

**UNDERSTANDING AND EVALUATING THE
WRONGFUL DEATH CLAIM**

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At common law, a cause of action was extinguished by the death of the plaintiff. Because the victim was viewed as the only person wronged by a negligent killing, even a defendant whose negligence caused the plaintiff's death was insulated from liability. This inequity gave rise to wrongful death statutes, first in England in 1846, and soon thereafter in every United States jurisdiction. The wrongful death action is entirely a creature of statute.

Durham ex rel. Estate of Wade v. U-Haul Int'l, 745 N.E.2d 755, 758 (Ind. 2001)(citations omitted).

As a result, the first step in understanding and evaluating a wrongful death claim in Indiana is to ensure you have a full grasp of the statutory provisions and pertinent case law controlling those claims. In Indiana, there are three (3) categories of wrongful death decedents: (1) adults with dependents, married adults and/or adults with death creditors; (2) unmarried adults with no dependents; and (3) children. What damages are recoverable and how you approach handling these cases will depend largely upon which category the decedent falls within. As a result, this article will address each of the three (3) categories separately.

A. Wrongful Death of an Adult with Dependents, a Spouse or Death Creditors

The General Wrongful Death Statute ("GWDS") can be found at Ind. Code §34-23-1-1. The GWDS provides the controlling statutory provisions for when a decedent dies leaving behind a surviving spouse, dependent children, dependent next of kin or death creditors (i.e. service providers that require payment for costs and expenses associated with the decedent's death). The GWDS reads as follows:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have

maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission. When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two (2) years, and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission. That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages inure to the exclusive benefit of the person or persons furnishing necessary and reasonable hospitalization or hospital services in connection with the last illness or injury of the decedent, performing necessary and reasonable medical or surgical services in connection with the last illness or injury of the decedent, to a funeral director or funeral home for the necessary and reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.

Death creditors under the GWDS are only allowed to recover the reasonable and necessary costs associated with hospitalization or hospital services, medical and surgical services, funeral expenses and the costs and expenses associated with the administration of the estate and prosecuting or settling the action including reasonable attorney fees and costs.

Spouses, dependent children¹ and dependent next of kin² may recover any of the following which applies: (1) the loss of the decedent's earnings; (2) for the loss to the children of their parent's care; (3) reasonable value of loss of care, love and affection sustained by the decedent's spouse; (4) reasonable value of loss of care, love and affection sustained by dependent next of kin; and (5) loss of parental training and guidance sustained by children during their minority. See Andis v. Hawkins, 489 N.E.2d 78 (Ind. Ct. App. 1986) and Ed Wiersma Trucking Company v. Pfaff, 643 N.E.2d 909, 913 (Ind. Ct. App. 1994). In addition, the costs associated with the hospitalization or hospital services, medical and surgical services, and funeral expenses may also be recovered. Similarly, spouses, dependent children and dependent next of kin may also recover the costs and expenses associated with the administration of the estate and prosecuting or settling the action including reasonable attorney fees and costs. Hematology-Oncology of Indiana, P.C. v. Fruits, 932 N.E.2d 698 (Ind. Ct. App. 2010) and Hillebrand v. Supervised Estate of Large, 914 N.E.2d 846 (Ind. Ct. App. 2009). Punitive damages, on the other hand, are not recoverable. Durham 745 N.E.2d at 759.

When determining the loss of the decedent's earnings, one should look at the decedent's "age, health, strength, occupation, habits, opportunities and capabilit[ies]". Elmer Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939, 943 (Ind. 2001). It has also long been understood that

1 Unlike surviving spouses, decedent's children must be dependent on decedent's support to qualify as beneficiaries under the GWDS. In re Greenwood Air Crash, 161 F.R.D. 387 (S.D. Ind. 1995). The term "dependent children" includes any legitimate child who has the right to maintain a claim for inheritance against the decedent's estate under the laws of intestate succession or to enforce parental obligations under the paternity statute against the decedent's estate. Johnson Controls, Inc. v. Forrester, 704 N.E.2d 1082 (Ind. Ct. App. 1999), transfer denied 726 N.E.2d 300.

2 Where dependent next of kin are beneficial claimants, personal representative must show need or necessity for support on part of those persons alleged to be dependent, coupled with actual contribution of such support by deceased, in order to establish dependency in cause of action by dependent next of kin. Koger v. Reid, 417 N.E.2d 1142 (Ind. Ct. App. 1981).

this element does not include “that portion of decedent’s earnings that the decedent himself would have consumed for his own personal expenses and maintenance.” Id. at 940. Therefore, it is often important to consult with economists on how best to handle this element of damages. The economist can help you determine likely earnings over the lifetime of the decedent, present day values and make the necessary deductions for personal consumption.

