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Damage Standards for Wrongful Death/Survival Actions: Loss to Survivors, Loss to the Estate, Loss of Accumulations to an Estate, and Investment Accumulations

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Abstract: *States in the United States have two general approaches to dealing with legal issues related to wrongful death. Both general approaches have been created by statutory law rather than the common law, which did not recognize a cause of tort action following wrongful death. One general approach to wrongful death has been to create a statutory right of specific classes of survivors to sue for their own damages resulting from the wrongful death. The other general approach has been to create statutory right for the estate of a decedent to sue for damages on a basis that is similar, but usually not identical to damages the decedent could have sued for if the decedent were still alive. In some states, both approaches are incorporated into what is called the "wrongful death statute." In other states, both approaches are incorporated into separate "wrongful death" and "survival" statutes, which is especially confusing because a "survival statute" refers to the "survival" of legal rights to sue by the estate of the decedent, not a right of survivors of the decedent to bring a suit for their own damages. Other elements of some wrongful death statutes that add to confusion are special damages elements referred to as "loss of accumulations to an estate" and "investment accumulations." "Loss of accumulations to an estate" refers to the right of survivors of a decedent to sue for their own possible losses resulting from assumed increases in the value of a decedent's estate if death had not occurred. "Investment accumulations" refer to annual investment amounts that a decedent would have been expected to make if not wrongfully killed. The purpose of this paper is to provide clear distinctions between the two general approaches, between the two types of statutory actions, and between damages based on "loss to the estate" versus damages based on "lost accumulations to an estate," and "investment accumulations."*

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I. Introduction

The purpose of this paper is to provide clear distinctions between two general approaches that states have taken with respect to the right to recover damages resulting from wrongful death circumstances. Those general approaches have been codified into two types of statutes that determine which damages can be recovered, but the statutes enacted by the states can sometimes be hybrids of the two general approaches such that both approaches may be combined into a single wrongful death statute. Other states have enacted two statutes, with one of each focused on one of the two general approaches. This is further confused by language that is used to describe the two types of statutes, such that there is a significant difference between "loss to an estate" on one hand and "loss of accumulations to an estate" by statutory survivors of a decedent on the other hand. Thus, this paper actually concerns three distinctions among concepts that are sometimes unclear in the literature regarding damages in cases of wrongful death. The first distinction is between the two general concepts underlying damages that can be sought by plaintiffs following a wrongful death. The second distinction is between the legal terms used by some states, but not all, for statutes based on the two general approaches. The third distinction is between damages based on "loss to an estate" versus damages based on "loss of accumulations to an estate," and "investment accumulations."

II. Two General Approaches to Wrongful Death Damages

Most states in the United States have two general approaches to dealing with legal issues related to wrongful death. Alabama has a third approach of relying exclusively on punitive damages in wrongful death actions. Most states allow punitive damages for egregious circumstances, but not as the exclusive basis for recovery. Both general approaches are created by statutory law rather than the common law because English common law limited the right of survivors to sue only for emotional losses prior to the enactment of Lord Campbell's Law in 1856 in Great Britain. One general approach has been to create a statutory right of specific classes of survivors to recover their own losses resulting from the death of a decedent. In this paper, this approach will be referred to as the survivor recovery approach. The other general approach is to allow the estate to recover damages for losses to the estate. That approach will be referred to as the estate recovery approach. Many, and perhaps most states, rely on combinations of the two general approaches, coupled with the possibility of punitive damages.

The Survivor Recovery Approach

In most states the right of survivors, to recover damages are set forth in what is called the state's "Wrongful Death Act." The underlying concept behind survivor recovery actions is that the death of a decedent had caused a loss of financial support, loss of household services and, in some states, emotional losses for statutory survivors of the decedent. The right to bring survivor recovery actions is limited to specific classes of survivors and does not extend to all persons who may have suffered losses resulting from the death. In most states using this general approach, the statutory claimants include the spouses of a decedent, children of a decedent, and parents of a decedent. If there are no survivors who are spouses, children or parents of a decedent, it is often the case that the right to sue for damages then passes to siblings of a decedent and may, in some states, extend to legal next of kin if there are also surviving siblings. Statutory limitations in Wrongful Death Actions of this type can create anomalies in that an individual who was an unmarried "partner" of a decedent typically does not have the right to sue for his or her own damages even though a minor child they shared in common does have that right. It also means that any children of a spouse or partner a decedent may have been supporting financially and with services cannot sue for damages if the decedent was not the natural parent and the children had not been legally adopted.

