# DAMAGES FOR WRONGFUL DEATH IN ALASKA

MILLARD F. INGRAHAM*

## I. INTRODUCTION

As former Chief Justice Boochever correctly observed, the Alaska wrongful death statute "establishes a dichotomy between, on the one hand, situations where a decedent leaves a husband, wife, children or other dependents, and, on the other hand, situations where there are no survivors in those categories."[1]

If the decedent is survived by a spouse, children, or other dependents, the personal representative brings an action for wrongful death on behalf of the surviving spouse, children, or other dependents. The damages recoverable in such a case are measured by losses to the surviving spouse, children, or other dependents. The personal representative is a nominal party only and holds the recovery in trust for the exclusive benefit of these parties. Since the damages recoverable are measured by the losses to the individual statutory beneficiaries, the allocation of settlements will be in accordance with the losses suffered by each of the surviving beneficiaries, without regard to the decedent's will or, in the absence of a will, to the laws of intestate succession. Since the personal representative holds the amounts recovered only as a trustee for the surviving spouse, children, and other dependents, these amounts are not assets of the decedent's estate and are not subject to claims of decedent's creditors or to estate or inheritance taxes.

On the other hand, if the deceased is not survived by a spouse, children, or other dependents, the personal representative brings an action for wrongful death on behalf of the estate. The personal representative is the real party in interest. The damages are those measured by the pecuniary loss to the estate. Since the amount recovered as damages for pecuniary loss to the estate "shall be administered as other personal property of the deceased person,"[2] the amount recovered will pass to the decedent's beneficiaries in accordance with his



* Private practitioner, Anchorage, Alaska. LL.B., University of Colorado, 1958; A.B., Columbia University, 1955.

1. Brown v. Estate of Jonz, 591 P.2d 532, 536 (Alaska 1979) (Boochever, C.J., dissenting).

2. ALASKA STAT. § 09.55.580 (1983).

will or, in the absence of a will, in accordance with the laws of intestate succession. Since the damages recovered are assets of the estate, they are subject to the claims of creditors and to estate and inheritance taxes.

In 1966 this writer presented a paper entitled "Damages for Wrongful Death in Alaska" before the first educational program sponsored by the Alaska Academy of Trial Lawyers. The paper was published later that year as an article in the now defunct *Alaska Law Journal*.[3] At the time the article was published, there had been no Alaska Supreme Court decisions addressing what damages may be recovered for wrongful death in Alaska or how those damages may be measured. The article examined the territorial history, both legislative and judicial, of Alaska's wrongful death statute,[4] survival statute,[5] and parental cause of action statute,[6] and attempted to predict what decisions the Alaska Supreme Court would make when it did address legal issues under these statutes. The article noted that the wrongful death statute contained the dichotomy observed by Justice Boochever and recommended that it should be remedied by further statutory amendment.

More than twenty-three years have now passed since the publication of that article. During this time, the Alaska Supreme Court on several occasions has addressed what damages are recoverable under Alaska's wrongful death statute and how those damages are measured. Unfortunately, the court has not, as yet, directly addressed these issues as they arise under the survival statute or the parental cause of action statute. The Alaska legislature has made no substantive amendments to any of the statutes under which damages for wrongful death may be recovered since the first state legislature in 1960. This article reviews the legislative and judicial history of the statutes under which damages for wrongful death may be recovered contained in the 1966 article, analyzes the decisions of the Alaska Supreme Court and the United States District Court for the District of Alaska interpreting those statutes, and suggests an amendment to the wrongful death statute that might eliminate some perceived inequities caused by the dichotomy in the statute.

Part II of this article contains the legislative and judicial history of the Alaska wrongful death statute. This section charts the evolution of the present Alaska wrongful death statute from an old Oregon

3. 4 ALASKA L.J. 113, 129, 145 (1966).

4. ALASKA STAT. § 09.55.580 (1983). At the time of the 1966 article the Alaska wrongful death statute was cited as ALASKA STAT. § 13.20.340.

5. ALASKA STAT. § 09.55.570 (1983). At the time of the 1966 article the Alaska survival statute was cited as ALASKA STAT. § 13.20.330.

6. ALASKA STAT. § 09.15.010 (1983).

statute on which it was based, through the statute contained in the civil code for the Territory of Alaska adopted by the United States Congress in 1900, through the various amendments made by the territorial legislature, to the last substantive amendments made in 1960 by the first Alaska state legislature. This section shows the dichotomy in the Alaska wrongful death statute and its historical genesis.

Part III of the article examines decisions of the Alaska Supreme Court interpreting the wrongful death statute where decedent is survived by a spouse, children, or other dependents. This section first addresses the difficult issue of who are "other dependents" within the meaning of the wrongful death statute. The section then examines the specific items of damage that the supreme court has held to be recoverable under the Alaska wrongful death statute and how those damages are measured. Finally, the section examines how lump-sum settlements are allocated among multiple beneficiaries of the decedent under the wrongful death statute, with some comments on the survival statute and how lump-sum settlements for wrongful death should be allocated between damages recoverable under the wrongful death statute and those recoverable under the survival statute.