As for the loss of the decedent’s care, love and affection sustained by the decedent’s spouse, the Indiana Supreme Court has held that this element includes the loss of consortium for the wrongful death of a spouse. Durham, 745 N.E.2d at 765. “[C]onsortium has been defined to include both tangible and intangible elements.” Id. It includes elements of both a conjugal nature and “other ‘elements of companionship.’” Id. Those other elements of companionship would include: aid, service, fellowship, companionship, company, cooperation and comfort. Id. Consortium would also include “both material services, i.e., calculable and monetary damages, as well as love, care and affection.” Id.

For the loss to the children of their parent’s care and loss of parental training and guidance sustained by children during their minority, it is often important to focus upon the parent child relationship during the decedent’s lifetime as a guide. Likewise, when dependent next of kin are involved, it is important to focus upon the relationship between the decedent and the dependent next of kin as the jury will be looking to that relationship when determining the assessment of damages.

Please keep in mind, in order for a verdict to be excessive under the GWDS, it must be so outrageous as to indicate passion, prejudice, or partiality rather than reasoned judgment and assessment. Kimberlin v. DeLong, 637 N.E.2d 121, 129 (Ind.1994). Therefore, in handling such cases, it is exceedingly important to conduct paper discovery to obtain as much detail on the

decedent's background/lifestyle and the elements of damages as possible. Attached to this article are sample discovery requests. The softer damages, such as loss of love, care and affection are normally easiest to address during a deposition wherein you can gauge the witness's demeanor and ease with which questions are answered.

B. Wrongful Death of an Unmarried Adult with No Dependents

The Adult Wrongful Death Statute ("AWDS") can be found at Ind. Code §34-23-1-2. The AWDS provides the controlling statutory provisions for when an adult dies without any dependents. The statute reads as follows:

- (a) As used in this section, "adult person" means an unmarried individual:
 - (1) who does not have any dependents; and
 - (2) who is not a child (as defined in IC 34-23-2-1).
- (b) If the death of an adult person is caused by the wrongful act or omission of another person, only the personal representative of the adult person may maintain an action against the person whose wrongful act or omission caused the death of the adult person.
- (c) In an action to recover damages for the death of an adult person, the damages:
 - (1) must be in an amount determined by a:
 - (A) court; or
 - (B) jury;
 - (2) may not include:
 - (A) damages awarded for a person's grief; or
 - (B) punitive damages; and
 - (3) may include but are not limited to the following:
 - (A) Reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person's death.
 - (B) Loss of the adult person's love and companionship.
- (d) Damages awarded under subsection (c)(3)(A) for medical, hospital, funeral, and burial expenses inure to the exclusive benefit of the adult person's estate for the payment of the expenses. The remainder of the damages inure to the exclusive benefit of a nondependent parent or nondependent child of the adult person.
- (e) Aggregate damages that may be recovered under subsection (c)(3)(B) may not exceed three hundred thousand dollars (\$300,000). A jury may not be advised of the monetary limits placed on damages under this subsection. If the jury awards the

plaintiff damages under subsection (c)(3)(B) in an amount that exceeds three hundred thousand dollars (\$300,000), the court shall reduce that part of the damages awarded to the plaintiff to three hundred thousand dollars (\$300,000).

(f) A parent or child who wishes to recover damages under this section has the burden of proving that the parent or child had a genuine, substantial, and ongoing relationship with the adult person before the parent or child may recover damages.

(g) In an action brought under this section, a court or a jury may not hear evidence concerning the lost earnings of the adult person that occur as a result of the wrongful act or omission.

(h) In awarding damages under this section to more than one (1) person, the court or the jury shall specify the amount of the damages that should be awarded to each person.

(i) In an action brought under this section, the trier of fact shall make a separate finding with respect to damages awarded under subsection (c)(3)(B).

As noted within the AWDS, damages encompass reasonable medical, hospital, funeral, and burial expenses as well as the loss of the decedent's love and companionship upon proof that the non dependent parent or child had a genuine, substantial, and ongoing relationship with the decedent. Recently, the Indiana Court of Appeals has held that loss of services, when proved, can also be a component of the loss of the decedent's love and companionship. Indiana Patient's Compensation Fund v. Brown, 934 N.E.2d 168, 178 (Ind. Ct. App. 2010). Unlike the GWDS, there is a cap on how much can be awarded for the loss of the decedent's love and companionship component. The loss of the decedent's love and companionship cannot exceed Three Hundred Thousand Dollars (\$300,000.00); however, the jury is never advised of this fact. Instead, the jury is allowed to deliberate and required to award damages on each element specifically so the court may then adjust the damages, if necessary.