The Loss to the Estate Approach

The other general approach of the states has been to create statutory right for the estate of a decedent to sue for damages or to continue suits that were originally filed by the decedent on a basis that is unrelated to how the award to the estate will be distributed among survivors. Recovery by an estate makes the right of recovery as similar as possible to the right of a living injured plaintiff to recover in a personal injury lawsuit. Under the common law, an individual's right to recover damages essentially died when he died. Creating a statutory right of the estate of an individual, functioning as if the decedent is in some legal sense still alive, to recover damages is generally intended to extend the right to recover from a personal injury causing death to recover as if death had not occurred. This second approach is broader than the survivor recovery approach in that it includes both suits for damages that have nothing to do with wrongful death and damages occasioned by the death. For example, if a decedent had sued his neighbor for property damages caused by his neighbor's tree branch falling onto his automobile, this second approach would allow the estate of the decedent to continue that action for recovery of losses to what is now the estate of the decedent. It also allows the estate of a decedent to sue for losses caused by the death itself, including loss of earnings of the decedent, medical costs of the decedent occasioned by the decedent's death, and funeral expenses of a decedent.

III. Two Types of Wrongful Death Statutes

Corresponding to the two general approaches taken by the states to wrongful death circumstances are two general classes of statutes. The first general approach generates wrongful death acts that are primarily based on the right of specified classes of survivors of a decedent to recover for their own losses resulting from the decedent's death. Such losses may include intangible losses such as loss of love and affection, loss of society and companionship, grief and bereavement and pain and suffering, and final medical expenses and funeral expenses for the decedent. However, the damages most often assessed by economic experts are loss of financial support, sometimes including job-related fringe benefits of a decedent from which a survivor was benefitting, and loss of household services for family members living with a decedent. The second approach generates what are called either wrongful death acts (when the state does not also have a survivor recovery act) or survival actions when a state also has a survivor act. If a state has statutes based on both general approaches, the survivor recovery act will be called the "wrongful death act" and the loss to the estate act will be called a "survival act." If a state only has a wrongful death act that is based primarily on recovery by survivors of their own losses, it is likely that "loss to the estate" elements will be incorporated into that act.

Missouri and Illinois provide examples of the two most common arrangements regarding wrongful death damages for states that primarily rely upon recovery by survivors rather than recovery by the estate of a decedent. In terms of key economic losses, the primary damages being sought are the lost financial support and household services suffered by statutory survivors of the decedent. Final medical expenses, funeral expenses, and loss of earning capacity from the moment of injury to the moment of death are also claimed, and are based on loss to the estate of the decedent rather than specific losses of statutory survivors.

Missouri, for example, has a recovery by survivors wrongful death act, but the act also allows for recovery of "pecuniary losses suffered by reason of the death" and "funeral expenses" of the decedent in addition to losses of survivors caused by the death of the decedent. The Missouri Act includes the following language: "In addition, the trier of facts may award such damages as the decedent may have suffered between the time of injury and the time of death and for which the decedent may have maintained an action had death not ensued" (Missouri Revised Statutes, 537.090). Illinois, by comparison, has both a wrongful death act and a survival act that make the same distinctions. The wrongful death act is based on recovery by survivors of their own losses, while the survival action allows recovery by the estate of the decedent for medical expenses involved with the death, funeral expenses, and lost earnings of the decedent between the moment of injury and the moment of death. In Missouri, wrongful death claims are filed on behalf of survivors bringing the action. In Illinois, wrongful death acts are filed on behalf of the estate of the decedent, but the damages being sought are very similar to those allowed under the Missouri act. In Illinois, a wrongful death action will normally be filed under both statutes concurrently, while in Missouri a wrongful death action will be filed under the wrongful death act. Losses to be recovered are generally the same, with exceptions relating to household services, but the captions for the cases will be different.

A small number of states have only one standard for losses. That standard is loss to the estate of the decedent regardless of who stands to inherit the estate. Kentucky, West Virginia, Connecticut, Georgia, and New Mexico all have such standards, though New Mexico appears to take into account losses to survivors to some extent. Regardless of the approach, however, wording can be different from state to state. While most states have Wrongful Death and Survival Acts if they have two acts, the state of Washington makes the same distinction between its "general survival statute," which would typically be called a wrongful death act, and its "special survival act," which would typically be called a survival act. In *Estate of Otani v. Broudy* (2004), the Washington Supreme Court said (pp. 755-756):

> The general survival statute, RCW 4.20.046(1), preserves all causes of action that a decedent could have brought if he or she had survived. Alternatively, the special survival statute, RCW 4.20.060, is limited to personal injury causes of action that result in death. Specifically, recovery under the general survival statute is for the benefit of, and passes through, the decedent's estate, whereas recovery under the special survival statute is for the benefit of, and is distributed directly to, the statutory beneficiaries.