Part IV of the article examines the measure of damages for loss to the estate where a decedent is not survived by a spouse, children, or other dependents. Since such decedents are frequently children, the section also addresses the parental cause of action statute, its history, and, it is submitted, an erroneous interpretation of that statute by the United States District Court for the District of Alaska.

The article concludes in Part V with an examination of some hypothetical cases which demonstrate perceived unjust and unfair results in the award of damages for wrongful death as a consequence of the dichotomy in the Alaska wrongful death statute. The section also contains a proposal for amendment of the Alaska wrongful death statute which would eliminate these perceived unjust and unfair results.

## II. THE HISTORY OF THE ALASKA WRONGFUL DEATH STATUTE

The Alaska wrongful death statute has evolved through numerous statutory amendments and judicial interpretations. The statute had its genesis in an old Oregon statute which read:

> When the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars and the amount recovered, if

> any, shall be administered as other personal property of the deceased person . . . .[7]

The Oregon cases interpreting this statute prior to 1900 held that the measure of damages was the pecuniary loss to the estate by reason of the death rather than the loss to the beneficiaries. The recoverable damages were the difference between the value of the decedent's estate at the time of the death and the probable value of the estate had the decedent survived to the end of his life expectancy.[8]

In 1900, Congress enacted a civil code for the Territory of Alaska which was taken largely from the Oregon code.[9] The wrongful death statute enacted in the Alaska code was taken from the Oregon statute quoted above, but additional language was incorporated into the statute which provided that, if the decedent left a surviving spouse or children, the amount recovered would be exclusively for them, and only when there was no surviving spouse or children would the amount recovered be administered as other personal property of the estate. Thus, the first Alaska wrongful death statute read:

> When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed [five] *ten* thousand dollars, and *the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife, or children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration, and when he or she leaves no husband, wife, or children, him or her surviving,* the amount recovered shall be administered as other personal property of the deceased person; but the Plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper.[10]

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7. OREGON LAWS ANN. § 371 (Hill 1892), *quoted in* Perham v. Portland Gen. Elec. Co., 33 Or. 451, 458, 53 P. 14, 16 (1898) *and* Wien Alaska Airlines v. Simmonds, 241 F.2d 57, 58-59 (9th Cir. 1957).

8. Perham v. Portland Gen. Elec. Co., 33 Or. 451, 466-67, 53 P. 14, 19 (1898); Carlson v. Oregon Short-Line Ry., 21 Or. 450, 456-57, 28 P. 497, 499 (1892).

9. City of Fairbanks v. Schaible, 375 P.2d 201, 207 (Alaska 1962) (quoting T. CARTER, ANNOTATED ALASKA CODES xviii (1907)).

10. THE LAWS OF ALASKA, CODE CIV. PROC. § 353 (ed. Carter 1900) (enacted by the United States Congress: Act of June 6, 1900, c.786, 31 Stat. 321, 392). The convention followed in this article to indicate amendments to statutes is that language deleted by the amendment will be enclosed in brackets and language added by the amendment will be italicized.

The Alaska wrongful death statute was first construed by the Ninth Circuit Court of Appeals in *Jennings v. Alaska Treadwell Gold Mining Co.*[11] In *Jennings,* the decedent left no spouse or children surviving. The court noted the language in the Alaska statute that Congress had added to the Oregon statute from which it was taken and reasoned that the addition did not affect the situation where no spouse or children survived the decedent. The court then followed the Oregon decisions and held that the measure of damages was the loss to the estate.[12]

In *Wien Alaska Airlines v. Simmonds,*[13] the Ninth Circuit Court of Appeals was presented with its first opportunity to construe the statute where a spouse and children did survive the decedent. In *Wien,* the court held that where a spouse and children survived the decedent the measure of damages was the pecuniary loss to the survivors, not the loss to the decedent's estate.[14]

In 1955, prior to the trial but subsequent to the accrual of the claim in *Wien,*[15] the territorial legislature significantly amended the wrongful death statute for the first time since its enactment in 1900. First, the legislature raised the maximum amount of recoverable damages to $50,000. Next, the legislature deleted the language surviving from the Oregon statute which provided that when a decedent is not survived by a spouse or children "the amount recovered shall be administered as other personal property of the deceased person," and in its place inserted that the damages recovered where no spouse or children survived would be for the benefit per capita of grandchildren, if any, or the surviving parent or parents of the decedent. Finally, the legislature provided that "[i]n determining the amount of the award,

11. 170 F. 146 (9th Cir. 1909). During territorial days, appeals from the United States District Courts for the Territory of Alaska were to the Ninth Circuit Court of Appeals. As the highest appellate court for the interpretation of Alaska law, the Ninth Circuit Court of Appeals functioned as the "territorial supreme court" and its decisions on Alaska law were binding on United Stated District Courts for the Territory of Alaska, the territorial trial courts.

