their recovery on the viability of the surviving spouse's claim? Is there a rational basis for providing recovery to minor children whose deceased parent's surviving spouse has a viable claim and denying recovery to those whose deceased parent's surviving spouse does not?

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] WISCONSIN STAT. § 895.04(2) begins: "If the deceased leaves surviving a spouse or domestic partner." We use "surviving spouse" to include either a surviving spouse or domestic partner.

FACTS

The relevant facts are few and undisputed. Billy Joe Force was involved in a motor vehicle accident and died on December 12, 2008. Billy and Linda Force were married, but had separated in 1996 after approximately six months of marriage. They did not have any children together. Billy did not provide Linda with any pecuniary support from 1997 to his death in 2008. During the five years before his death, Billy had no contact at all with Linda. Linda is the special administrator of the Estate of Billy Joe Force, which claims fear and apprehension of death, pain and suffering, and funeral and medical expenses. Linda, the Estate, and Hailey Marie-Joe Force, Billy's adjudicated daughter born December 3, 2008, sought wrongful death damages. Hailey claimed "an independent, cognizable claim for relief of her own," but also claimed, alternatively, that "the court has a duty and obligation to determine an amount that should be set aside for [her] protection." In a separate case, which was consolidated in the circuit court with Linda, the Estate, and Hailey's case, Mehgan and Lauren Force, Billy's daughters born February 22, 2002, and September 24, 2000, sought damages for wrongful death, claiming that they were entitled to Billy's "aid, society and companionship." The plaintiffs in both cases sued Jeffrey Brown, the driver of the other vehicle in the fatal accident, his insurer, American Family Mutual Insurance Company, and Regent Insurance Company, the insurer of Billy's employer, for whom he was driving at the time of the accident.

Regent, American Family, and Brown (collectively, Regent) moved for summary judgment, which the circuit court granted, ruling: (1) that the children did not have an independent cause of action under WIS. STAT. § 895.04; (2) that Linda had no compensable damages; (3) that because Linda could not

recover, there was no offset for Hailey (recall that the other girls did not claim an offset in their complaint); and (4) dismissing Linda and all three children's claims.[3] The children appealed.

DISCUSSION

*Under **Cogger** and its Progeny, Minor Children Have No Independent Claim When There Is a Surviving Spouse*

There is no common law action for wrongful death; the right to bring suit is purely statutory. ***Cogger v. Trudell***, 35 Wis. 2d 350, 353, 151 N.W.2d 146 (1967). Regarding to whom the recovered wrongful death award belongs, and therefore also who may bring a cause of action per WIS. STAT. § 895.04(1), § 895.04(2) states:

> **(2)** If the deceased leaves surviving a spouse or domestic partner under [WIS. STAT.] ch. 770 and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse or surviving domestic partner, and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse or domestic partner of the deceased; if no spouse or domestic partner survives, to the deceased's lineal heirs as determined by [WIS. STAT. §] 852.01; if no lineal heirs

[3] The viability and effect of the Estate's survival claims for pain and suffering are not at issue in this case.

> survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death…. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

Subsection (4) defines allowable damages for pecuniary injury and provides that "[j]udgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action."

Cogger is the lead case applying this statute where children seek to recover even though there is a surviving spouse who may not be able to recover. Darla Trudell was killed in a car accident where she was the passenger in a car driven by her husband, Joseph Trudell. ***Cogger***, 35 Wis. 2d at 352. Darla's two minor children sued Joseph, as well as the driver of the other car and his insurer and the owner of the car Joseph was driving. ***Id.*** The circuit court denied the defendants' motion for summary judgment. ***Id.***

On appeal, the supreme court looked to WIS. STAT. § 895.04(2) to determine who was the proper party plaintiff. ***Cogger***, 35 Wis. 2d at 354. The court held that subsection (2) created a "series of priorities with regard to the ownership of a cause of action for wrongful death" and that these priorities had not been changed by a 1961 amendment, which added the section allowing the court to determine an amount to be set aside for the minor children. ***Id.*** at 354-55. The court looked to authority construing the prior statute to conclude that "[t]he beneficiaries and their preferred status are as follows: First, the spouse; second, a child or children; third, the parents. Thus the nonexistence of the preferred beneficiary or beneficiaries is essential to a right of action by or in behalf of other beneficiaries." ***Id.*** (quoting ***Cincoski v. Rogers***, 4 Wis. 2d 423, 425, 90 N.W.2d

784 (1958)). The court rejected the plaintiffs' argument that the 1961 amendment had put both the surviving spouse and the surviving children in the first priority class. ***Id.*** at 356.