Punitive damages are not recoverable under the AWDS. In addition, the income level and/or earning ability of the decedent are not only irrelevant that evidence is also not admissible.

The AWDS does not specifically authorize or prohibit an award for attorney fees, litigation costs, or estate administration costs unlike the provisions of the GWDS and the CWDS, discussed in more detail below. As a result, there has been much attention of late on this topic at the Indiana Court of Appeals. In three (3) very recent opinions, the Court of Appeals has ruled in favor of awarding attorney fees, litigation costs and estate administration in two (2) opinions and denied such an award in the third. *See McCabe v. Comm’r, Ind. Dep’t of Ins.*, 930 N.E.2d 1202 (Ind. Ct. App. 2010); *Hematology-Oncology of Indiana, P.C.*, 932 N.E.2d at 700-04 (Ind. Ct. App. 2010); and *Indiana Patient’s Compensation*, 934 N.E.2d at 177. This issue is ripe for consideration by the Indiana Supreme Court or the state legislature. As practitioners, it would be wise to continue to monitor this situation given the split of authority on this point.

A. Wrongful Death of a Child

The Child Wrongful Death Statute (“CWDS”) can be found at Ind. Code §34-23-2-1 and reads in relevant part as follows:

(b) As used in this section, "child" means an unmarried individual without dependents who is:

- (1) less than twenty (20) years of age; or
- (2) less than twenty-three (23) years of age and is enrolled in a postsecondary educational institution or a career and technical education school or program that is not a postsecondary educational program.

The term includes a fetus that has attained viability (as defined in IC 16-18-2-365).

* * * * *

(f) In an action to recover for the death of a child, the plaintiff may recover damages:

- (1) for the loss of the child's services;
- (2) for the loss of the child's love and companionship; and
- (3) to pay the expenses of:
 - (A) health care and hospitalization necessitated by the wrongful act or omission that caused the child's death;

- (B) the child's funeral and burial;
 - (C) the reasonable expense of psychiatric and psychological counseling incurred by a surviving parent or minor sibling of the child that is required because of the death of the child;
 - (D) uninsured debts of the child, including debts for which a parent is obligated on behalf of the child; and
 - (E) the administration of the child's estate, including reasonable attorney's fees.
- (g) Damages may be awarded under this section only with respect to the period of time from the death of the child until:
- (1) the date that the child would have reached:
 - (A) twenty (20) years of age; or
 - (B) twenty-three (23) years of age, if the child was enrolled in a postsecondary educational institution or in a career and technical education school or program that is not a postsecondary educational program; or
 - (2) the date of the child's last surviving parent's death; whichever first occurs.
- (h) Damages may be awarded under subsection (f)(2) only with respect to the period of time from the death of the child until the date of the child's last surviving parent's death.
- (i) Damages awarded under subsection (f)(1), (f)(2), (f)(3)(C), and (f)(3)(D) inure to the benefit of:
- (1) the father and mother jointly if both parents had custody of the child;
 - (2) the custodial parent, or custodial grandparent, and the noncustodial parent of the deceased child as apportioned by the court according to their respective losses; or
 - (3) a custodial grandparent of the child if the child was not survived by a parent entitled to benefit under this section.
- However, a parent or grandparent who abandoned a deceased child while the child was alive is not entitled to any recovery under this chapter.

The CWDS allows for the recovery of health care and hospitalization expenses, funeral and burial expenses, the uninsured debts of the child (including debts for which a parent is obligated on behalf of the child), and the costs to administer the child's estate, including reasonable attorney fees. The CWDS puts time limitations, however, on the other recoverable elements of damages. The estates ability to recover for the loss of the child's services and for the

reasonable expense of psychiatric and psychological counseling incurred by a surviving parent or minor sibling of the deceased child is limited to the time period from the child's death until the child would have reached the age of twenty (20) or twenty-three (23) if the child was enrolled in postsecondary education or career/technical school or the date of the child's last surviving parent's death, whichever occurs first. Damages for the for the loss of the child's love and companionship is limited to the period of time from the death of the child until the date of the child's last surviving parent's death.

Punitive damages were not recoverable under the CWDS. Andis, 489 N.E.2d 78.