12. *Id.* at 149. Loss to the estate was also adopted by the territorial trial courts as the measure of damages when the decedent was not survived by a spouse or dependent children. Linge's Adm'r v. Alaska Treadwell Co., 3 Alaska 9, 13-14 (1906); Kreidler v. Ketchikan Spruce Mills, 10 Alaska 365, 367 (1943). In *Kreidler,* it appears that decedent was actually survived by adult, non-dependent children. The court applied a loss to the estate measure of damages for the wrongful death without any discussion of whether the survival of children mandated another measure of damages.

13. 241 F.2d 57 (9th Cir. 1957).

14. *Id.* at 58. A territorial trial court decision also adopting pecuniary loss to the surviving spouse and children as the measure of damages when a spouse or children survive the decedent is *Dralle v. Steele,* 13 Alaska 680, 688 (1952).

15. *Id.* at 58 n.2.

the court or jury shall consider but is not limited to . . ." six specified items of damage:

> (1) Deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to the age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during his lifetime.
>
> (2) Loss of contributions for support.
>
> (3) Loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries.
>
> (4) Loss of consortium.
>
> (5) Loss of prospective training and education.
>
> (6) Medical and funeral expenses.[16]

In 1957, the legislature again amended the statute. It deleted grandchildren and parents as statutory beneficiaries for whom damages for wrongful death could be recovered and reinserted the language from the 1900 statute that when a decedent is not survived by a

16. In its entirety, the statute enacted in 1955 read as follows:

When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefore against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages herein shall not exceed [ten] *fifty* thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children, him or her surviving; [and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration, and when he or she leaves no husband, wife, or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper.] *or leaving no husband, wife or children surviving then and in that event, for the benefit per capita of the child or children of the decedent's child or children, if any, and the surviving parent or parents of the decedent. When the Plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.*

*The damages recoverable under this Act shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.*

*In fixing the amount of damages to be awarded under this Act, the Court or jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the*

spouse or children "the amount recovered shall be administered as other personal property of the deceased person."[17]

In 1960, the first state legislature made the last substantive[18] amendments to the statute. The legislature removed the limitation on the maximum recoverable damages and substituted that the damages shall be "such . . . as the court or jury may deem fair and just"; it added "other dependents" to the class of beneficiaries for whose benefit damages for wrongful death may be recovered; and it limited the

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*death. In determining the amount of the award, the Court or jury shall consider but is not limited to the following:*

*(1) Deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to the age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during his lifetime.*

*(2) Loss of contributions for support.*

*(3) Loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries.*

*(4) Loss of consortium.*

*(5) Loss of prospective training and education.*

*(6) Medical and funeral expenses.*

*The death of a beneficiary or beneficiaries before judgment shall not affect the amount of damages recoverable hereunder.*

*The right of action hereby granted shall not be abated by the death of a person named or to be named the defendants.*

Act, ch.153, 1955 Alaska Sess. Laws 315.

17. The relevant portion of the statute as amended read:

When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefore against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifty thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving; [or leaving no husband, wife or children surviving then and in that event, for the benefit per capita of the child or children of the decedent's child or children, if any, and the surviving parent or parents of the decedent] *and when he or she leaves no husband, wife or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person.*

Act, ch.6, 1957 Alaska Sess. Laws 7.

18. In 1972, the wrongful death statute was moved from Title 13, ALASKA STAT. 13.20.340, to Title 9, ALASKA STAT. § 09.55.580, as part of the Act adopting the Uniform Probate Code. Act, ch. 78, § 4, 1972 Alaska Sess. Laws 120-21. The statute was revised in 1983 to eliminate gender references pursuant to Act, ch.58, § 4, 1982 Alaska Sess. Laws. By this revision, "decedent's husband or wife and children when he or she leaves a husband, wife or children" was changed to "decedent's spouse and children when decedent is survived by a spouse or children," and "decedent leaves no husband, or wife surviving him or her" was changed to "decedent is survived by no spouse or children."

damages recoverable to "pecuniary loss"[19] when the decedent is not survived by a spouse, children, or other dependents.

The Alaska wrongful death statute as it presently exists and has existed virtually unchanged since 1960, reads as follows:

> (a) When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. The action shall be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents. When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the deceased person, but shall be limited to pecuniary loss. When the Plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.
>
> (b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.
>
> (c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all of the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

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19. The relevant portion of the statute as amended read:

> When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall, [not exceed fifty thousand dollars] *be such damages as to the court or jury may deem fair and just* and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving *or dependents*; and when he or she leaves no husband, wife or children, him or her surviving; *or other dependents,* the amount recovered shall be administered as other personal property of the deceased person *but shall be limited to pecuniary loss.* When the Plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

Act, ch. 163, 1960 Alaska Sess. Laws 259.

