



## Introduction

Presently before the Court is Defendants' Motion to Dismiss. Defendants argue that Plaintiffs' claims are barred by the statute of limitations and are not revived by the Delaware Child Victim's Act. For the reasons discussed below, the Court finds that Plaintiffs wrongful death action is dismissed as untimely but the survival action brought on behalf of the decedent's estate is proper.

## Facts

According to the Complaint, Kevin Heaney was sexually abused as a child by former Roman Catholic Priest, Edward Dudzinski, from 1978-1981 when he was between the ages of ten and thirteen. Kevin Heaney died in 1987 at age 19.<sup>1</sup> His parents, William J. Heaney and Othell Heaney, filed this suit in November 2008 pursuant to 10 *Del. C.* § 8145, the Delaware Child Victim's Act.<sup>2</sup> They claim damages from assault and battery, negligence, gross negligence, wrongful death, breach of fiduciary duty, fraud, breach of contract and implied covenant of good faith and fair dealing, conspiracy and aiding and abetting.

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<sup>1</sup> Compl., Docket Item ("D.I.") 1.

<sup>2</sup> Effective July 10, 2007, the Act created "a two year window, allowing victims of childhood sexual abuse to bring civil suits previously barred by the statute of limitations." *Whitwell v. Archmere Academy, Inc.*, 2008 WL 1735370, at \*1.

Plaintiffs William J. Heaney and Othell Heaney bring the wrongful death action on their own behalf. Plaintiff William J. Heaney brings the survival action on behalf of Kevin Heaney in his capacity as the personal representative of the Estate of Kevin Heaney.

On January 21, 2009, Defendants filed this Motion to Dismiss.<sup>3</sup> In the motion, they argue that Plaintiffs' wrongful death claim must be dismissed because it is time barred and the cause of action is not revived by the Child Victim's Act. Defendants claim that Plaintiffs remaining claims are also barred by the statute of limitations and are not revived by the Child Victim's Act because Plaintiffs are not "victims" recognized under the Act.

#### Discussion

Plaintiffs' wrongful death action is barred by the statute of limitations and it is not revived by the Child Victim's Act. Delaware's Wrongful Death Act provides, "[a]n action may be maintained against a person whose wrongful act causes the death of another."<sup>4</sup> However, a wrongful death claim must be brought within two years of the victim's death.<sup>5</sup> Kevin Heaney died in 1987 thus Plaintiffs' cause of action for wrongful death expired in 1989.

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<sup>3</sup> Defs. Mot. to Dismiss, D.I. 34.

<sup>4</sup> 10 *Del. C.* § 3722(a).

<sup>5</sup> See 10 *Del. C.* § 8107.

Plaintiffs' wrongful death action is not revived by 10 *Del. C.* § 8145.

Section 8145(b) of the Act provides:

For a period of 2 years following the effective date of this section, *victims* of child sexual abuse that occurred in this State who have been barred from filing suit against *their abusers* by virtue of the expiration of the former civil statute of limitations, shall be permitted to file those claims in the Superior Court of this State. (emphasis added).

The language of the act is clear. The legislature's use of the term "victims" in the context of filing suits against "their abuser" indicates that the right to bring a revived cause of action under this Act lies solely with the victim.

The right to bring a wrongful death claim lies with the spouse, parent and child of the deceased, not with the victim himself.<sup>6</sup> Because the Child Victim's Act is not meant to revive the claims of parties other than the victim, it cannot be said to reopen the statute of limitations for wrongful death claims. This claim is therefore dismissed as untimely.

A survival action, however, is separate and distinct from a wrongful death action. A survival action is defined under Delaware law as follows:

All causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive to and against the executors or administrators of the person to, or against whom, the cause of action accrued. Accordingly, all actions, so surviving, may be instituted or prosecuted by or against the executors or administrators of the person to or against whom the cause of action accrued. This section shall not affect the

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<sup>6</sup> 10 *Del. C.* § 3724(a).

survivorship among the original parties to a joint cause of action.<sup>7</sup>

Although otherwise time barred, civil causes of action for sexual abuse based upon sexual acts that would constitute a criminal offense under the Delaware Code are revived by the Child Victim's Act. They may be brought as a survival action by Plaintiff William J. Heaney in his capacity as the personal representative of the Estate of Kevin Heaney. The Delaware Supreme Court has described a survival action as "a continuation of a right of action which accrued to the deceased at common law and which he could have maintained himself but for his death thereafter. Recovery under a survival action is measured by the pecuniary loss occasioned to the deceased himself, and therefore to his estate."<sup>8</sup>

There is no dispute that if Kevin Heaney were alive today, he would be recognized as a "victim" under the Child Victim's Act and thus he would have a right of action against Defendants. Because Kevin Heaney is now deceased, the right to pursue his cause of action is vested in his estate. Therefore, William J. Heaney, acting as the personal representative of the Estate of Kevin Heaney is a proper

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<sup>7</sup> 10 *Del. C.* § 3701.

<sup>8</sup> *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742 (Del. 1997), citing *Thompson v. D'Angelo*, 320 A.2d 729, 733 (Del.1974).

plaintiff to bring the survival action pursuant to the Child Victim's Act.

Accordingly, Plaintiffs' wrongful death claim is dismissed. Plaintiff William J. Heaney, acting in his capacity as the personal representative of the Estate of Kevin Heaney may proceed with the survival action.

**IT IS SO ORDERED.**

/s/ Calvin L. Scott  
**Judge Calvin L. Scott, Jr.**