IV. Loss to an Estate versus Loss of Accumulations to an Estate

The terms "loss to an estate" and "loss of accumulations to an estate" are so similar that some judges have interpreted them as meaning essentially the same thing. Conceptually, however, the two damage elements are quite different. Loss to the estate is loss to an artificial legal entity created by law. The estate represents all of the remaining interests after death of the decedent until all legal matters affecting the decedent have been resolved, regardless of who may inherit the estate. “Loss of accumulation to an estate,” on the other hand, is a potential financial loss suffered by survivors of a decedent in the following sense: As the result of the death of a decedent, survivors have recovered the estate left by the decedent at the time of the decedent’s death. If the decedent had not died, the decedent could potentially have increased the value of his or her estate that would be left to survivors in the future. Survivors did not lose the estate of the decedent as it existed at the moment of death, but increases in the value of the estate survivors might have inherited when the decedent eventually died in the future. As an example, if the estate of the decedent at the moment of death had been valued at $500,000, it might be argued that if the decedent had not died, the value of the estate left to survivors might have increased to a present value of $750,000 when the decedent eventually died a “natural death.” The result is that survivors have lost $250,000 in inheritance value as a result of the wrongful death of the decedent.

Loss to an Estate

“Loss to an estate” is calculated as either the net or gross loss of earning capacity that the decedent lost as a result of death, plus other expenses occasioned by the estate, including medical costs related to dying plus funeral expenses that the decedent would not have had to pay at that time if the death had not occurred. Some states, including Kentucky, West Virginia and Georgia, allow an estate to recover for an individual’s entire loss of earning capacity. Other states, including Connecticut, New Mexico, Pennsylvania, and Tennessee allow an individual to recover the decedent’s earning capacity as loss of earnings net of the personal maintenance expenses necessary to earn the lost earnings in the labor market. Whichever way the loss to the estate is calculated, after all legal issues relating to the individual have been resolved, the estate is distributed according to the will or to the estate provisions of state law to either survivors or charitable enterprises indicated in the will of the decedent. (Most states, using the recovery by survivors approach, reduce lost earnings of a decedent so that the net result reflects financial support lost by statutory survivors.)

Loss of Accumulations to an Estate

“Loss of accumulation to an estate” depends on the assumption not just that the future estate would be larger than the estate inherited by survivors at the time of a wrongful death, but that the present value of the estate in the future would have been larger than the value of the estate at the time of death. It is not sufficient that the value of the estate would have grown over time. For there to be a loss of "accumulation to an estate" the estate must be projected to have grown fast enough to exceed the discount rate used to reduce a future estate to present value. If the present value of an estate would have grown more slowly than the discount rate, the value of inheritances at the time of death will be greater than if the decedent had remained alive through a normal life expectancy, resulting in no economic loss.

Loss of accumulation to an estate can be difficult to establish. It would often be the case that the present value of an estate would have declined rather than increased. Given normal life cycle planning, an individual's net assets would increase during the earnings period of life and then decline during the retirement period. For such a decedent, being wrongfully killed during the middle of the estate accumulation period of the life cycle would result in a decline in the value of the estate by life's normally expected end. In the event of a wrongful death, survivors would, in effect, inherit an estate that included net worth an individual had developed to provide for his or her own retirement. If such an individual had survived to the end of a normal life expectancy, the individual's net worth, and thus estate after death, would have declined during the retirement period. This would mean that the present value of the estate would have been smaller at the end of a normal life expectancy than at the time of the wrongful death. As a result, no loss to survivors would occur.

For loss of accumulations to an estate to occur in most states, the following assumptions would have to be true:

(1) The present value of the estate at the end of a normal life expectancy must be larger than the estate of the decedent at the time of death;
(2) The future beneficiaries of the estate must be assumed to be at least substantially the same beneficiaries as at the time of death;
(3) The life expectancy of at least some of the survivors must be longer than the life expectancy of the decedent.