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations of what the deceased may have saved during his lifetime;

(2) loss of contributions for support;

(3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;

(4) loss of consortium;

(5) loss of prospective training and education;

(6) medical and funeral expense.

(d) The death of a beneficiary or beneficiaries before judgment does not affect the amount of damages recoverable hereunder.

(e) The right of action hereby granted is not abated by the death of a person named or to be named the defendant.[20]

## III. DAMAGES WHERE THE DECEDENT IS SURVIVED BY A SPOUSE OR CHILDREN OR OTHER DEPENDENTS

### A. Who are "Other Dependents?"

In the 1960 amendment, the legislature added "other dependents" to "spouse or children" as the class of persons for whose exclusive benefit damages for wrongful death are recovered.[21] Although it is usually clear who a decedent's spouse or children are, it is not clear who a decedent's "other dependents" are.

The issue of who are "other dependents" first came before the Alaska Supreme Court in *In re Estate of Pushruk.*[22] In *Pushruk,* the decedent left his mother as his sole legal heir. It was stipulated that the decedent's mother was not dependent on the decedent at the time of his death. The personal representative of the estate argued, however, that "dependent" within the meaning of the Alaska wrongful death statute includes those who can show that they would have become dependent on the deceased had he survived. Presumably, the personal representative was prepared to show that had decedent lived, his mother would have become dependent upon him in her old age; thus, the personal representative argued that the mother should be considered a dependent for whose exclusive benefit damages for wrongful death are recovered. The Alaska Supreme Court rejected the personal representative's argument and held that dependency is a factual matter that must be determined according to the facts and circumstances existing at the time of death.[23] Since the decedent's mother was not dependent upon him at the time of death, she could

20. ALASKA STAT. § 09.55.580 (1983).

21. *See supra* text accompanying notes 18-20.

22. 562 P.2d 329 (Alaska 1977).

23. *Id.* at 332.

not be considered an "other dependent" for whose benefit the damages for wrongful death may be recovered.

The next case addressing the issue of "other dependents" to come before the Alaska Supreme Court was *Brown v. Estate of Jonz.*[24] In *Brown,* the decedent was survived by his widow, a child born of his marriage to the widow, and three non-adopted stepchildren who lived with decedent and were solely supported by decedent. The widow commenced an action for wrongful death of decedent on behalf of herself, decedent's natural child, and the three non-adopted stepchildren. The widow contended that the non-adopted stepchildren were either "other dependents" or "children" within the meaning of the Alaska wrongful death statute. The trial court ruled in pretrial motions that the stepchildren were not in the class of beneficiaries for whose benefit damages for wrongful death could be recovered. On appeal, the Alaska Supreme Court declined to review the trial court's ruling because the widow failed to preserve the issue by not objecting to an instruction to the jury that "[t]he word heir of decedent Russell Brown as used in these instructions refers to Onita J. Brown, his widow, and Marie Nicole Brown, his daughter," and by not offering other instructions on the issue.[25] In a footnote, the supreme court expressly stated: "In declining to review this issue [of whether stepchildren are 'other dependents'], it is not our intention to imply either agreement or disagreement with the superior court's construction of the Alaska Wrongful Death Act."[26]

In a ringing dissent, Justice Boochever contended that "it was plain error not to instruct that the stepchildren of Russell Brown, who were completely dependent upon him at the time of his death, were 'other dependents' " entitled to recover damages to them caused by the wrongful death of their stepfather.[27] Justice Boochever quoted with approval *In re Estate of Pushruk* concerning the history and purpose of the 1960 amendment which added "other dependents" to the class of beneficiaries for whose exclusive benefit damages for wrongful death may be recovered:

> Considering the history and purposes of the statute, this amendment appears designed to protect the interest of those who, like children and spouses, will suffer financial loss. The term "dependents" provides for all such persons without creating either an excessively narrow or an overbroad classification. Thus, dependency is a question of fact.[28]

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24. 591 P.2d 532 (Alaska 1979).

25. *Id.* at 533.

26. *Id.* at 535 n.8.

27. *Id.* at 536 (Boochever, C.J., dissenting).

28. *Id.* (Boochever, C.J., dissenting) (quoting In re Estate of Pushruk, 562 P.2d 329, 331 (Alaska 1977)).

