

CONFIDENTIAL MEMORANDUM TO ATTORNEYS

It is confirmed that the Plaintiff is a citizen and resident of Germany.

1. Defendant Carnival Corporation is a duly organized, created and existing corporation pursuant to the laws of the United States of America and is the owner of the *Costa Concordia*. Carnival maintains a principal office in the State of Florida and authorized to do business in Texas, Louisiana and New York. Carnival is subject to the U.S. Court's of general and specific jurisdiction by virtue of property owned by it presently located, or to located, within this District.

1.2 Defendant Costa Crociere is a subsidiary corporation of Carnival Corporation organized, created and existing pursuant to the laws of Italy, and was the operator of the *Costa Concordia*. Carnival is subject to this Court's general and specific jurisdiction by virtue of property owned by it presently located and as a U.S.A. corporation.

II. JURISDICTION

The Court has jurisdiction over the lawsuit pursuant to 28 U.S.C. § 1333 because the suit involves admiralty and maritime jurisdiction.

Some of the facts are as follows:

On or about January 13, 2012, the *Costa Concordia*, carrying over 4,200 passengers and crew, struck a rock offshore Isola del Giglio, Grosseto, Italy.

In the chaos and terror that followed, at least 32 people lost their lives; many were

injured. Two are still missing as of this date, and hundreds more were injured for life physically and psychologically.

This tragedy resulted from a ridiculous stunt perpetrated by the so-called captain of the *Costa Concordia*, in an ill-conceived attempt to “salute” the inhabitants of Isola del Giglio, or “honor” past and present crew members who lived on the island, and was the failure of Carnival to implement a proper safety management system called Health Education Safety of Seas (HESS).

Instead of a salute, it was an obscene and deadly gesture; instead of honor, it was shame. The grounding of the *Costa Concordia* was a tragedy, but the plan for passenger safety and evacuation was a travesty, leading to loss of life for some, and pain, suffering and ongoing trauma for hundreds.

Carnival and Costa were the cause of the pain, suffering and death caused to 32 passengers. Carnival and Costa were ultimately responsible for preparing and maintaining safety programs for all companies and vessels under its control, including the *Costa Concordia* herself. Carnival was ultimately responsible for ensuring the crew of the *Costa Concordia* was familiar with the safety programs, and was trained to follow them.

Most importantly, Carnival was ultimately responsible for ensuring the crew of the *Costa Concordia* adhered to the safety programs and followed them in an emergency, applying those programs and their training to evacuate the passengers of the *Costa Concordia* safely, and without injury or loss of life.

Carnival failed to fulfill its responsibility under governing laws and regulations of the United States of America. As a result, some people died and many people were injured.

Carnival is being sued for its independent acts of wrongdoing, negligent acts, and failures to act, all of which caused and contributed to the *Costa Concordia* tragedy, the loss of life and the injuries of hundreds more.

Carnival Corporation and Costa Crociere operate as a single economic enterprise. The agreements governing the subsidiaries structure amazingly provide that "Costa" and Carnival Corporation each continue to have separate boards of directors, but the boards and senior executive management of both companies are identical.

Carnival is the owner, operator and manager of the *Costa Concordia* and, in reality, Carnival is the true and beneficial owner of the *Costa Concordia*.

"Costa" is a conduit through which Carnival conducts its business, and is liable for the acts and failures to act.

For the foregoing reasons, among others, Carnival and Costa are alter ego corporations which are not entitled to maintain the fiction of their separate existence, and thus the true owner of the *Costa Concordia* is Carnival, which owns, controls and operates the vessels.

Carnival is liable for the death of passengers and injuries to passengers by reason of its negligence in failing to prepare and maintain safety programs for all companies and vessels under its control. Carnival was ultimately responsible for ensuring the crew of the *Costa Concordia* were familiar with the safety programs, and were trained to follow them.

Most importantly, Carnival was ultimately responsible for ensuring the crew of the *Costa Concordia* adhered to the safety programs and followed them in an emergency, applying those programs and their training to evacuate the passengers of the *Costa Concordia* safely, and without

injury or loss of life.

