Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption

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Reading 3

Economic Loss in the Case of a Full-Time Mother and Homemaker: When Lost Services are the Only Pecuniary Loss

by Thomas R. Ireland

In most of the early literature that considered "household services," the primary focus was on services provided by either primary or secondary homemakers. That is reflected in this collection in the paper by Douglass, Kenney and Miller [Reading #7, 1990]. Much of the literature that has come later is more general in its application, indicating that it has become more and more common to see assessments of lost services in both personal injury and wrongful death cases that do not involve homemakers. The special role of homemakers is still reflected in many of the readings that follow, particularly Reading #12 by Ireland [1991] and Reading #14 by Fischer [1993], but most of the book deals with problems generic to nonmarket service production by any decedent. What makes role of homemakers unique is that either all or a much more substantial portion of the pecuniary value of the loss caused by the death takes the form of nonmarket services. As the terms are used here, a *primary homemaker* is a full time specialist in providing nonmarket services to a family, without outside labor market employment. A *secondary homemaker* is still a specialist in providing nonmarket services, but has also invested considerable amounts of time in the labor market and is likely to return to the labor market at some point in the future.

In the sense pioneered by Gary Becker [1982], a homemaker is someone who has acquired special family-specific skills in providing nonmarket services to her family.[1] Becker views the family as a quasi-business in which two partners come together for mutual advantage in child rearing, perhaps elder care, and maximization of the flow of goods and services to the family as a whole. This usually requires one spouse, usually the husband and father, to specialize in developing his human capital skills in a way that will generate the largest possible income in the labor market. But it also requires the other spouse, usually the wife and mother, to specialize in taking care of the needs of the household and children, at the expense of part (a secondary homemaker) or all (a primary homemaker) of her earning potential in the labor market.

With the exception of the special case of "corporate spouses" to be discussed immediately below, the motive to have one spouse become either a primary or secondary homemaker normally relates to either child rearing or eldercare, most often the former. The value of an adult's labor market services are too great to be sacrificed without substantial nonmarket benefits. Based on the definitions of "homemaker" used here, a married couple without children and without other special family problems requiring a full or part time specialist, is not likely to have a "homemaker" in either the primary or secondary senses. Both spouses work on a full time basis and attempt to maximize family income by joint employment, though with possible conflicts for professionals based on locational limitations if the two spouses pass over promotions or job opportunities to live together. Some married couples have even made decisions to live in different parts of the country in order to maximize the career potentials for both spouses.

A *corporate spouse* provides a special type of nonmarket services that contribute directly to the labor market earnings of the family's primary wage earner. It is widely known that wives play a very important role in the successes of their top management level husbands. This was the central issue in the highly publicized divorce between Lorna and Gary Wendt at the end of 1997 and early in 1998.[2] Lorna Wendt was awarded $20 million based on Lorna Wendt's claims that she deserved exactly half of their estate as compensation for her 31 years as a corporate wife to Gary Wendt, president of GE Capital Services, a very profitable unit of the General Electric Company. Her lawyers successfully argued that she had organized lavish business dinners at their home in Stamford, Connecticut, a suburb of New York City, that she had traveled extensively on GE trips and was responsible for handling the family's moves each time her husband received a promotion, and that she did most of the work in raising the couple's two daughters.

This is a reasonable statement of the functions of corporate wives of top scale persons in corporate management, but many wives of doctors, lawyers and top level sales people also play very important roles in directly helping their husbands to achieve high earnings. Reading #13 by Brandi [1992] considers the role of a wife in an unpaid capacity in directly running her husband's small business, which also fits into this general category. In this book, the term "corporate spouse" is used to refer to any unpaid services of a spouse that have direct effects on the earnings of the spouse formally employed in the labor market. This is opposed to the services of primary and secondary homemakers, which may have indirect effects by freeing the spouse with primary emphasis in labor market earnings from major responsibilities for raising children, maintaining a home or eldercare. In a true corporate wife situation, however, both direct and indirect effects are involved. Lorna Wendt's claim of entitlement to half of the couple's estate included her primary responsibility for raising the couple's two daughters, which is an indirect homemaker contribution, rather than a direct corporate wife contribution.

This reading considers the special problems involved with developing a loss analysis for primary homemakers, secondary homemakers and corporate spouses.

3.1 Pecuniary Loss in the Death of a Primary Homemaker

When a full time mother and homemaker is killed, the entire pecuniary loss consists of the value of the nonmarket services she had been providing to her family. If the basis for calculating loss of financial support to the family is the loss of family income,[3] the subtraction of the homemaker's personal consumption from family income superficially appears to increase the amount of purely monetary family income made available to other family members. This superficial appearance ignores the fact that it is likely that some family expenses will rise as services the homemaker was providing before her death are replaced with services purchased from the commercial marketplace. However, in some instances, other family members will take over some the services that had previously been provided by the homemaker and other services will simply not be replaced. If this occurs, more family income actually is available after the death of the homemaker for expenditures by other family members.