Justice Boochever concluded that "the failure to instruct that the dependent children were entitled to recover results in a miscarriage of justice."[29]

The most recent case addressing the issue of "other dependents" is *Greer Tank and Welding, Inc. v. Boettger.*[30] In *Boettger,* the decedent, Sam Boettger, had married Louella Boettger in May 1965. At the time of their marriage, Louella had a son, Todd, born in July 1964. While Sam was very devoted to Todd and treated him like his own son, he never formally adopted him. A child, Forrest, was born of the marriage. Sam and Louella were divorced in 1968, largely because Sam, in order to earn enough money to support his family, was away from home too much for Louella. After the divorce, Sam sent money to her irregularly in varying amounts, depending on how he was doing. The couple remarried about a year after the divorce, in part because Louella was pregnant with their second child, Danielle. They were divorced a second time in 1972, again because Sam's job as a long-haul truck driver required him to be away from home too much. After the second divorce, Sam continued to provide irregular support to the family and would stay with the family for short periods when he was near their home in Seattle, Washington. Sam was killed in 1975 while en route to Alaska to investigate job possibilities. Louella brought an action for wrongful death on behalf of herself, Sam's children, Forrest and Danielle, and her child, Todd.

The defendant Greer's first contention was that, as a matter of law, Louella and Todd could not be "other dependents" under the Alaska wrongful death statute because Sam owed no legal duty of support to them. Sam was divorced from Louella at the time of his death and he had never adopted Todd. The court rejected this contention and adopted Justice Boochever's reasoning in his dissent in *Brown v. Estate of Jonz* that dependency is a question of fact, not of legal relations. The court held:

> We believe that the legislature, by adding "other dependents" to the categories of spouse and children, intended to embrace those who occupy a position similar to those in the specified classes and who were actually dependent upon the decedent for support at the time of his death. A showing must be made of actual dependency for significant contributions of support over a sufficient period of time to justify the assumption that some contribution would have continued.[31]

Greer next contended that even if Louella and Todd were not barred as a matter of law from being "other dependents," they were not as a matter of fact dependent upon Sam for their support. The

29. *Id.* at 538 (Boochever, C.J., dissenting).
30. 609 P.2d 548 (Alaska 1980).
31. *Id.* at 551.

court also rejected this contention, finding that "[a]lthough Sam's contributions to his family were not regular, and varied in amount, we believe that they were sufficient to enable us to uphold the trial court's ruling."[32]

Justices Conner and Burke dissented on the grounds that they could "find no justification for including Louella and Todd within the intendment of the wrongful death statute" because "[a]t the time of a decedent's death there existed no cognizable legal relationship between the decedent and either Louella or Todd."[33] Justice Burke added that he thought "it quite remarkable that Greer should now find itself legally obligated to pay money to persons *to whom the decedent himself owed no such obligation* at the time of his death."[34]

Although *Boettger* may have been correctly decided on its facts, the open-ended holding, that dependency is purely a matter of fact at the time of death, results in considerable uncertainty as to what types of relations can result in a dependency. A non-spouse companion with whom a decedent had cohabitated but not married, and to whom he had given partial support, would probably be a dependent; but would an occasional lover upon whom the decedent irregularly bestowed gifts? How long must a cohabitation endure to create a factual dependency? How much financial support must the decedent have contributed to create a dependency? Could a long-time employee be a "dependent" if he or she could show factual dependency upon employment with the decedent? The determination of dependency as a question of fact must be developed by further judicial decision.

B. Recoverable Items of Damage

1. *Loss of Contributions for Support.* Paragraph (c)(2) of the Alaska wrongful death statute directs the court or jury to consider "loss of contributions for support" in determining the amount of damages to be awarded. In most wrongful death cases where the decedent is survived by a spouse, children, or other dependents, the largest item of recoverable damage to the surviving beneficiaries is the loss of contributions for their support which they would have received from the decedent had the decedent lived to his or her probable life expectancy.

The measure of damages for loss of contributions for support was first considered by the Alaska Supreme Court in *State v. Guinn.*[35] Robert Guinn died as a result of an automobile accident. His surviving spouse, Mary Guinn, commenced an action for wrongful death as administratrix of his estate on behalf of herself and their child, Celeste,

32. *Id.*
33. *Id.* at 553.
34. *Id.* (emphasis in original).
35. 555 P.2d 530, 544-47 (Alaska 1976).

against the State of Alaska. The case was tried to the court without a jury, as was then required for actions against the State of Alaska.[36] The court first determined that the State of Alaska was legally responsible for the death of Robert Guinn. It then considered the question of damages.

Richard Solie, a consulting economist, had testified as an expert witness on behalf of Guinn on the issue of damages. His calculations concerning the loss of contributions for support incurred by the surviving beneficiaries were largely adopted by the trial court in fixing an award. In his testimony, Dr. Solie projected the probable gross income that Guinn would have made between the time of his death and the end of his working life expectancy based upon the following assumptions: that Guinn would have remained employed by his employer, Wien Airlines, during the balance of his thirty-eight-year working life expectancy; that he would have been promoted to the position of a dispatcher; and that he would have received the automatic increases in the wage rate based on length of service contained in the union contract with the employer.[37] Dr. Solie then calculated the amount that Guinn would have spent on personal consumption between the time of his death and the end of his probable working life expectancy. This calculation was based upon consumption figures furnished by the United States Department of Labor, Bureau of Labor

36. The former Alaska Statute § 09.50.290, in effect since statehood, required actions against the state to be tried to the court; it was repealed by Act, ch. 147 § 1, 1975 Alaska Sess. Laws.