> The general plan of the statute was not changed. It was only amended to allow the courts to deal with the proceeds which would otherwise go to the surviving spouse in such a way as to protect the dependent children.
>
> We believe that if the legislature had intended to create a cause of action in the surviving children in situations where previously none had existed, it would have done so in a more direct and clear manner.

Id. at 356-57. The children do not have an independent cause of action because their share, by the terms of the statute, is "set aside" from the spouse's award. ***Id.*** at 358. The court further concluded that "[a] careful reading of the entire section makes it clear that the trial court … must work from the amount recovered by the spouse *who is charged with the support of the minor children*." ***Id.*** (emphasis added). Thus, even though one of the two children was not the child of the surviving spouse, the ***Cogger*** court interpreted the new provision specifically addressing minor children assuming that the surviving spouse had a support obligation. ***Id.*** at 357 ("It was only amended to allow courts to deal with the proceeds which would otherwise go to the surviving spouse in such a way as to protect the dependent children."). The court did not consider a nonrecovery situation where there is no negligence and the children are not dependents of the surviving spouse.

Cogger *Applied*

The ***Cogger*** reading of WIS. STAT. § 895.04(2)—that a minor child's recovery is dependent upon recovery by a surviving spouse—has been applied several other times where the children were dependent on the surviving spouse and

that person was allegedly responsible for the wrongful death. For example, in ***Hanson v. Valdivia***, 51 Wis. 2d 466, 475-76, 187 N.W.2d 151 (1971), the minor children could not bring a claim for the deceased parent's wrongful death because the surviving spouse could not recover, as the complaint alleged that the spouse "was a participant in the conduct which allegedly caused [the] wrongful death." ***Id.*** The administrator of the estate sought to maintain the action with the provision that any damages recovered be put in trust for the children. ***Id.*** at 475. Relying on ***Cogger***, the supreme court rejected this theory.

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

Hanson, 51 Wis. 2d at 475.

Similarly, in ***Xiong v. Xiong***, 2002 WI App 110, 255 Wis. 2d 693, 648 N.W.2d 900, Mai Xiong died as a passenger in a car driven by Nhia Xiong. ***Id.***, ¶2. Mai and Nhia's children brought a wrongful death claim against Nhia, their father. ***Id.***, ¶1. The circuit court dismissed their action because Nhia, the surviving spouse, was responsible for the death and thus could not recover. The Xiong children argued that this was error because Mai and Nhia were not legally married. ***Id.***, ¶2. On appeal, the court reviewed Mai and Nhia's history, including

their traditional Hmong marriage, apparently not recognized as legal in Laos. ***Id.***, ¶¶6-7. When they came to the United States, Mai and Nhia told immigration authorities that they were married and lived together as husband and wife for over eighteen years, raising five children together. ***Id.***, ¶10. The court determined that there was "authority for the proposition that when a determination is made that a marriage is void or voidable and the court finds that either or both parties believed in good faith that the marriage was valid, the court shall declare that the marriage shall have the legal effect of a valid marriage." ***Id.***, ¶22. The court noted that WIS. STAT. § 895.04 does not define "spouse" and could include "putative spouse." ***Id.***, ¶23. Because Nhia should be recognized as Mai's lawful spouse, and he could not bring a claim because he was responsible for the death, the children's claim was properly dismissed. ***Id.***, ¶25.