The state of Idaho (*Pfau v. Comair Holdings, Inc.*, 2000) has specifically ruled that "loss of accumulations to an estate" is not recoverable in a wrongful death action in Idaho. This ruling was based on the rationale that it was highly speculative for the court to assume any particular division of a future estate among potential beneficiaries, as compared with the legal requirement of parents to support each other and their minor children. The states of Florida, Iowa and Ohio, and perhaps others, specifically recognize a right to recover for loss of accumulations to an estate, but this category of possible loss is not mentioned in wrongful death statutes, preferred jury instructions, and case law of most states with wrongful death acts that focus primarily on losses of survivors of a decedent. Loss of accumulation to an estate would simply be part of losses to the estate in cases with that standard. (See the paper by Rosenbaum and Cushing elsewhere in this symposium for a discussion of this issue in all 50 states.)

Florida is unique in that the right to recover for "loss of accumulations of an estate" is limited to the estates of persons older than the age of 25 (see Fla. Stat. § 768.18 and Fla Stat. § 768.21). With this exception, states specifically allowing "lost accumulations to an estate" have no special requirements with respect to the probability that survivors would still be alive when the future estate became available. The Florida exception is peculiarly worded in that the damages section (Fla. Stat. § 768.18) refers to a "minor child" in explaining the exception to the right to recover for lost accumulations to an estate, but refers to the "definitions" statute (Fla. Stat. § 768.21) where the following language appears: "'Minor children' means children under the age of 25, notwithstanding the age of majority." However, others part of the statute allowing recovery by a spouse or minor children appear not to be limited to decedents under the age of 25. Thus, it appears that the statutory language is specifically designed to prevent parents of a child under the age of 25 from bringing an action for a loss of financial support from a decedent child who was under the age of 25. It is obviously unlikely that most parents of a child under the age of 25 would have died long before the end of child's normal life expectance, but it is unclear whether this is the reason for Florida's special exception. Ohio and Iowa do not appear to have such a special exception, but the requirement that survivors must be expected to have survived to the end of the decedent's normal life expectancy would presumably apply in all other states with recovery by survivors standards.

Alaska has both a Wrongful Death Act and a Survival Act. The Survival Act takes over if a decedent dies without dependants who have standing to bring a suit under the Wrongful Death Act. The Alaska Supreme Court spoke at some length about how the two are supposed to work in tandem. In *Osborne v. Russell* (1983), the decedent had no beneficiaries. The defense appealed the trial court's award of damages to the estate, claiming that there must be dependents for recovery to occur in Alaska. The Court cited *Matter of Estate of Pushruk* (1977) in indicating that the estate could recover damages if there were no dependants. The defense also appealed on the basis that the plaintiff had failed to apply a "net accumulations" theory. The *Osborne* Court described the "net accumulations theory" and said (p. 560):

> Under (the net accumulations theory), the loss to the estate equals the amount which the deceased would have earned by his own efforts and saved (from the time of his death to the time he probably would have died had he not been wrongfully killed) and left at his death as part of his estate. This is in contrast to the more prevalent theory, and the one applied by the court in this case, which is that the loss to the estate equals the decedent's probable future earnings, diminished by the amount he would have spent for his own living expenses had he survived. (Citation omitted.) However, we see little reason to accept either of these theories in favor of the other, since in cases where damages are recovered for loss to the estate they will necessarily render nearly identical results.

The Court pointed out in a footnote that the two theories could produce different results if a jury were convinced that the decedent would have made substantial contributions to charities or others not likely to inherit his estate. However, the Alaska decision in *Osborne* does not suggest the fundamental conceptual differences indicated in the next section between "personal consumption" expenditures and "personal maintenance" expenditures in Pennsylvania and Tennessee.

V. Loss of Accumulations to an Estate vs. Investment Accumulations

To add to confusion, the District of Columbia Survival Act § 12-101 uses the term "accumulations" in a different context than that term would apply in states allowing survivors to recover for lost accumulations to an estate. The District of Columbia defines "accumulations" as remaining portions of income that a decedent can be projected to have invested after subtraction for amounts a decedent would have spent on his own living expenses, on the living expenses of the individual beneficiaries under the D.C. Wrongful Death Act § 16-2701, and income taxes. Jury Instructions § 14.03, are as follows:

> [T]he estate is entitled to receive the amount of money the deceased would have accumulated over the course of his or her normally expected lifetime. In determining this amount, you should consider the deceased's potential future earnings. In this regard, you should consider the deceased's age, health, occupation, work and educational background, earning capacity, size of the decedent's estate to date, and any other factors concerning the deceased's future income. You may also take into account the effect of inflation on future income.

