

Journal of Legal Economics, Winter 2000-01
10(3): 23-35

The Estate of a Minor Child in a Child Death Case

The traditional model in a wrongful death action for assessing parental loss to survivors has the great disadvantage of providing very little compensation for one of the most horrendous types of loss that parents can suffer. In terms of economic damages, parents can recover for their own loss of prospective financial support from the child as an adult and for loss of household production while the child is a minor and possibly for guidance and counsel of the child as an adult. When children grow up and have families of their own, the amount of financial and household service support they provide to their parents is likely to be quite small. There is no evidence that most parents are hoping for such support. Thus, even with very liberal assumptions, the amount of pecuniary loss that can be demonstrated by parents of a minor child is quite small and seems disproportionate to the loss parents have suffered. This also seems disproportionate to the nonpecuniary losses that parents can sometimes claim, such as

*Thomas R. Ireland, Department of Economics, University of Missouri-St. Louis, St. Louis, Missouri
John O. Ward, Department of Economics, University of Missouri-Kansas City, Kansas City, Missouri

grief and bereavement, loss of consortium and/or companionship, and the loss of enjoyment of the child's life. Such nonpecuniary loss rules are not uniform among states and may be subject to maximum amounts specified in state laws. The result, in some circumstances, can be very small awards of economic damages in cases involving the death of children.

Some states have rules and procedures that allow a broader pecuniary consideration of the consequences of child death. In a number of publications, we have argued in the past for use of the parental investment approach. A number of papers both by us and by others advocating that approach were reproduced in Ireland and Ward (1995) and discussed further in Ireland and Ward (1996). We argued that the parental investment approach used in Michigan since 1960 is more consistent with why parents have children and results in outcomes that more reasonably reflect the nature of the losses suffered by parents when a child is killed. Most parents do not expect future financial support in the way allowed under standard wrongful death treatments but do hope for future companionship and counsel from their children. The parental investment approach values children in a way that is consistent with parental financial expectations. However, this approach has not been accepted by other states and has been expressly forbidden in a number of states. Its future does not appear bright, other than in the state of Michigan.

The parental investment approach, however, is not the only way that economic considerations can be considered in a child death case. In this paper, we consider two alternative legal structures in other states that have the effect of increasing the size of pecuniary damages awarded to parents following the wrongful death of minor children. These legal structures can be very easily confused with each other and one purpose of this paper is to draw careful distinctions between them. One structure involves "survival of action" legislation that is not designed specifically to deal with deaths of minor children but has enormous consequences in such cases. The second is a specific right to recover for "lost accumulations to the estate" of a minor child as a damage category within a wrongful death act. Because the focus in both instances is on the estate of a decedent child, we will also discuss reasons why the estate of a decedent child is typically not considered in traditional wrongful death action states.

Distinctions Needed to Discuss Wrongful Death Legislation

The following summary of distinctions relating to how states handle wrongful death actions may be helpful.

1. States may enact wrongful death actions or survival actions or both actions paired with each other to avoid double counting of damages.
2. In a wrongful death action, survivors bring claims for their own losses that have resulted from the death of a decedent.
3. In a survival action, the estate of the decedent brings action to recover for the estate on behalf of the decedent.
4. Wrongful death actions may or may not include a right of the estate to recover for "lost accumulations to an estate."
5. Survival actions may be limited to the period from "the moment of injury to the moment of death" or may extend for the entire normally expected life expectancy of the decedent.
6. When a survival action allows for recovery of the entire normally expected life expectancy of an individual, it is worded that "the value of the individual's life" may be recovered. (See below with respect to Arkansas.)
7. Survival actions limited to the period from the moment of injury to the moment of death are unlikely to have any significance in cases involving the deaths of children because most value that would be produced by children would only exist after the survival action no longer applied.
8. Survival actions that apply to the entire period of the normally expected life expectancy of the decedent can be divided into "full earnings" states and "personal maintenance" states.
9. In a "full earnings" state, the estate of the decedent can seek damages for the entire lost earnings of the decedent (with or without reduction for taxes) in the same way that a living injured plaintiff could be awarded his or her entire lost earnings in a personal injury litigation.
10. In a "personal maintenance" state, the estate of the decedent may recover for the entire amount of lost earnings and lost household production, but some amount for personal maintenance must be subtracted to determine the amount recoverable by the estate.

11. When a state has "paired" wrongful death actions and survival actions, calculations are normally based on the action that allows the largest recovery, but with the qualification that specific damages amounts claimed under one action cannot also be claimed under the other action.

12. In a "full earnings" state a wrongful death action would be irrelevant because the entirety of lost earnings and household services could be claimed under the survival action.

The essential conclusions of this paper are stated in this list of twelve distinctions. The remainder of this paper is devoted to providing an understanding of these distinctions, starting with survival actions.