GROSS NEGLIGENCE

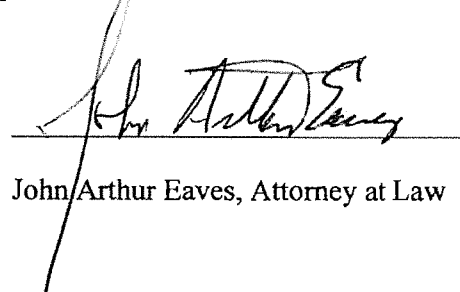
The condition of the *Costa Concordia* and her appurtenances encountered by passengers exposed her to extreme hazards. By allowing, requiring, or condoning the so-called captain of the *Costa Concordia* to maneuver Carnival's vessel as he did, and to allow to exist, or fail to correct, the deplorable safety practices, poor training, and lax or deficient evacuation procedures on board the *Costa Concordia*, Carnival and Costa were on notice of the dangerous condition onboard the vessel. Nonetheless, they ignored these maneuvers, and the deplorable, poor, lax or deficient procedures on board, and exposed passengers to the consequences of their actions.

They proceeded with knowledge or conscious indifference that their failure to prepare and maintain safety programs for all companies and vessels under their control, and their failure to ensure the crew of the *Costa Concordia* adhered to the safety programs and followed them in an emergency, applying those programs and their training to evacuate the passengers of the *Costa Concordia* safely, would result in injury and/or death to their passengers. Despite that knowledge, and the understanding a high likelihood existed that injury or death would result from their acts or failures to act, they proceeded in disregard, and subjected passengers to the dangerous and deadly conditions which resulted from these acts and failures to act.

As a direct and proximate result of Carnival's conduct, including negligence and gross negligence, passengers suffered the following injuries and resultant damages, including, but not limited to: (a) mental anguish in the past; (b) lost earnings; (c) physical pain and suffering; (d) conduct entitling passengers to punitive and moral damages; (e) all such other and further damages as allowed by law (see case attached).

The attached "Wrongful Death Statutes" is common among all states - Exhibit B. The damages that are allowable are set forth in Exhibit A.

Witness my signature, this the 2nd day of April, 2012.

A handwritten signature in cursive script, appearing to read "John Arthur Eaves", is written over a horizontal line. A long, thin vertical stroke extends downwards from the signature, crossing the printed name below.

John Arthur Eaves, Attorney at Law

Westlaw Delivery Summary Report for FUNDREN,SHANA

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| Your Search: | "wrongful death" & "11-7-13" & (distribution w/10 beneficiaries) |
| Date/Time of Request: | Monday, April 2, 2012 14:15 Central |
| Client Identifier: | WRONGFUL DEATH |
| Database: | MS-CS |
| Citation Text: | 31 So.3d 1227 |
| Lines: | 293 |
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31 So.3d 1227
(Cite as: 31 So.3d 1227)



Court of Appeals of Mississippi.

In the Matter of the ESTATE OF Martha Thomas Kabbes BURNS, One and the Same Person as Martha Thomas Kabbes,
Deceased:

John Clayton Kabbes, Appellant,

v.

John Baxter Burns, Appellee.

No. 2008-CA-00690-COA.

July 28, 2009.

Rehearing Denied Dec. 8, 2009.

Certiorari Denied April 1, 2010.

Background: Widower, whose wife had died in automobile accident, petitioned to recover his portion of settlement proceeds related to wife's death. The Chancery Court, Hinds County, Denise Owens, J., awarded husband proceeds. Stepson appealed.

Holdings: The Court of Appeals, Ishee, J., held that:

- (1) funds were **wrongful death** proceeds, and
- (2) antenuptial agreement had no bearing on proceeds.

Affirmed.

Ex A

ISHEE, J., for the Court.

¶ 1. On a Petition to Pay Escrow Funds filed by John Burns (Burns), the Chancery Court for the First Judicial District of Hinds County, over the objection of John Kabbes (Kabbes), found that funds held in the court registry in the amount of \$47,858.74 were **wrongful-death** benefits. The chancery court found that an antenuptial agreement between Burns and Martha Kabbes Burns (Martha), the deceased, had no bearing on the settlement of the **wrongful-death** claim. Accordingly, the chancery court ordered the funds be turned over to Burns, who was a proper **wrongful-death** beneficiary.^{FNI} Aggrieved by the chancery court's ruling, Kabbes appeals. He presents the following two issues for this Court to consider:

FNI. Martha's children had already received their shares of the **wrongful-death** settlement proceeds. The amount remaining in the court's registry represented the amount attributable to Burns.