> After you arrive at this amount, then you should subtract the amounts the deceased would have spent on his or her own living expenses, and for the living expenses of the individual beneficiaries under the Wrongful Death claim, and whatever taxes it is reasonably certain he or she would have been required to pay. When you have finished these calculations, you have arrived at a figure which is the amount of the deceased's estate's probable net future earnings or accumulations.
>
> Next, you must discount this amount, the net future earnings, to present value. Here is how you must make the calculation: You must figure the amount, which, if invested at a particular rate of interest today over the number of years the decedent would have been expected to live, would return an amount equal to the net future earnings.

This language is awkward, but the meaning appears to be that a jury is expected to calculate a stream of future incomes of a decedent. The jury should then subtract from the income of each future year the decedent's personal consumption expenses in that year, amounts spent for the living expenses of beneficiaries in that year, and income taxes in that year. The amount left after those subtractions, if any, can be described as the decedent's "net earnings" or "accumulations." The estate's loss is then defined as equal to the present value of the stream of "net earnings" or "accumulations." To reduce confusion, "accumulations" will henceforth be referred to as "investment accumulations" since the term "accumulations" in this context means something different from what is meant by "net accumulations to an estate" as that term would apply in wrongful death acts. The "investment accumulation," as defined above, is not defined in terms of a present value at life's end, but as a sum of annual net investments the deceased would have accumulated over his or her normal work-life expectancy. The loss of investment accumulations is a loss to the estate, not a loss of a portion of the estate to a survivor. Under normal life circumstances this "investment accumulation" calculation does not take into account the fact that the decedent would have used some of these lost "investment accumulations" after retirement to support retirement living expenses. Thus, this would be a dollar amount that reached its total present value when the work-life period ended, regardless of what would be done with the accumulated asset values during retirement.

The same would be true if the individual drew down assets in order to pay for expenses during years when personal consumption expenses plus living expenses of beneficiaries under the Wrongful

Death Act plus taxes exceeded income of the deceased. For those years, there would be no "accumulations," but also no subtractions from the total present value of all accumulations over the decedent's work-life. Based on this language, the loss to the estate is equal to the sum of positive investment accumulations during years of work-life without subtraction for negative investment accumulations that might have also occurred.

VI. Dual Wrongful Death and Survivor Actions

Tennessee, Pennsylvania and Alaska are unique (to this author's knowledge) in having dual statutes that allow recovery by survivors of lost financial support by statutory survivors and recovery by an estate for loss of earning capacity. In both Pennsylvania and Tennessee, a claim based on loss of earnings cannot be claimed under both acts simultaneously, so that plaintiffs must choose which act will apply to which parts of the lost earnings stream. How this might occur can best be illustrated by using an example in which using both actions would potentially maximize the recovery of damages.

Assume the wrongful death of a single father who was earning \$50,000 in real current dollars at the time of his death and was raising and supporting a minor son with no special handicaps who was twelve years of age. Assume that the child's mother had previously died. During the period of the minority of the child, the child would sue for loss of financial support the son would have received from his father under the Wrongful Death Act. Damages in the form of loss of support would be estimated as the earnings of the father minus what forensic economists usually call "personal consumption." "Personal consumption," as typically used by forensic economists, actually means "personal consumption expenditures of a decedent that would not have benefitted survivors of the decedent." Assume personal expenditures of the father that would not have benefitted the son are determined to be equal to 30% of the father's earnings, leaving 70% to be treated as lost financial support for the son. Thus, the son's loss of support based upon 70% of \$50,000 in the first year would be \$35,000 for that year. The total damage amount before discounting (and Pennsylvania does not discount except for medical malpractice cases) during the remaining ten years of the son's assumed dependency on his father would be $\$35{,}000 \times 10 \text{ years} = \$350{,}000$.

For the portion of income claimed under the Survival Act, damages would be measured as the father's earnings net of his personal maintenance expenses, which would now include the father's cost for housing, utilities and other expenses that the father would have had to spend to maintain himself in the commercial labor market. Personal maintenance does not include some discretionary expenses that would be included as part of "personal consumption" under the Wrongful Death Act, but would include the large expenditures for housing, utilities and other family goods that would be treated as part of the father's support for his son during the period of dependency. A decision would have to be made about the period during which the father would continue to support his son. For example, assume that age is 22, allowing possible graduation with a bachelor degree for the son. Assume that the father had a work-life expectancy of 20 years at the time of his death so that ten of those years would be during the minor's dependency and 10 of those years after the minor was no longer assumed to be supported by his father. Assume further that the father continues to earn $50,000 per year in real dollars. At the end of the son's dependency, the claim for damages would shift to the survival act, with the estate of the father claiming $50,000 per year in real dollars minus the father's personal maintenance expenses at $30,000 per year, or 60% of earnings. From this point forward, the estate would claim $20,000 per year in real dollars for another ten years. The total damages amount for this portion of the lost earnings stream without discounting would be $\$20{,}000 \times 10 = \$200{,}000$. Thus, total damages would be $550,000 in the combined action with $350,000 in damages under the wrongful death act and $200,000 in damages under the survival act.