Survival of Action Legislation

Survival of action ("survival act") legislation specifies that the death of a claimant does not terminate the right of the estate of the claimant to pursue recovery of damages after the death of a decedent. A survival of action can occur in any situation where an individual dies before litigation has been resolved and the estate steps in to represent the decedent. In this regard, it does not matter whether that individual is an adult or a child, nor does it matter whether or not the death was "wrongful." What matters is that the individual had a right to sue for damages that are taken over by the representative of the individual's estate when an individual dies. The form of litigation typically takes the form of the estate of the deceased versus the alleged tort malfeasor.

Survival actions can take many forms, with different sorts of rights to recover damages after an individual's death passing to the individual's estate. To the extent that survival actions are involved in wrongful death circumstances, the rights to recover damages that are of primary concern are rights to recover for earnings loss (including possible job-related fringe benefits) and the loss of ability to produce household services. In many states, the survival act applies only to the period from the moment of injury to the moment of death. In such states, the right to sue for personal injury applies to the period when the individual is still alive and a separate, but paired, wrongful death act applies to the period after the death. Survival actions with this limitation have very little relevance to a child's death case because a child's projected earnings and services would only begin long after

the child's death.

In some states, however, the survival action applies to the normal expected life span of the decedent. The language used in states having this type of action is often "the right to recover for the value of the decedent's life." Such actions are also sometimes referred to as "estate law recoveries." This form of survival action apparently exists in Alaska, Connecticut, Hawaii, Pennsylvania, West Virginia, Kentucky, Tennessee, Georgia, Mississippi, New Mexico and now Arkansas. Arkansas has passed an amended survival action that became effective on 31 July 2001 that includes a right to recover for the loss of the value of life. This new Arkansas amendment is only a few lines long. The part that is relevant to the current context can be expressed in one sentence, which is 16-62-101(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." When this is the case, the estate of the child can pursue earnings losses and household service losses of the child for the child's entire life span. In such cases, even though no earnings would ordinarily be projected until the child reached majority and the value of household services would be small while a child is a minor, the resultant claim of the estate of a decedent child who was normal and healthy before the child's death still represents a significant amount of money.

The amount that can be recovered is a function of yet another distinction that is especially important in cases involving deaths of minor children. In Georgia, Kentucky, and West Virginia (henceforth "full earnings states"), the estate can bring an action for recovery of the entire amount of the decedent's expected lost earnings (or lost earning capacity). In Alaska, Connecticut, Hawaii, Mississippi, New Mexico, Pennsylvania, and Tennessee (henceforth "personal maintenance states") the estate can bring an action for recovery of the lost earnings net of personal maintenance expenditures. The specific way this is handled in New Mexico requires that recovery should be for lost earnings net of all taxes and personal living expenses. The key difference between New Mexico and the other personal maintenance states is the explicit statement that all taxes must be subtracted from the value of life earnings to determine the amount recoverable to the estate.

Whether or not subtractions are made for personal expenses and/or taxes, the basic concept underlying this type of survival action is that the decedent lost his or her stream of earnings and household

services as a result of the wrongful death. If the decedent had survived, he or she could have maintained an action to recover for both categories of damages. Therefore, the legislatures in those states gave the estate of the decedent the right to recover for both categories or damages over the normal expected life span of the decedent. Personal maintenance states treat some of the expenditures the decedent would have made as expenditures necessary to maintain life and thus the decedent's prospective loss of future earnings. This view is closely tied to the concept of human capital as capital that must be maintained in order for a lost income to be earned. Personal maintenance expenditures include the food, clothing, transportation and shelter an individual would need to have in order to earn a future income. Personal maintenance states apparently deem these necessary expenditures to maintain life as offsets to what was lost by the decedent's estate, rather than as discretionary consumption expenditures that could be passed on to the decedent's heirs. The full earnings states apparently reason that a living person who maintained an action would not have to subtract personal living expenses and do not require the estate of the decedent to do so either. By implication, full earnings states treat all potential consumption expenditures as benefits a decedent should be able to leave to his or her heirs.

Some of the personal maintenance states, however, pair their survival actions with wrongful death actions. This is important because some of the personal expenditures that would have been necessary to maintain the decedent in the labor market would also have been beneficial to surviving spouses and children of decedents, though not parents of a wrongfully killed minor. Personal expenditures of this type are often called "family goods" and include such expenditures as housing, utilities and transportation, which benefit more than one family member simultaneously. Under a "pure" personal maintenance standard, expenditures necessary to maintain an individual's ability to function in the labor market would be considered personal maintenance expenditures. Clearly, that would include some amount of expenditure for housing, utilities and transportation. However, expenditures on housing, utilities and transportation would have concurrently benefited other family members and thus would be recoverable under the wrongful death approach. With a "paired" survival act and wrongful death act, as in Pennsylvania, the reduction for consumption from earnings excludes family goods because of the wrongful action and thus only deducts personal maintenance expenditures that do not benefit survivors.