I. Whether the chancellor erred in finding that the proceeds in the registry of the court were **wrongful-death** proceeds.

II. Whether the chancellor erred in finding that the antenuptial agreement between Martha and Burns had no bearing on the settlement of the **wrongful-death** claim.

Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2. On July 18, 2002, Martha died in a one-vehicle accident in Alabama. At the time, she was married to Burns, and she had three children from a prior marriage-Kabbes, Carmen Goforth, and Lila Strobe.

¶ 3. Following Martha's death, Kabbes filed suit on behalf of her **wrongful-death** beneficiaries against General Motors Company, Michelin North America, Inc., and Brakes Plus, Inc., d/b/a Scotty's Tire & Automotive. Pertinent to the present appeal, Michelin filed its answer and denied all the allegations. According to Michelin, the tire was not defective. Instead, Michelin contended that any problem with the tire was caused by underinflation or overloading of the vehicle, and the proximate cause of Martha's death was her failure to use a seatbelt and her act of opening the vehicle's door during the accident.

¶ 4. After extensive discovery, Michelin and the parties to the lawsuit engaged in *1229 settlement negotiations. They submitted a settlement agreement to the chancery court in which they recognized that Michelin's liability was doubtful and that any recovery from it was unlikely. The settlement agreement provided that Kabbes, Burns, and the two daughters would release all claims against Michelin, which, in return, agreed to pay a confidential sum. On June 30, 2004, the chancery court entered a decree approving of the settlement and ordering that any expenses arising from the death and the estate of Martha must be paid from the proceeds of the settlement.

¶ 5. On March 7, 2006, the chancery court ruled upon Kabbes's Petition to Pay Over Escrow Funds and entered an order finding that the remaining settlement proceeds on deposit in the court's registry, which totaled \$47,858.74, were **wrongful-death** proceeds. Accordingly, the chancery court found that the antenuptial agreement between Martha and Burns had no bearing on settlement of the **wrongful-death** claim and that Burns had not waived his claim to payment of said funds. Kabbes filed a motion for reconsideration, which the chancery court denied. Kabbes then timely filed the present appeal.

STANDARD OF REVIEW

[1] ¶ 6. The determination of **wrongful-death** beneficiaries is a question of law, and this Court will review such a determination under a *de novo* standard. Gonzales v. Gray, 824 So.2d 558, 561(¶ 10) (Miss.2002) (citing Estate of Jones v. Howell, 687 So.2d 1171, 1174 (Miss.1996)).

DISCUSSION

I. Wrongful-Death Proceeds

¶ 7. Kabbes first argues that the chancellor erred in finding that the settlement proceeds held in the court's registry were **wrongful-death** proceeds. Kabbes argues that: (1) there was no wrong proven so as to qualify the settlement proceeds as **wrongful-death** proceeds, and (2) the chancellor lacked authority to find that the proceeds were **wrongful-death** proceeds because that was a fact issue for the jury to determine.

¶ 8. The cases cited by Kabbes in support of his argument are easily distinguishable from the present situation in that they all involve a **wrongful-death** case that was tried before a jury. He cites no case that holds that the proceeds from the settlement of a **wrongful-death** claim are not **wrongful-death** proceeds or that it is error to distribute the proceeds of a **wrongful-death** settlement to the **wrongful-death** beneficiaries.

¶ 9. The supreme court has long held that a "**wrongful death** action is not part of the estate of the deceased." Pannell v. Guess, 671 So.2d 1310, 1313 (Miss.1996) (citing Partyka v. Yazoo Dev. Corp., 376 So.2d 646, 650 (Miss.1979)). "The **wrongful death** statute creates a new and independent cause of action in favor of those named in the statute." Partyka, 376 So.2d at 650 (citing Hasson Grocery Co. v. Cook, 196 Miss. 452, 459, 17 So.2d 791, 792 (1944)). Pannell involved the settlement of a doubtful claim and determination of **wrongful-death** beneficiaries. Pannell, 671 So.2d at 1312. The supreme court found no merit to the appellants' claim that the chancery court should have held a hearing to determine how to divide the **wrongful-death** proceeds. Id. at 1314. According to the opinion, the case started out as a **wrongful-death** action, but no **wrongful-death** suit was filed because a settlement was reached with the driver's insurer. Id. at 1313. Nevertheless, the *1230 supreme court found no error with the distribution of the settlement proceeds to the **wrongful-death** beneficiaries provided for in Mississippi Code Annotated section 11-7-13 (Supp.1991). Id. at 1314. The supreme court stated that the **wrongful-death** statute provides that the proceeds shall be distributed equally among the **wrongful-death** beneficiaries. Id.

