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Understanding Florida's Wrongful Death Act, Statute § 768.21(8)

Florida Statute § 768.21(8) provides limitations for who can bring a lawsuit against a medical facility or healthcare provider if their medical negligence causes the wrongful death of a patient.

This is the actual statute, word for word:

Section (3): Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

**What this means is that in the case of wrongful death of a parent, minor children (children under 25 as defined by the Wrongful Death Statute), and all children of the deceased are eligible to file a lawsuit in a court of law.*

Section (4): Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

**What this means is that parents of adult children may also file a claim to recover damages if the adult child was not married and has no children.*

Section (8): The damages specified in subsection 3 shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical negligence as defined by s. 766.106(1).

**What this means is that if the wrongful death was due to medical negligence or error, the parents of an adult deceased and adult children of the deceased may not file a lawsuit. Only a spouse or minor child is not precluded. A minor child is described as anyone under age 25. There is no option available to those groups of individuals to seek redress or justice in court.*

Persons age 18 and above, without a spouse and without a minor child are therefore eligible to be a Florida Free Kill (Victim of the Wrongful Death Act).

Florida Medical Rights Association

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Points to ponder:

- This law allows medical providers to take a Kevorkian-like position, only worse because it is without patient permission, with no fear of retribution.
- When a victim prevails in a wrongful death suit, the healthcare provider must pay back Medicaid, Medicare and health insurance companies. In Florida, if the victim falls into the “Free Kill” category of a wrongful death case, the hospital does not have to pay back said organizations and the victims are left without recourse.
- The Florida Supreme Court incorrectly ruled in *Mizrahi vs. N. Miami Medical Center* (Fla. 2000), that turning over this law would cause an increase in health care costs and, thus, failed to find the law unconstitutional under its rational basis analysis. This was not a valid argument at the time and the Florida Supreme Court in subsequent decisions recognized that when it found other similar laws that denied victims equal protection under the law unconstitutional.
- The Florida Supreme Court in the *Estate of McCall v. Unites States of America* (Fla. 2014) and *North Broward Hospital District v. Kalitan* (Fla. 2017) recognized that medical insurance rates never decreased and actually increased while denying victims equal protection under the law and violating the Florida Constitution.
- The Court in *McCall* noted, “There is no indication that the past medical malpractice crisis continues into the present. If the medical malpractice crisis does not continue into the present, I fail to see how a past crisis can justify the permanent exclusion of an entire class of victims from seeking compensation for pain and suffering damages due to the wrongful death of their parents as a result of medical malpractice.”
- Florida Statute § 768.21(8) is clearly unconstitutional as it denies a certain class of individuals equal protection under the law and deprives these classes of individuals from their right to access the courts for redress as enumerated by the Florida Constitution.
- A person affected by medical error who is still living may file; however, if they die before the lawsuit is finalized and they do not have a spouse or minor child, they forfeit the case.
- The Florida Free Kill Law arbitrarily without reason punishes the most grievously injured and their surviving family members.

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Population affected by Florida's Wrongful Death Act:

Persons age 18 and above, without a spouse and without a minor child:

- 2.3 million college students (approximate)
- 6.8 million widowed seniors (approximate)
- LGBT (childless and age 18 or above)
- Divorced and widowed adults whose children are no longer minors
- Any adult individual without a child

We estimate approximately 15 million Florida residents are at risk, according to the United States Census Bureau (2013).