In cases of minor children, the difference between full earnings states and personal maintenance states is substantial. In a full earnings state, the present value of lost future earnings of the decedent child is fully recoverable. In a personal maintenance state, savings rates by single persons in the ranges shown by Brown (1998) suggest that only the very rich spend less than 70 % of their incomes on personal maintenance. If personal maintenance expenditures by a single adult living alone is 70 % (or more), recoveries would be 30 % (or less) as large as in full earnings states that make no deduction for personal maintenance. By comparison however, even 30 % of future lost earnings leads to larger pecuniary recoveries by parents of a wrongfully killed minor child in a traditional wrongful death state. In a traditional wrongful death state, only the amount that the child could reasonably have been expected to provide to the parents in the form of financial support can be recovered. That amount is often zero.

Loss of Accumulations to an Estate

The second form of recovery that would involve the estate of a decedent child involves projecting loss of accumulations to an estate of a child under the state's wrongful death act. Most states with wrongful death actions do not contain this category of recoverable damages. In Missouri, for example, the wrongful death damages section §537.090 is as follows:

In every action brought under section §537.080, the trier of the facts may give to the parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting those damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased may have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable.

Based on this damage section, parents would have a claim for services of the child around the home growing up, any future

financial support the child could have been expected to provide to the child's parents, and the reasonable value of the future services, consortium, companionship, comfort, instruction, guidance, counsel, and training the child might have been expected to provide. Such projections must be based on assumptions that are inherently speculative.

In a few states, including Alaska, the District of Columbia, Florida, Iowa, Ohio, Washington and perhaps others, there is specific language for recovery by survivors of the lost accumulations to the estate of the decedent. This would include the estate of a minor child in some of these states. However, Florida's Wrongful Death Act Damages Section 768.21(6)(a)(1), specifically precludes recovery of any sort of pecuniary damages by parents for the death of a minor child. In Florida, the only recovery in the death of a child is for loss of intangibles. See also *Estates of Grayson v. United States* (1990). Ohio has a classic wrongful death statute that contains a specific right of recovery for loss of accumulations to an estate and will constitute our example of this type of damages section. The damages section of the Ohio Revised Code, Section 2125.02(B) provides for the following compensatory damages:

1. Loss of support from the reasonably expected earning capacity of the decedent;
2. Loss of services of the decedent;
3. Loss of society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training and education, suffered by the surviving spouse, minor children, parents, or next of kin;
4. Loss of prospective inheritance to the decedent's heirs at the time of his death;
5. The mental anguish incurred by the surviving spouse, minor children, or next of kin.

If that section is compared with the damages section from Missouri, the two obvious differences are represented in (4) and (5) of the Ohio section. Ohio allows recovery for mental anguish, while Missouri prohibits recovery for grief and bereavement. That is an example of the differences in intangibles that can be recovered in Ohio but not Missouri. It is item (4), however, that is of immediate interest. Ohio specifically allows recovery of the prospective

inheritance to the decedent's heirs at the time of a death. The amount of this recovery is the difference between the value inherited at the time of the decedent's death and the amount that would have been inherited at the time the decedent would normally have been expected to die.

To the extent that states permit parents to sue for such lost accumulations even though the parents own life expectancies would have expired, parents may be able to recover damages for lost accumulations to a child's estate.

Two Cases Explaining Differences in Standards for Recovery

Two cases offer special insights to some of the distinctions in standards for recovery that have been discussed in this paper. The first is *Federated Insurance Company v. Estate of David Jason Norberg* (2000). In this case, the Court of Appeals of the State of Washington explains the distinction between recovery by an estate in a survival action and recovery under a wrongful death act for loss of accumulations to an estate [at 567].

A survival action, though often brought together with an action for wrongful death, is conceptually distinct. The wrongful death statutes, RCW 4.20.010 and 4.24.010, create new causes of action for the benefit of specific surviving relatives to compensate for losses caused to them by the decedent's death...The Survival of Actions statute allows the decedent's existing causes of action to survive and continue "as an asset of his estate."

The conceptual distinction leads to distinctions in the type of damages allowed. For example, amounts the decedent would have spent on family support are recoverable in a wrongful death action, but not a survival action. In a survival action, the only allowable recovery is "the net accumulations which the estate would have acquired if the decedent had survived to expected life time." ...

Typically, net accumulations are the decedent's net earnings over a normal life span, calculated by determining the decedent's probable gross earnings, subtracting personal and family support expenditures, and then reducing the figure to present value...