Tax Considerations

Even though an award to an estate is exempt from the federal personal income tax, any state income tax, Social Security payroll tax, Medical payroll tax and any city payroll taxes, there are potential tax implications in a choice between whether to claim particular years of lost earnings in Pennsylvania and Tennessee. The estate need not pay income taxes, but an estate is subject to the federal estate tax and any state inheritance taxes that might apply to either the estate itself or inheritance by survivors. There are no income taxes on the award (including payroll taxes), but an award to an estate would increase the size of the estate and the inherited portions of the estate, triggering higher estate and/or inheritance taxes. An award directly to survivors is not treated as an inheritance under the tax exemption on awards and thus not subject to inheritance taxes. Thus, it might in some circumstances be wise for estate and inheritance taxes to be taken into account. For example, if a wrongfully killed decedent had an estate that was valued at more than $5,430,000 in 2015 and the decedent's estate was awarded one million for net lost earnings (after personal maintenance) of the decedent, the federal estate tax on the additional one million dollars would be 40 percent. That would mean that the tax consequence of a $1,000,000 award for lost earnings of the estate after the period of dependency would only have a value after estate taxes of $600,000, which could be reduced even further if an inheritance tax on survivors also applied.

This would not change the general incentive of survivors to allocate as much of future earning capacity as possible to the Wrongful Death Act rather than the Survival Act, but would exaggerate that incentive.

VI. Other Special Provisions of Survival Actions

In 2001, Arkansas modified its existing Survival Act to add subsection (b). Subsection (a) provides for a legal action filed before an individual's death to be maintained by his or her estate after death, but makes a special exception for slander or libel, which cannot be maintained after death. That is a fairly typical Survival Action for a state, like Arkansas, in which legal actions resulting from a wrongful death would typically be brought under the Arkansas Wrongful Death Act based on losses suffered by survivors authorized by statute to bring an action for their own losses. Subsection (b), however, created a new right to sue for damages by the estate of a decedent, saying succinctly:

> (b) In addition to all other elements of damages provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damages.

The new subsection (b) has been the focus of three important legal decisions in Arkansas since its enactment: *Durham v. Marberry* (2004); *McMullin v. United States* (2007); and *One National Bank v. Pope* (2008). Those decisions attempted to determine what the new subsection meant in terms of possible recovery by an estate. As noted, in the decisions themselves (see the Appendix), there was an effort on the part of plaintiff attorneys to interpret the new subsection as authorizing recovery for loss of enjoyment of life damages (hedonic damages). The new subsection may have been motivated by "right to life" sentiment, but it had the effect of generating a flurry of litigation relating to a possible right to recover for hedonic damages in a wrongful death action.

VII. Conclusion

The laws governing recovery of damages in wrongful death cases vary significantly by state. The combination of two general approaches for determining damages; statutes that provide for damages on the basis of loss to survivors, loss to the estate, or loss of investment accumulations; and various hybrid statutory schemes can make the state-by-state evaluation of damages in wrongful death actions difficult. Any evaluation of potential loss in wrongful death cases must be tailored to the approach specified by the relevant state statutory scheme.

References

Durham v. Marberry, 356 Ark. 481; 156 S.W.3d 242 (Ark. 2004)

Matter of the Estate of Pushruk, 562 P.2d 329 (Alaska 1977)

McMullin v. United States, 515 F. Supp. 2d 914 (E.D. Ark. 2007)

One National Bank v. Pope, 372 Ark. 208; 272 S.W.3d 98 (Ark. 2008)

Osborne v. Russell, 669 P.2d 550 (Alas. 1983).