¶ 10. In Gonzales, 824 So.2d at 559(¶ 1), the supreme court also dealt with the settlement of a doubtful claim regarding a **wrongful-death** suit. The issue before the supreme court was whether Mississippi or Arkansas substantive law controlled the distribution of the **wrongful-death** settlement proceeds. Id. at 561 (¶¶ 9, 12). In a *de novo* review of the issue, the supreme court reversed the chancery court and found that the Mississippi **wrongful-death** statute was controlling as to the settlement of the doubtful **wrongful-death** claim. Id. at 560(¶ 6).

[2] ¶ 11. As shown in the previous cases, Mississippi courts have regularly distributed the proceeds of **wrongful-death** settlements to the **wrongful-death** beneficiaries. This has been the case even when the parties settled a doubtful claim. Therefore, we find no error with the chancellor's determination that the proceeds in the court's registry were **wrongful-death** proceeds. This issue is without merit.

II. Antenuptial Agreement

[3] ¶ 12. As pointed out by Kabbes in his brief, “[a]n antenuptial contract is just as enforceable as any other contract.” *Mabus v. Mabus*, 890 So.2d 806, 818(¶ 53) (Miss.2003). The section of the antenuptial agreement, which Kabbes argues now bars Burns’s recovery, states the following:

Each of the parties hereto agree that on the death of the other, the surviving party will not have and will not in any way assert any claim, interest, estate or title of any kind or nature whatsoever in or to any property, real, personal, or mixed, of which the other party may die seized and possessed....

Kabbes argues that under the quoted provision, “Burns relinquished any right to recover many of the damages allowed pursuant to the Mississippi **wrongful death** statute.” Burns does not dispute the validity of the antenuptial agreement. However, he argues that the chancellor was correct in holding that the antenuptial agreement had no bearing on the settlement because **wrongful-death** proceeds do not enter the deceased’s estate, and they are distributed pursuant to the **wrongful-death** statute.

[4][5][6] ¶ 13. Regarding the nature of a **wrongful-death** claim, the supreme court has stated that “Mississippi’s **wrongful death** statute creates a cause of action unknown to the common law, and we have held that the statute must be strictly construed. The **wrongful death** statute creates a new and independent cause of action in favor of those named therein.” *Estate of Jones v. Howell*, 687 So.2d 1171, 1178 (Miss.1996) (citations omitted) “Mississippi’s **wrongful death** statute, Miss.Code Ann. [section] 11-7-13, created a cause of action unknown to the common law. The **wrongful death** action is not part of the estate of the deceased, and only those individuals listed in the **wrongful death** statute may bring this independent cause of action.” *Pannell*, 671 So.2d at 1313 (citations omitted). Accordingly, Burns is correct in his argument that the **wrongful-death** proceeds do not enter the estate of the deceased. However, it is not only the **wrongful-death** proceeds but the **wrongful-death** action itself that does not enter the *1231 estate. “[A] **wrongful death** suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent.” *Carter v. Miss. Dep’t of Corr.*, 860 So.2d 1187, 1192(¶ 17) (Miss.2003). Nevertheless, as stated by the supreme court, only the **wrongful-death** beneficiaries may bring a **wrongful-death** claim. While the action is derivative in that it is a claim for damages that could have been recovered by the deceased, the action itself arises upon the deceased’s death and belongs to the **wrongful-death** beneficiaries. Therefore, the antenuptial agreement had no bearing on the **wrongful-death** claim or on the distribution of the proceeds received from settling that claim.

¶ 14. As for the expenses of the estate, Mississippi Code Annotated section 11-7-13 (Rev.2004) provides that “an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses.” Recognizing this, in the decree approving of the settlement, the chancellor provided that the petitioner, Kabbes, was authorized to pay any estate expenses and any approved attorney’s fees from the proceeds of the settlement. Therefore, any claim that Burns’s recovery should be reduced for such expenses is without merit.

