

# Trial Law TIPS

Roy D. Wasson's  
TIP #43

**ROY D. WASSON** is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

## Exclusion of Wrongful Death Survivors from Courtroom Under “The Rule”

### Introduction

Defendants often invoke the witness sequestration rule (“the Rule”) in an effort to exclude from the courtroom survivors of deceased victims in wrongful death cases. Their stated legal grounds for invoking the Rule to exclude survivors is that only the Personal Representative is a proper party to the lawsuit. Defendants argue that, while the suit is being brought “for the benefit” of the survivors, under § 768.20, Fla. Stat, the P.R. is the only plaintiff. But we know that their real reason for trying to keep grieving family members away from the trial is to hide from the jury the true impact of the damages their negligent clients have caused.

## Name Survivors as Plaintiffs in Complaint

Fight defense efforts to exclude surviving family members! One possible way is by trying to name survivors as plaintiffs in the pleadings, even though that is not usually done. *See Johnson v. United States*, 780 F.2d 902, 909 (11<sup>th</sup> Cir. 1986)(affirming verdict for plaintiffs where mother of dead baby was permitted to be in the courtroom for the entire trial, although only the father was the personal representative; noting that both parents had sued as plaintiffs, and observed that “[u]nder the Florida Wrongful Death statute, survivors of deceased minor children are not explicitly excluded from joining as parties”). Use caution if you try that procedure, as the defense will attempt to obtain a cost judgment against the survivors personally if you do not prevail, although there is authority that the individual survivors cannot be liable for costs.

## Survivors Are Real Parties in Interest

If you lose the argument that surviving family members can join as plaintiffs in their own right (or you decide not to try that approach), argue that survivors—even if technically non-parties—are real parties in interest. *See Ding v. Jones*, 667 So 2d 894 (Fla. 2d DCA 1996)(“survivor’s cause of action remains personal to the survivor”). *See also generally, Freeman v. Rubin*, 318 So. 2d 540 (Fla. 2d DCA 1975), in which the court held that a mentally-impaired man whose lawsuit was prosecuted in the name of his guardian was entitled to be present in the courtroom when the case was tried.

Point out to the trial judge that each statutory survivor is more than a mere non-party witness; he or she has a right to have separate counsel who recovers a contingency fee from the portion of the settlement or judgment attributable to that survivor’s damages. *See Pearson v. DeLamerens*, 656 So. 2d 217 (Fla. 3d DCA 1995).

## Courts Have Discretion to Permit Presence of Non-Parties

Finally, inform the trial court that he or she has discretion in the matter. “The rule of witness sequestration is not an absolute rule which must be invoked at the mere request of counsel. The trial judge is endowed with a sound judicial discretion to decide whether particular prospective witnesses should be excluded from the sequestration rule.” *Randolph v. State*, 463 So. 2d 186, 191 (Fla. 1994).

The purpose of “the rule” should not generally require exclusion of wrongful death survivors. That purpose is “to avoid the coloring of a witness’ testimony by that which he has heard from other witnesses who have preceded him on the stand.” *Id.* Survivors in death cases generally all have been deposed. So it is not possible for them to color their testimony without creating such inconsistency between their trial testimony and their depositions as will permit ready impeachment by the defense.

## Conclusion

The jury will not be misled by the presence of survivors at trial. And it is unfair to exclude the decedent’s family from the proceedings which can bring some small measure of justice to their lives. Fight for the right of a victim’s survivors to be present during the entire trial, or as much of it as they can bear to watch.

As always, if at first you don’t succeed, just . . .

***Keep Tryin!***

***Roy***