Amendments After ***Cogger***

Since ***Cogger*** was decided, the legislature has amended WIS. STAT. § 895.04 nearly two dozen times, most recently in 2009.[4] While many of these amendments were housekeeping in nature—adjusting damage caps, making language gender neutral—some made substantive changes to the statute, and in particular to subsection (2). For example, 2009 Wis. Act 28, § 3269 added a domestic partner as a person who can recover benefits. A domestic partner is on

[4] *See* 2009 Wis. Act 276, § 97; 2009 Wis. Act 28, § 3269 (adding domestic partner to subsections (2) and (6)); 1997 Wis. Act 290, § 10; 1997 Wis. Act 89, § 3 (cap), 1991 Wis. Act 308, § 1 (cap); 1989 Wis. Act 307, § 102; 1985 Wis. Act 130, § 1; 1983 Wis. Act 315, § 1 (cap); 1979 Wis. Laws, ch. 166, § 1 (cap); 1975 Wis. Laws, ch. 422, § 152; 1975 Wis. Laws, ch. 287 (recoverable damages); 1975 Wis. Laws, ch. 199, § 480 (gender neutral); 1975 Wis. Laws, ch. 166 (tying award of judgment for pecuniary injury to ability to bring action); 1971 Wis. Laws, ch. 213, § 5 (change age 18 to 21); 1971 Wis. Laws, ch. 59 (cap); 1969 Wis. Laws, ch. 436 (cap); 1969 Wis. Laws, ch. 339, § 27 (cross-reference to probate code); 1967 Wis. Laws, ch. 267 (cap); 1965 Wis. Laws, ch. 66, § 2 (renumbered).

the same level with a spouse—first priority. Yet the legislature did not undo ***Cogger***'s reading of the statute carving out the minor children's recovery only if the surviving spouse recovers. Respondents argue, persuasively, that the ***Cogger*** interpretation of § 895.04(2) must reflect legislative intent, because the legislature has not changed the language relating to minor children, despite numerous amendments to the statute.

*The **Steinbarth** Public Policy Exception*

Steinbarth v. Johannes, 144 Wis. 2d 159, 423 N.W.2d 540 (1988), deviates from ***Cogger*** on public policy grounds because the surviving spouse killed the decedent. Bernard Johannes fatally shot his wife, Patricia Johannes. ***Steinbarth***, 144 Wis. 2d at 161. Patricia's adult children (Bernard's stepchildren), Kathryn and Kurt Steinbarth, sued Bernard for wrongful death. The circuit court and court of appeals[5] concluded that the Steinbarths' claim was barred under WIS. STAT. § 895.04(2) because there was a surviving spouse. ***Steinbarth***, 144 Wis. 2d at 162-63.

The supreme court reversed, concluding that one who intentionally kills his or her spouse is not a surviving spouse for purposes of WIS. STAT. § 895.04(2). ***Steinbarth***, 144 Wis. 2d at 165.

> In light of the pervasive legislative policy of prohibiting a killer from benefiting from his or her criminal act, we conclude that to include a person who feloniously and intentionally kills his or her spouse as a surviving spouse within the meaning of the wrongful death act would lead to an absurd result by shielding the killer from civil liability.

[5] The court of appeals initially certified the case to the supreme court, but that certification was denied. ***Steinbarth v. Johannes***, 144 Wis. 2d 159, 163, 423 N.W.2d 540 (1988).

Id. The court looked to WIS. STAT. § 852.01(2m), which provides that an heir who feloniously and intentionally kills the decedent is treated as predeceased, with the estate passing to the next heir. ***Steinbarth***, 144 Wis. 2d at 166. Applying this rationale to WIS. STAT. ch. 895, the court allowed the wrongful death award to bypass the spouse and go to the adult children. The court cited several other situations in which a benefit otherwise due to a killer is diverted. ***Steinbarth***, 144 Wis. 2d at 166-67 (life insurance, beneficiary under contract, joint tenancy). The court distinguished ***Cogger***, noting that the children there were minors, thus calling into play a different part of the statute. ***Steinbarth***, 144 Wis. 2d at 168. Second, and more important, ***Cogger*** involved negligence, and there is no basis for stopping a surviving spouse, who unintentionally but negligently causes the spouse's death, from seeking wrongful death benefits for the loss of the spouse from a more negligent wrongdoer. ***Steinbarth***, 144 Wis. 2d at 168. When the surviving spouse has killed the decedent spouse, "the surviving spouse cannot under any conceivable circumstance seek recovery under the wrongful death statute for the loss of the decedent." ***Id.*** at 169.