Estate of Otani v. Broudy, 151 Wn.2d 750; 92 P3d 192 (Wash. 2004)

Pfau v. Comair Holdings, Inc., 135 Idaho 152 (Id. 2000)

Schmitt v. Jenkins Truck Lines Inc., 170 N.W.2d 632 (Iowa 1969)

Appendix: Descriptions of Legal Decisions Discussed in This Paper

Alaska

Matter of the Estate of Pushruk, 562 P.2d 329 (Alaska 1977). At issue was the desire of a mother of a decedent son to be declared dependent on her son within the meaning of the Alaska Wrongful Death Act even though she was not dependent on him for financial support. The court rejected that concept, saying (p. 332) "dependency is determined according to the facts and circumstances existing at the time of death." The Court also said (p. 331, *emphasis added*):

> [I]f the decedent is survived by a spouse, child or dependent, the action is brought on behalf of the statutory beneficiary and damages are measured by the loss to the survivors. The personal representative is then a nominal party only and holds the recovery in trust. On the other hand, if the deceased is not survived by the beneficiaries named in the statute, the personal representative is the real party in interest in the wrongful death action. *Damages are limited to the loss to the estate* and are distributed as other personal property of the deceased.

Osborne v. Russell, 669 P.2d 550 (Alas. 1983). The Alaska Supreme Court explains that with a single person with no dependents, it does not matter in Alaska whether an action is brought under Alaska's wrongful death action utilizing a net accumulations to the estate approach or under Alaska's survival action under a net earnings approach. The court also said: "[T]he possibility that the deceased would later have acquired dependents toward whom he would have expended sums has been ruled by this court to be too speculative as a matter of law for a jury to consider. See *Matter of Estate of Pushruk*, 562 P.2d at 332."

Arkansas

Durham v. Marberry, 356 Ark. 481; 156 S.W.3d 242 (Ark. 2004). The Arkansas Supreme Court held that a 2001 Arkansas survival action Ark. Code Ann. § 16-62-101 (Supp. 2003) created a new element of damages in circumstances of wrongful death called "loss of life" and that an injured plaintiff did not have to have survived beyond the fatal injury to have the right to recover this loss element. The Court indicated (p. 247) that "loss of life" and "loss of enjoyment of life" are different elements even though they "are both hedonic." In doing so, the *Durham* Court cited *Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (Del. 1990) and *Willinger v. Mercy Catholic Medical Center*, 482 Pa. 141, 393 A.2d 1188 (1978) as drawing a distinction between "loss of life" and "loss of enjoyment of life." *Willinger* has been interpreted as not allowing recovery for lost enjoyment of life in death cases in Pennsylvania and Sterner is one of the decisions that precluded an economist from offering hedonic damages testimony in Delaware. The Durham Court appeared to indicate that it would probably not allow expert testimony about the amount of damages to be awarded for "loss of life." The Court cited its own decision in *Clark & Sons v. Elliot*, 251 Ark. 853 (1972), as indicating that (p. 493) "there is no hard and fast rule to determine compensatory damages for non-pecuniary losses."

McMullin v. United States, 515 F. Supp. 2d 914 (E.D. Ark. 2007). This is a judicial ruling in a Federal Tort Claims Act (FTCA) case involving a medical malpractice wrongful death action. An economist was apparently not involved in this case. Judge Eisele held that the Arkansas Survival Action statute applies to medical malpractice in spite of some controversy in the Arkansas Courts about whether the Arkansas Medical Malpractice Act changed this application. This meant that Judge Eisele had to make an award under Ark. Code. Ann. § 16-62-101(b), which says: "In addition to all other elements of damages provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damage (as modified in 2001)." Judge Eisele reviewed the decision in *Durham v. Marberry*, 356 Ark, 481 (2004) which is the only appellate interpretation of the 2001 addition to the Survival Act. He found no guidance in that decision. He indicated that he had found two U.S.

District Court decisions in which interpretations of this section were made. In one of the two, the judge awarded $400,000, but spoke of the vagueness of the new statutory language. In the other, the judge had permitted the testimony of Dr. Stan V. Smith, but that judge did not find Smith's testimony "persuasive" and awarded amounts of $81,068.91 and $71,463.91. Judge Eisele also discussed a 2006 Note by Ali M. Brady, "The Measure of Life: Determining the Value of Lost Years after *Durham v. Marberry*," 59 Ark. L. Rev. 125 at some length. After extensive discussion, Judge Eisele awarded $600,000 for loss-of-life damages.