37. Most of the state's attack on the methodology employed by Dr. Solie in computing probable future gross earnings concerns whether the court could consider the automatic increases in the wage rate contained in the union contract. At the time of the trial, the Alaska Supreme Court had held in Beaulieu v. Elliott, 434 P.2d 665, 671 (Alaska 1967), that in computing future lost income in personal injury or wrongful death cases, the trier of fact could not consider probable future inflationary increases in the general wage scale nor, on the other hand, could it discount to its present value the gross amount of the probable future income loss. The *Beaulieu* court reasoned "that the rate of depreciation and the value of the dollar, attributable to ongoing inflation, approximately offsets the financial windfall otherwise attributable to a failure to discount to present value." State v. Guinn, 555 P.2d 530, at 545. In State v. Guinn, 555 P.2d 530 (Alaska 1976), the court held that while the trier of fact could not consider general inflationary wage increases in computing future lost income, it could consider fixed step increases contained in the union contract. The holding no longer has the importance that it had at that time because of the "tort reform" legislation passed in 1986 where, among other things, the legislature provided that the finder of fact must reduce future economic damages to present value, but when computing the amount of wages the injured party could have been expected to earn during future years, the finder of fact may take "into account future anticipated inflation and reasonably anticipated increases in the injured party's earnings . . . " unless "the parties agree that the award of future damages may be computed under the rule adopted in the case of Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967)." ALASKA STAT. § 09.17.040(b), (c) (Supp. 1988).

Statistics. Dr. Solie deducted the amount attributed to Guinn's personal consumption from the amount projected as gross future earnings. He determined that the remainder represented the income which would have been directly or indirectly available as support to the surviving spouse and child had Guinn lived to the end of his probable working life expectancy.[38]

The Alaska Supreme Court approved the general methodology used by Dr. Solie. The state argued that the consumption figure which Dr. Solie used was too low. The court would not consider this argument because the state did not challenge the accuracy of the testimony at the trial level and "it does not appear that it was clear error to rely on the methodology to which Dr. Solie testified."[39] The state also argued that since the Alaska wrongful death statute required the trier of fact to "fix the award at a sum which will fairly compensate for the injury resulting from the death, the award is to be evaluated as if it were the principal of an annuity contract, for the purpose of determining the annual income-generative capacity of the award."[40] The court noted that this "annuity analysis" was used in one California decision but held that no such evaluation was required under Alaska law.[41]

The methodology of determining loss of contributions for support to the surviving beneficiaries by projecting decedent's probable future income and subtracting his probable consumption was again approved by the Alaska Supreme Court in *Greer Tank and Welding v. Boettger.*[42] In *Boettger,* Eugene Silberberg, an economist who testified on behalf of the estate, projected the decedent's lifetime earnings at $346,531. From this amount he subtracted $90,148, which represented "the percentage of $346,531 that the head of a family of five living at home would normally spend on himself." The trial court, sitting as the trier of fact without a jury, rejected the economist's total for the decedent's lifetime earnings and projected decedent's lifetime earnings at only $182,329.75. However, the trial court accepted the $90,148 figure that the economist had projected as decedent's lifetime personal consumption and deducted it from the $182,329.75. As a

38. The Alaska Supreme Court had held that probable future income taxes are not to be deducted from probable future lost earnings between the time of trial and the end of the probable working life expectancy, although they are to be deducted from probable lost earnings from the time of injury or death until time of trial. *Beaulieu,* 434 P.2d 665, 672-73 (Alaska 1967).

39. 555 P.2d at 547.

40. *Id.*

41. *Id.* at 547 n.41 (citing Lucas v. Southern Pac. R.R., 19 Cal. App. 3d 124, 96 Cal. Rptr. 356 (1971)).