Does Public Policy, or the Statute Itself, Dictate a Different Result than ***Cogger****?*

At first blush, ***Cogger*** and its progeny seem to unquestionably preclude the children's recovery in this case. Linda has no recovery because she was estranged from Billy, so there is no award from which to carve out a share under WIS. STAT. § 895.04(2). On the other hand, in ***Steinbarth*** the supreme court made a public policy exception to the statutory rule, refusing to allow any recovery for the surviving spouse who murdered the decedent, but allowing the children's claim to move forward. ***Steinbarth*** was based on the long-standing policy that wrongdoers should not benefit from their bad acts. Here, Linda's recovery is not barred due to wrongful conduct. Linda's passive estrangement

from Billy may trigger a public policy exception for reasons on the other end of the spectrum: while the surviving spouse in ***Steinbarth*** was a murderer, Linda has done nothing wrong, and neither have Billy's children, who have no relationship with Linda. The holding in ***Xiong*** provides precedent for treating a surviving spouse as such, or not, depending on the facts of the actual union. In this case, Linda and Billy were estranged for over a decade. The minor children are not Linda's, and she has no relationship with them, much less an obligation to support them. And Linda's estrangement from Billy has resulted in nonrecovery for her, which means no recovery for the children. Public policy may dictate that Linda's inability to recover due to her estrangement from Billy should not deny his dependent minor children a recovery.

Alternatively, the statute itself is arguably subject to an interpretation that gives minor children the ability to recover even when the spouse cannot. While the statute provides that lineal heirs are only entitled to recover if there is no surviving spouse, the provision specifically addressing minor children "with whose support the deceased was legally charged" clearly contemplates recovery for those children. Certainly, a reading of the statute that there must be a recovery by the spouse from which to "set aside" is reasonable, but the language of the statute does not demand this interpretation in all circumstances. Notably, the statute specifically empowers the court, "*in recognition of the duty and responsibility of a parent to support minor children*," to determine the amount to be "set aside for the protection of the children." WIS. STAT. § 895.04(2) (emphasis added). The provision then permits the court to consider a number of factors, including the age of the children, the capacity and integrity of the surviving spouse, and "any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such

children or otherwise protected as circumstances may warrant." ***Id.*** ***Cogger*** was decided in era when it was assumed that the surviving spouse would also be a parent with a legal obligation to support the minor children, and the statutory "set aside" is arguably based on that duty. ***Cogger***, 35 Wis. 2d at 358 (circuit court "must work from the amount *recovered by the spouse who is charged with the support of the minor children*") (emphasis added). The assumption that the surviving spouse would be living as a family with the minor children could also explain why the negligence of the surviving spouse would be visited on the children.

However, the ***Cogger*** court did not interpret the statute in a nonrecovery situation absent negligence and where there was no dependence by the decedent's minor children on the surviving spouse. The minor child provision does not expressly say that minor children cannot recover if the surviving spouse does not. Arguably, this scenario does not justify denying recovery to the very people the set-aside provision was meant to protect—the deceased's minor dependent children.

Equal Protection Argument

The Force children argue that WIS. STAT. § 895.04 violates the Equal Protection Clause of the United States Constitution and article I, section 1 of the Wisconsin Constitution by impermissibly treating similarly situated people differently. *See* ***Treiber v. Knoll***, 135 Wis. 2d 58, 68, 398 N.W.2d 756 (1987). The burden is on the Force children to show, beyond a reasonable doubt, that the statute is unconstitutional. ***State ex rel. Hammermill Paper Co. v. La Plante***, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). Under the rational basis standard for equal protection analysis, which the Force children concede applies, the distinction

made in the statute must be upheld if there is any rational basis to support it. ***Id.*** at 74. "The test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification." ***Id.*** We note that the ***Cogger*** court summarily dismissed the plaintiffs' equal protection argument: "Plaintiffs also question the statutes' constitutionality as regards sec. 1, art. XIV, United States constitution, the 'equal protection clause.' We find no merit to this contention." ***Cogger***, 35 Wis. 2d at 360.