Clearly, however, the family is not made better off by the homemaker's death, even in purely pecuniary terms. There is a large loss of nonmarket services that were often performed with great skill by the homemaker in a manner that cannot be replaced in qualitative terms by either other family members or by services hired in the commercial marketplace. A skilled homemaker is a person who has devoted considerable effort to understanding in very family-specific ways the set of needs represented by the entire family. In the terms used by Nobel laureate Gary Becker [1981], the homemaker had acquired family-specific human capital in lieu of labor-market-focused human capital. She had developed her family-specific human capital in a way designed to benefit her husband and her children—and herself. In doing so, both she and her husband must have decided that her homemaking and child care services were sufficiently valuable to justify the fact that she had given up considerable labor market earnings *and earnings potential in the future* in order to become a full time homemaker. There are homemakers whose abilities are so limited that they were incapable of labor market employment,[4] but the vast majority of full time homemakers are homemakers by choice and not a lack of labor market options, at least in families with two adult spouses.

In most cases, the reason for one adult deciding to become a primary homemaker relates to raising children. Becker offers substantial theoretical justification for the proposition that a well educated spouse available to children on a full time basis can significantly improve "child quality" by supplying attentive personal educational services to the children. Such spouses increase the opportunities of children to participate in important extra curricular activities and reduce the chances that children will engage in mischief that will result in lowered educational successes. In some instances, a spouse may also become a primary homemaker to be a care giver to one or more elder parents of the couple. But without children or elderly parents or the responsibilities of a corporate spouse, there is really not much for an adult who is not employed in the labor market to do in the home. Thus, voluntary full time employment in nonmarket activities is normally the result of one of these three roles, at least in families in which one spouse is working full time in the labor market. (There is some tendency for marital partners who are both employed in the labor market to retire together, which opens travel possibilities for both of them.)

The value of a homemaker's contributions can be evaluated by both replacement cost and opportunity cost methodologies. Ireland and Ward [Reading #11] points out some of the problems of the replacement cost methodology for dealing with homemakers of differing educational levels. Most time use studies do not adjust for the educational level of the homemaker, but it is clear that education has strong and direct effects on the quality with which educational services to children and even eldercare services can be rendered. It also affects the quality of financial management that can be provided to the household and on many other types of nonmarket service provision. (This would, of course, also apply to the services of corporate spouses.) Fischer [Reading #14] also makes this point very clearly. Ireland [Readings #5 and #12] strongly argues that a homemaker's educational background and potential before the marriage can be used to simulate a hypothetical long term earnings stream, which can then be used to develop an opportunity cost measure based on Current Population Survey Series P-60 data. Douglass, Kenney and Miller [Reading #7] indicate how a replacement cost approach can be used to measure a homemaker's contributions.

3.2 Pecuniary Loss in the Death of a Secondary Homemaker

A secondary homemaker may represent the hardest assessment job for an economist among the alternatives considered in this reading. A secondary homemaker maintains "mommy track" employment in the labor market, while assuming primary responsibility for child rearing. In this case, the "homemaker" spouse has invested in *some* family-specific human capital and *some* labor market human capital, but has not maximized the potential in either direction. Her homemaking skills and services will not be as great as those of a primary homemaker of equal ability, but her labor market earnings will presumably offset that difference for her family. Here again, it would be absurd to project the value of her homemaking skills based on what might be earned by workers with low education in the labor market in a replacement cost analysis. The value of her services would ordinarily be well above the unskilled level if she has the appropriate ability and education. On the other hand, her labor market earnings rate is much lower than she would be earning in a career occupation, rather than a "mommy track" job, so that an opportunity cost analysis based on her actual labor market earnings will be likely to underestimate the value of her nonmarket services.

One possible solution would be to use Current Population Survey (Series P-60) data for her education level as a proxy for her potential labor market earnings rate. That rate could then be used to estimate the value of her nonmarket services, while her money earnings would be measured in terms of what she was actually paid. In one case this author worked on, the secondary homemaker had passed up employment because of her child rearing responsibilities that could be estimated fairly accurately in terms of current earnings if she had taken that position. In this case, she had continued to work full time in the same profession, but at a lower pay rate to be in the same area as her husband, and without the opportunity to travel in ways necessary for career advancement. The differential between her earnings in the employment that she had rejected in favor of child rearing responsibilities and her current earnings became the basis of projecting her forgone earnings in a divorce action. In some circumstances, this approach could also be used in a wrongful death action.