¶ 15. Additionally, Kabbes argues that the antenuptial agreement should have precluded Burns from recovering any damages intended to compensate the deceased, such as lost wages and pain and suffering. However, when section 11-7-13 states that all **wrongful-death** proceeds “shall be distributed equally,” it makes no distinction between proceeds attributable to the deceased or to her **wrongful-death** heirs. In applying section 11-7-13, the supreme court found that “the **wrongful death** statute does not provide that the lower court may conduct a hearing to determine how to divide the proceeds.” *Pannell*, 671 So.2d at 1314.

¶ 16. In making his argument, Kabbes misconstrues the supreme court's analysis of **wrongful-death** benefits in *River Region Medical Corp. v. Patterson*, 975 So.2d 205, 208(¶ 10) (Miss.2007) (citing *Long v. McKinney*, 897 So.2d 160, 169 (¶¶ 32-33) (Miss.2004)). Kabbes argues that any damages "intended to compensate the decedent for her individual loss"-damages for lost wages and the pain and suffering-should be recovered by the estate. However, we can find no such holding in *Patterson*. In analyzing Patterson's claim, the supreme court stated the following:

"[T]here are several kinds of damages which may be pursued, and *these damages are not due to the same claimants*." "For instance, the estate is entitled to recover funeral costs and final medical expenses. The beneficiaries are entitled to recover for their *respective* claims of loss of society and companionship. The **wrongful-death** beneficiaries are entitled to recover the present net cash value of the decedent's continued existence." Assuming Thomas Patterson was a legitimate **wrongful-death** beneficiary, as we must do in giving him all reasonable inferences, he would then be entitled to recover for himself any loss of society and companionship he might prove, and to share equally in the damages which might have been recovered by Ms. Nettles, "had death not ensued."

Id. (internal citations omitted). The *Patterson* court concluded that the deceased's **wrongful-death** beneficiaries would share equally in all of the damages except those *1232 for loss of society and companionship. *Id.* at (¶ 11).

¶ 17. Therefore, the holding in *Patterson* is contrary to Kabbes's argument in that *Patterson* provides that the damages recovered from the claims attributable to the deceased are those that section 11-7-13 requires to be divided equally among the **wrongful-death** beneficiaries. Any damages awarded for medical or funeral expenses are attributable to the estate, and the chancellor provided for such in the decree approving the settlement. The only claims that were personal to the claimants were claims for loss of society and companionship. Such a claim is, by its very nature, personal to the claimant, and it would not be recoverable by the deceased's estate.

¶ 18. The chancellor had previously authorized Kabbes to pay estate expenses with the settlement award. With the claim belonging to the **wrongful-death** beneficiaries and no further damages passing to Martha's estate, we find no error with the chancellor's determination that the antenuptial agreement between Martha and Burns had no bearing on the disbursement of the settlement proceeds remaining in the court's registry. We find that this issue is without merit.

¶ 19. THE JUDGMENT OF THE CHANCERY COURT OF HINDS COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, GRIFFIS, BARNES, ROBERTS, CARLTON AND MAXWELL, JJ.,
CONCUR.

Miss.App.,2009.
In re Estate of Burns
31 So.3d 1227

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MISSISSIPPI CODE OF 1972 *As Amended*

SEC. 11-7-13. Actions for injuries producing death.

Whenever the death of any person or of any unborn quick child shall be caused by any real, wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person or of any unborn quick child shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death, and to all deaths caused by breach of warranty, either express or implied, of the purity and fitness of foods, drugs, medicines, beverages, tobacco or other articles or commodities intended for human consumption.

Any person entitled to bring a wrongful death action may assert or maintain a claim for any breach of expressed warranty or for any breach of implied warranty. A wrongful death action may be maintained or asserted for strict liability in tort or for any cause of action known to the law for which any person, corporation, legal representative or entity would be liable for damages if death had not ensued.

In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate

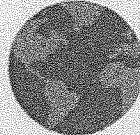


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has been opened or not. Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, nor wife, nor children, nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. All references in this section to children shall include descendants of a deceased child, such descendants to take the share of the deceased child by representation. There shall not be, in any case, a distinction between the kindred of the whole and half blood of equal degree. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates. The provisions of this section shall apply to illegitimate children on account of the death of the natural father and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.

Any rights which a blood parent or parents may have under this section are hereby conferred upon and vested in an adopting parent or adopting parents surviving their deceased adopted child, just as if the child were theirs by the full blood and had been born to the adopting parents in lawful wedlock.