42. 609 P.2d 548, 552 (Alaska 1980).

result, the trial court raised the percentage of decedent's lifetime personal consumption from approximately twenty-seven percent to almost fifty percent of his lifetime future earnings, even though there was no evidence specifically indicating that decedent would personally consume fifty percent of his income over his lifetime.[43]

Dr. Silberberg estimated that decedent, if he were living alone and contributing only to the support of his two natural children, would have personally consumed sixty-nine percent of his income. He also estimated that the head of a family of five would have personally consumed twenty-seven percent of his income. The supreme court affirmed the award of the trial judge on the basis that the lower court "could reasonably have extrapolated his fifty percent consumption from these two estimates above, in light of the evidence that [the decedent] had four dependents rather than two, that his spending habits were conservative, and that he was apparently maintaining a separate residence."[44]

The most recent Alaska Supreme Court case addressing damages for loss of contributions for support to a surviving spouse, children, or other dependents is *Tommy's Elbow Room, Inc. v. Kavorkian.*[45] *Kavorkian,* unlike *Guinn* and *Boettger,* was tried before a jury. In *Kavorkian,* the court instructed the jury as to the proper method of determining damages for wrongful death where the decedent was survived by a spouse and a daughter. In order to determine "the possible loss of money or property that each beneficiary could have reasonably expected to receive from [the decedent] had she continued to live,"[46] the jury was instructed as follows:

> First, compute the amount the deceased would have earned had she lived from the date of her death to the present and subtract from that figure an amount representing the income taxes the deceased would have paid on those earnings and also subtract an amount representing what the deceased would have spent on herself had she lived. Second, compute the amount of earnings the deceased would have earned from the present to the end of her natural life expectancy. Do not subtract the income taxes she would have paid but do subtract an amount representing what the deceased would have

43. *Id.*

44. *Id.* at 552. The court, in affirming the "extrapolation" of the trial judge, relied upon its dicta in Morrison v. State, 516 P.2d 402, 405 (Alaska 1973):

> Certainly in many cases, as is true in this case, some items of damage cannot be fixed with mathematical precision. In those instances the trial judge is necessarily forced to estimate and as long as he follows the correct rules of law, and his estimation appears reasonable and is grounded upon the evidence, his finding will remain undisturbed.

609 P.2d at 552.

45. 727 P.2d 1038 (Alaska 1986).

46. *Id.* at 1046.

> spent on herself had she lived to the end of her natural life expectancy. The sum of these two calculations is the amount the deceased would have had available to give the beneficiaries.[47]

The defendant, Tommy's Elbow Room, objected to this instruction because it did not specifically require the jury to award to the surviving spouse and child the economic loss suffered by each as a result of the wrongful death of the decedent. Instead, the instruction directed the jury to follow the methodology approved in *Guinn* and *Boettger*: to project the future income that decedent would have earned between the time of her death and the end of her natural life expectancy, to subtract from this amount the amount of her probable personal consumption during this period, and to award the remainder as the net economic loss suffered by the surviving spouse and child. The court characterized the method as "a 'shorthand' method for another, more exacting method in which the fact-finder attempts to specify the contributions the deceased in fact would have made to her household . . . ."[48] The court observed that "[t]his 'shorthand' method is more common and involves fewer computations." The court found "no error in using it."[49]

The supreme court did criticize the instruction because it did not "explicitly direct the jury's attention to how long each of the individual beneficiaries would have received contributions [for support]."[50] The court noted, however, that the economist who testified on behalf of the beneficiaries called the jury's attention to each beneficiary's circumstances as they related to loss of contributions for support:

> He told the jury that if Marie Kavorkian had lived, Sarah Kavorkian would presumably have left home after graduating from college, and that Sarah's recovery should reflect this fact. He also emphasized that in computing the fair value of "assistance and services" Ralph Kavorkian would have received, the fact that Ralph's life expectancy was less than Marie's should be taken into account.[51]

The court also noted that the jury instructions and the verdict forms instructed the jury to make separate awards for Ralph and Sarah Kavorkian. Thus, the court held that the jury instruction was "not incorrect, but incomplete" and, when supplemented by the testimony of the expert, any error in the instruction was harmless.[52]

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47. *Id.* at 1046-47.

48. *Id.* at 1047 (citing 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:6, at 142 (2d ed. 1975)).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* In the text of its opinion, the supreme court refers to the decedent as "Marie." In the instruction quoted above, the superior court refers to the decedent as

Read together, *Guinn, Greer,* and *Kavorkian* indicate that where the decedent is survived by a spouse, children, or other dependents, an award of damages for loss of contributions for support will be determined as follows: first, the finder of fact must make a separate damage award for each beneficiary based upon the circumstances of each.[53] The proof of damages for loss of contributions for support for each beneficiary will be determined by the amount that each beneficiary could have expected for support between the time of decedent's death and the end of decedent's probable life expectancy. If it is probable that a child or other dependent would have ceased to receive contribution or support from the decedent at some time in the future, the fact finder must consider that probability in making an award of loss of contributions for support to that beneficiary. However, when at least one of the surviving beneficiaries could have reasonably expected contributions for support from the decedent from the time of decedent's death until the end of decedent's probable life expectancy, the fact finder may compute the measure of total loss to all the beneficiaries by the "shorthand" method of projecting the gross amount decedent probably would have earned from the time of his or her death to the end of his or her probable life expectancy, deducting the amount that decedent would have personally consumed and awarding the remainder as the total amount that would have directly or indirectly gone for the support of decedent's spouse, children, or other dependents. The finder of fact must then apportion this award among the spouse, children, or other dependents according to the losses suffered by each.