The net accumulations method is an appropriate measure only if it carries out the essential function of the Survival of Actions statute. That essential function is not to create a separate claim for survivors, but to preserve causes [*127] of action that a person could have maintained had he not died...If David had not

died, he would have been able to maintain his own personal injury suit against Federated. In that suit, he would have recovered future earnings lost due to his injuries. Therefore, future earnings are appropriately used to calculate an award in a survival action. As a survivor he would still be ineligible to receive the inheritance. Because David could not have recovered for loss of inheritance if he were still alive, his estate cannot recover David's loss of inheritance in a survival action.

The second case is *Osborne v. Russell* (1983). In this case, the Alaska Supreme Court explains why, if a decedent is a single person with no dependents, it does not matter in Alaska whether an action is brought under a "net accumulations" theory under the wrongful death action or a "net earnings approach" under its survival action [at 560]:

Russell's second point is that the court's instruction was erroneous because it failed to apply a "net accumulations" theory. Under this 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...However, we see little reason to select either of these theories in favor of the other, since in cases where damages are recovered for the loss to the estate they will necessarily render nearly identical results.

Both theories begin by estimating the deceased's future gross income due to his own efforts. They differ in what is to be deducted from this amount; the net earnings theory deducts only that amount which the deceased would have spent on his own living expenses, while the net accumulations theory deducts this amount plus whatever amount the deceased would have expended on dependents. But under the Alaska statutory scheme the amount that the deceased would have expended on dependents will necessarily be zero when loss to the estate recovery applies, since that measure of recovery is used only when there are no dependents.

Further, the 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 a matter for the jury to consider. Thus, loss to the estate recovery presumes an absence of dependents throughout the deceased's life expectancy. The net earnings theory and the net accumulations theory are therefore alternative measures of the same amount when determining loss to the estate under AS 09.55.580B - the probable value of the deceased's estate had he not prematurely expired less the actual value of the estate at death. Consequently we discern no reversible error in the manner in which the court instructed the jury on damages in this case.

Specific Prohibitions of Lost Inheritance in Wrongful Death Actions

The damages section in Missouri, as noted above, contains no mention of accumulations to an estate. More states are like Missouri than are like states that have recoveries by an estate based on losses of a decedent or which include rights to recover lost accumulations to an estate. One of those states is Idaho, whose Supreme Court recently addressed the subject of lost inheritance in *Pfau v. Comair Holdings, Inc.* (2000). In that case, the Idaho Supreme Court addressed the following question that was certified to it by Judge John Feikens of the U.S. District Court for the Eastern District of Michigan, Southern Division on May 6, 2000:

Under Idaho's Wrongful Death Act and all related case and statutory law, are economic damages limited to the loss of support received or reasonably anticipated during the life of the decedent, or do they also include damages for the loss of anticipated inheritance the claimants may have received after the natural death of the decedent, and/or the loss of net accumulation of the decedent, and/or loss of earnings of the decedent?

After completing its analysis of the Idaho Wrongful Act, the legislative intent behind that act and court decisions under that act, the *Pfau* Court said the following [at *1166]:

We decline to extend the measure of damages for wrongful death 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 loss 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 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.

One can imagine many other wrongful death states that do not contain specific mention of a right to recover for "lost accumulations to an estate" making rulings similar to the Idaho Supreme Court about the ability of a court to project the value of increases in the inheritance that a survivor might have received at the end of the survivor's normal life expectancy.

Concluding Remarks

In this paper, we have tried to explain the distinction between accumulations by an estate as a damage category within wrongful death action damages and recovery by an estate under a survival action. Neither of these legal structures was developed specifically for the purpose of providing economic damages that parents could recover following the wrongful death of a child, but both of them may have that result under circumstances we have described. However, either of them may allow parents larger damages than are possible under the traditional wrongful death approach to deaths of minor children.

References

- Brown, Ralph J. 1998. "Saving Rate Estimates for Single Persons by Income, Age and Gender." *Journal of Legal Economics* 8(2): 49-62
- Federated Insurance Company v. Estate of David Jason Norberg*, 101 Wn. App. 119, 4 P.3d 844; 2000 Wash. App. LEXIS 885.
- Ireland, Thomas R., and John O. Ward. 1995. *Valuing Children in Litigation: Family and Individual Loss Assessment*. Tucson, Arizona: Lawyers & Judges Publishing Co.
- _____. 1996. The Investment Approach to Parental Loss in the Death of a Child: A Guide to Understanding Alternative Versions. *Journal of Legal Economics* 5(3): 43-58.
- Osborne v. Russell*, 669 P.2d 550; 1983 Alas. LEXIS 466.
- Pfau v. Comair Holdings, Inc.*, 135 Idaho 152; 15 P.3d 1160; 2000 Ida. LEXIS 137