The Force children argue that the statutory scheme creates four classifications that deny them equal protection. First, there is unequal treatment under the statute because it affords protection to a child from an intact marriage versus one where there is estrangement. Second, a child whose parent has been injured but not killed can bring a claim for loss of society and companionship, even if there is a surviving spouse, *see* ***Theama v. City of Kenosha***, 117 Wis. 2d 508, 344 N.W.2d 513 (1984), but a child whose parent has died does not have such a right. Third, a child whose parent has died due to medical malpractice may bring a claim for loss of society and companionship under WIS. STAT. § 655.007, even if there is a surviving spouse, *see* ***Rineck v. Johnson***, 155 Wis. 2d 659, 456 N.W.2d 336 (1990), while a child whose parent has died from a cause other than medical negligence may not. Fourth, when the deceased has an obligation to support both the minor children and the surviving spouse, only the surviving spouse can bring a claim for loss of support.[6]

[6] The Force children include a fifth classification, adult children, who bring a claim for loss of society and companionship, while minor children may not. We do not include this classification in our list because in the case the Force children cite there was no surviving spouse, under which scenario minor children could also bring a claim.

We measure the reasonableness of a statute's classifications using the five factors set forth in ***Harris v. Kelley***, 70 Wis. 2d 242, 252, 234 N.W.2d 628 (1975). Two of the factors are implicated in this case: "All classifications must be based upon substantial distinctions which made one class really different from another," and "The classification adopted must be germane to the purpose of the law." "Under this 'rational basis' test, equal protection is violated only if the classification rests upon grounds wholly irrelevant to the achievement of the state's objective." ***Konkel v. Acuity***, 2009 WI App 132, ¶27, 321 Wis. 2d 306, 775 N.W.2d 258 (quoting ***State v. Smet***, 2005 WI App 263, ¶21, 288 Wis. 2d 525, 709 N.W.2d 474).

Does the Statute's Classification Violate Equal Protection?

We see the classification that results from ***Cogger***'s determination that recovery for minor children is conditioned on recovery by the surviving spouse as follows. The first class consists of children whose deceased parent's surviving spouse has a viable claim for wrongful death. The second class consists of children whose deceased parent's surviving spouse does not have a viable claim. For the first class, there may be a recovery from which the court can set aside a share for the children. For the second class, there is no chance of a set-aside for the children.[7] As noted above, while ***Cogger*** makes this differentiation, the statute itself does not expressly do so.

[7] Our supreme court has dealt elsewhere with distinctions based on medical malpractice and nonfatal injuries. *See* ***Theama v. City of Kenosha***, 117 Wis. 2d 508, 344 N.W.2d 513 (1984) (society and companionship, nonfatal injury); ***Rineck v. Johnson***, 155 Wis. 2d 659, 456 N.W.2d 336 (1990) (medical malpractice death).

Cogger's holding—that minor children cannot recover when a surviving spouse does not—and its resultant distinction must be upheld if there is any rational basis to support it. ***Hammermill***, 58 Wis. 2d at 74. Indeed, if we cannot locate a rationale that influenced the legislature, we must construct one that might have influenced the legislative determination. ***Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶57, 237 Wis. 2d 99, 613 N.W.2d 849.

Regent tells us that a review of the statute's drafting record does not reveal the legislative intent in the addition of the minor children set-aside provision. There is no need to go to the legislative history, because the statute itself tells us the intent: to protect minor dependent children whose parent has died. The statute applies when the deceased leaves minor children "with whose support the deceased was legally charged." WIS. STAT. § 895.04(2). The statute commands the court to determine the amount to be set aside "in recognition of the duty and responsibility of a parent to support minor children." ***Id.*** Furthermore, the ***Cogger*** court explained that the "change in [§ 895.04(2)] was for the express purpose of affording protection to the minor children of the decedent." ***Cogger***, 35 Wis. 2d at 356. Nevertheless, Regent proposes that "the wrongful death statute envisions a nuclear family with a mother and father who are married to one another and who have children together" and that the statute was meant to protect marriage and families.