3.3 Pecuniary Loss in the Death of a Corporate Spouse

As defined here, a "corporate spouse" is any spouse who directly assists in increasing the earnings of the other spouse, who is the primary wage earner in the family. As in the Wendt divorce case described above, this might involve putting on parties for business associates or contacts, going to dinner with prospective clients and their spouses, or business travel at which much business is conducted in social circumstances. It might also involve cases like those described in Reading #13 by Brandi, in which a spouse becomes directly involved in the small business operation of her spouse without receiving direct financial remuneration. What defines the corporate spouse circumstance is that the spouse contributes

directly to the income earning efforts of the primary wage earner in the family.

In the Wendt case, the judge's finding effectively implied that both marital partners had contributed equally to the creation of family wealth. Though an equal division of family wealth is often a legal presumption in divorce actions, this presumption is often relaxed when the amount of wealth is very large. Fischer (among others) suggests in Reading #14 that a husband's education and income can be used as a proxy for the wife's ability. This is also an argument made in Gronau [1980]. The problem with doing so is the same reason that probably underlies the exemption from the presumption of an equal division of family wealth in divorce cases involving large wealth. It is very clear that some individuals with identical education have significantly greater abilities to generate large incomes and wealth than others. If a husband earns an amount reasonably typical for his educational classification and his wife, with the same education, becomes a primary homemaker, it is reasonable to suppose that she could have had earnings comparable to his if she had entered the labor market with a full career focus. If, however, another husband with a high school education is earning $200,000 per year in a private business, it is not reasonable to suppose that his wife, also with a high school education, could have entered the labor market and had the same success.

The problem in facing the lawyers for Lorna Wendt was to show that she really was of sufficient talent to have generated half of the wealth she and her quite skilled husband accumulated, acting together. In her case, she succeeded. In many similar cases, corporate wives have not been able to make this case, though the Wendt case may send a signal to other divorcing corporate wives to try harder to make that argument. Interestingly, however, this author is not aware of any wrongful death action involving a corporate spouse.

3.4 The Importance of Family Specific Information

One issue that has come up throughout this reading and in others in this book is the importance of developing family-specific information relating to the provision of nonmarket services. Whether one uses replacement cost or opportunity cost and whether one assesses lost nonmarket services from a narrow domestic-services or a broader total-family-function perspective, concrete information about the specific services that a decedent had been providing prior to death will significantly increase the accuracy and plausibility of a lost services analysis. This is particularly true with respect to primary homemakers, secondary homemakers and corporate spouses. And while several readings in this collection describe interviews conducted by economists to provide this concrete information, the case for having this done by an outside experts is very strong. See the readings by Boss [Reading #23] or Caragonne [Reading #24].

There is nothing about the training of an economist that provides any guidance in how to properly conduct an interview, so an economist is effectively no more skilled at interviewing than a juror. In some circumstances, conducting such interviews without proper training could condemn a whole report to a successful *Daubert* challenge.

Notes

1. In a tiny number of cases, men may qualify as homemakers in this sense, but such a male who is not directly employed in the labor market is more likely to qualify in the special category of "corporate husband," as will be discussed.

2. "Divorce verdict puts value on corporate wife," Associated Press Story, *St. Louis Post-Dispatch*, December 4, 1997, page A3; "'Corporate Wife' Gains in a Divorce Ruling," *Wall Street Journal*, December 4, 1997, page B1; "Lifestyles of the rich and divorcing," *U.S. News & World Report*, December 15, 1997, page 27; "Divorce Lawyers Anxiously Await the Rest of the GE Wendt Decision," *Wall Street Journal*, December 24, 1997, page B5; "Divorce settlement is about principle, not money, for GE 'corporate wife,'" New York Times News Service, *St. Louis Post-Dispatch*, January 18, 1998, page A7.

3. This issue is explored in depth in Readings #31 to #33. Economists are not in agreement on the issue of whether personal consumption of a decedent should be based on the decedent's own income or family income. With a full time homemaker, the decedent is a consumer of family income, but earns no monetary income herself. Therefore, if the basis for loss is family income, more family income in monetary terms is available to other family members after the death of the homemaker. This is an important reason in John O. Ward's rationale (Reading #31) for using only the decedent's own income as the sole basis for loss. Using that standard, since the decedent homemaker earned no income, there would be no personal consumption deduction to consider. But using the family income standard, the homemaker's death does free up some income for other family members, net of actual outlays for commercially purchased services to replace services previously supplied by the homemaker. Trout (Reading #32) offers the rationale for the family income basis for personal consumption, but does not directly address the special circumstances involved in the death of a primary homemaker who had no labor market earnings.

4. This may, however, be the case with some single mothers on welfare, whose labor market skills are very marginal. Clearly, however, this is not true of all or even most single mothers on welfare.

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