One National Bank v. Pope, 372 Ark. 208; 272 S.W.3d 98 (Ark. 2008). This decision does not yet have addresses that would allow proper citations, but is important in determining the meaning of Arkansas's new 2005 survival action language in Ark § 16-62-101(b) (Repl.2005), which says: "(b) In addition to all other elements of damages provided by law, a decedent's estate may recover decedent's loss of life as an independent element of damages." The Court referenced its own decision in *Durham v. Marberry*, 356 Ark. 481 (2004) as maintaining a distinction between "loss-of-enjoyment-of-life damages" and "loss-of-life damages" as damages that are "pre-death" and damages that "only begin accruing when life is lost, at death[.]" The Court noted that in the *Durham* decision it had quoted *Katsetos v. Nolan*, 170 Conn. 637 (1976) as being instructive about how the Court viewed "loss-of-life" damages. The Court also indicated that the interpretation made in *McMullin v. United States*, 515 F. Supp. 2d 914 (E.D. Ark. 2007) of the *Durham* decision was correct in that (p. 214) "many types of evidence may be presented as evidence of loss-of-life damages." The Court held that (p. 214) "an estate seeking loss-of-life damages pursuant to section 16-62-101(b) must present some evidence that the decedent valued his or her life from which a jury could infer and derive that value and on which it could base an award of damages." There was no indication in the decision that the estate had tried to present an economic expert to place a dollar value on "loss-of-life" damages, nor that the Court would have felt it appropriate for the estate to have done so.

Idaho

Pfau v. Comair Holdings, Inc., 135 Idaho 152 (Id. 2000). The Idaho Supreme Court ruled that loss of accumulations to an estate is not recoverable under the Idaho Wrongful Death Act. The Court said (p. 158):

> [W]e decline to extend the measure of damages to include loss of inheritance, loss of net accumulation and loss of earnings because

> these damages are too speculative for purposes of ascertaining the pecuniary loss to the beneficiary. This Court recognizes the speculative nature of support damages, and does not preclude recovery solely on that basis.... However, a measure of loss of inheritance is not only speculative in determining the numerical amounts but is compounded by the limitless number of contingencies that would preclude a beneficiary from receiving an inheritance from the decedent if the decedent had lived out his or her natural life. Because there is a legal right to support by parents of their minor children, and a legal right of parents to the earnings and services of a child, a court need not determine whether a child or parent would receive such benefits absent the premature death. We presume damages based on those legal rights. There is no corresponding legal duty of the decedent to leave the beneficiary an inheritance. Therefore, a court would not only have to determine the speculative amount of those benefits, but would also have to determine whether the decedent would have accumulated or increased an estate, the nature of the family relationship, and the probability that the decedent would have left some or all of the increased value of the estate to the beneficiary.

Iowa

Schmitt v. Jenkins Truck Lines Inc., 170 N.W.2d 632 (Iowa 1969). This decision provides a description of how damages in a wrongful death case in Iowa are calculated and is frequently cited in other Iowa decisions. The court listed the following allowable damage items: (1) The present worth or value of the estate which decedent would reasonably be expected to have saved and accumulated as a result of his efforts between time of his death and end of his natural life; (2) An award of interest on the reasonable funeral expenses of decedent for such length of time as it was prematurely incurred, not to exceed either the reasonable cost of a funeral for a person of decedent's social and financial standing or the amount claimed therefore; (3) Recovery for all elements of damages sustained by the wrongfully injured person from the time of injury until the date of his death including those elements of damages permitted by *Fitzgerald v. Hale*, 247 Iowa 1194,78 N.W.2d 509; (4) The present worth of the services and support which he presumably would have contributed to his wife and children, or both, but for his untimely death. The decision involved a death of a homemaker, but the Court held that she had the capacity to work outside the home, saying (p. 655): "A person may not have worked or may have had no income prior to a fatal injury but still suffer destruction of future earning capacity." Finally, the Court also indicated that adult children could recover for loss of services and, potentially, support (p. 664): "Parental affection for children probably will not cease after minority and the father may still contribute to his children's support.... The jury in considering loss to the children by their parents' deaths is not limited to the time during which they are minors if it can conclude from the evidence such services would have continued after they attained majority."

Washington

Otani v. Broudy, 151 Wn.2d 750; 92 P3d 192 (Wash. 2004). This decision was appealed to the Washington Supreme Court to resolve whether damages are available to an estate for a decedent's loss of enjoyment of life (LOEL) under Washington's survival statutes. The decision provides a review of Washington's general and special survival statutes and how it interacts with Washington's wrongful death statute. It holds by a 7 to 3 margin that recovery is not available for LOEL, holding that (p. 197) "loss of enjoyment of life is not a claim Mrs. Otani could have brought had she survived because it is not a loss she experienced in life." The court held that the standard in a survival action is what an individual could recover if still alive, but one cannot recover for what one lost by being dead if one is still alive.

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