We cannot fit the way the statute works to either the rationale of protecting children or that of fostering marriage and the traditional nuclear family. Regarding the nuclear family, the statute was amended to include domestic partners, so it no longer is limited to a mom and dad, married to each other, with children only of their union. *See* 2009 Wis. Act 28, § 3269 (adding domestic

partner). While Regent appropriately recognizes numerous statutes supporting marriage, if the decedent were divorced, with no new surviving spouse, the children could recover. How does that promote marriage? Consider the case where the deceased parent divorced and remarried, and the minor children live with the other parent. There, the minor children have a potential claim, as long as the new spouse brings a viable claim. But, under ***Cogger***'s interpretation, the children's recovery is now dependent on the new spouse's support of those children. *See* WIS JI—CIVIL 1861. It is difficult to conceive that the statute would or could realistically impact any decision about marriage. Any purpose, or effect, of promoting an intact family is not apparent. What rational basis is there for the ***Cogger*** court's classification as it depends entirely on a potentially unrelated party's ability, and perhaps even inclination, to bring a wrongful death claim? We realize that a statute does not violate the Equal Protection Clause just because it is imperfect. 16B AM. JUR. 2D *Constitutional Law* § 859 (2009). But the results here are arguably arbitrary and haphazard.

Regarding the reasonableness of the classification created by ***Cogger***'s holding, we ask: Is the child of an intact, functioning marriage different than one from an estranged marriage? ***Harris*** requires that the classifications be based on distinctions that make one class "really different" from another. ***Harris***, 70 Wis. 2d at 252. Regarding the stated purpose of the statute, to protect minor children, does inability of a minor child to recover when there is a surviving spouse who is somehow barred further that purpose? In light of the strong and stated public policy of providing support to minor children, the disallowance of recovery for minor children when a spouse does not recover appears to be an unintended and irrational consequence. The need to protect children who have lost a parent is no less compelling as to the Force children than it is when there is a

surviving spouse who brings a viable claim. The support obligation owing to these children is no less pressing because the father did not divorce his estranged wife. When support for the minor child is front and center in the statutory scheme, is visiting the father's marital decision on the children rational?

The ultimate question is whether there is a rational relationship to a legitimate government interest. *See* ***Lake Country Racquet & Athletic Club, Inc. v. Morgan***, 2006 WI App 25, ¶32, 289 Wis. 2d 498, 710 N.W.2d 701. The statute must be upheld unless it is wholly irrelevant to the state's objective. ***Konkel***, 321 Wis. 2d 306, ¶27. ***Cogger***'s interpretation disallowing a minor child's ability to recover when the spouse does not recover arguably not only fails to promote the stated objective of protecting children, it undercuts that goal. We think there are real public policy and equal protection questions posed by this case, and, because answering them in a fair manner would require us to overrule ***Cogger***, they are questions for the supreme court, not the court of appeals. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).[8]

CONCLUSION

Do the Force children have a viable wrongful death claim under WIS. STAT. § 895.04, despite the existence of a surviving spouse, albeit a spouse who has not communicated with the decedent for years? Under ***Cogger***, we must answer this question "no." But perhaps, just as the supreme court made a public policy exception to treat a killer spouse as predeceased in ***Steinbarth***, a public

[8] One member of the panel is joining in the certification request because the member, though believing ***Cogger*** was correctly decided, agrees that greater clarity is needed in this area of the law and that, in light of ***Cogger***, the supreme court is the proper body to provide that clarity.

policy exception is appropriate here. Does the statute violate the Equal Protection Clause by treating similarly situated claimants differently, without a rational basis? The distinction drawn by the statute appears to be arbitrary and to produce results contrary to the purpose—to protect children. Resolution of this case involves public policy decisions by the supreme court. We respectfully ask that the Wisconsin Supreme Court accept the certified questions.