2. *Loss of Expectation of Inheritance.* Paragraph (c)(1) of the Alaska wrongful death statute directs the court or jury to consider "deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries," in addition to loss of contributions for support, in determining the amount of damages to be awarded. Other jurisdictions which measure damages for wrongful death by deprivation of the expectation of pecuniary benefits to the beneficiaries permit the finder of fact to consider those amounts that the decedent would have earned and saved between the time of death and the end of probable life expectancy, and which the beneficiaries would have inherited, in fixing

"Gladys." Decedent's full name was Gladys Marie Kavorkian. "Gladys" and "Marie" refer to the same decedent.

53. This principle was first stated by the Alaska Supreme Court in Horsford v. Estate of Horsford, 561 P.2d 722, 727 (Alaska 1977). The court noted that the statute is "silent as to whether or not the trier of fact should determine the loss suffered by each surviving beneficiary and then make a separate award for each, or calculate the loss suffered by each beneficiary, total such losses, and then enter a lump sum verdict." 561 P.2d at 724. The court held that the proper method is for the trier of fact to make a separate award for each beneficiary. *Id.* at 726.

the damage award. This item of damage is generally called loss of the beneficiaries' expectation of inheritance.[54]

In *Kavorkian,* the court instructed the jury that it could award the surviving beneficiaries of Mrs. Kavorkian money or property that each could have reasonably expected to receive from Mrs. Kavorkian had she continued to live. Furthermore, it told the jurors that "[t]his item of loss includes both the loss, if any, of money and property, including support, that the deceased would have given to each beneficiary during the deceased's lifetime and *any savings or accumulations the deceased would have produced during her natural life and which would have gone to the beneficiary on the deceased's death.*"[55] The instruction was thus in accordance with the general rule that surviving beneficiaries of the decedent are entitled to loss of expectation of inheritance, as part of "deprivation of the expectation of pecuniary benefits." Apparently, no objection was made to this portion of the instruction.

Some defendants have objected to recovery for expectation of inheritance in wrongful death awards because of the peculiar wording of the Alaska statute. Their argument focuses on the language in paragraph (c)(1) of the statute that directs the finder of fact to consider "deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries . . . *without regard to probable accumulations of what the deceased may have saved during his lifetime.*"[56] These defendants interpret this language to mean that in determining the pecuniary benefits that the beneficiary or beneficiaries might have expected had the decedent continued to live, the finder of fact may not consider amounts the decedent may have saved from the time of his death until the end of his natural life expectancy that would have been inherited by his beneficiaries.

This argument is not persuasive for at least two reasons. First, in determining the amount of an award of damages to the beneficiaries for wrongful death, the finder of fact is not necessarily limited to the six items of damage specifically listed in paragraph (c) of the statute.

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54. 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:39, at 278. Speiser states:

> No less an authority than Tiffany, in the second edition of his pioneer wrongful death treatise, published more than half a century ago, stated: "Where the evidence shows that it is probable that the decedent, but for his death would have accumulated property, which if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefits as to authorize a recovery of damages for its loss."

55. 727 P.2d at 1046 (emphasis added).

56. ALASKA STAT. § 09.55.580 (1983) (emphasis added).

Under the wrongful death statute, the finder of fact shall limit damages to those "which are the natural and proximate consequences of the negligent or wrongful act or omission" of the defendant and shall fix an award that "will fairly compensate for the injury resulting from the death." The six specifically listed items are circumstances that "the court or jury shall consider *but is not limited to*" in fixing the amount of the damages. For example, in *Kavorkian* the court ruled that the jury could award the statutory beneficiaries damages for their mental anguish resulting from the death of decedent, even though that item of damage is not included in the specifically listed items of damages.[57] The same reasoning that persuaded the *Kavorkian* court to allow recovery of mental anguish should also allow recovery of loss of inheritance, even if the court holds that loss of inheritance is not recoverable under paragraph (c)(1) as "deprivation of the expectation of pecuniary benefits."

Second, a close textual analysis of paragraph (c)(1) does not mandate the rejection of loss of expectation of inheritance as a recoverable item of damage. The Alaska wrongful death statute directs the finder of fact to consider, in determining the amount of an award, deprivation of the expectation of pecuniary benefits "that would have resulted from the *continued life* of the deceased and without regard to probable accumulations of what the deceased may have saved during the *lifetime* of the deceased." An interpretation of this language that is at least as reasonable as that of the defendants set forth above is that the statute draws a distinction between "the continued life of the deceased" and "the lifetime of the deceased." Under this interpretation of the statute, "the continued life of the deceased" is the life that decedent would have lived but for the wrongful death, and "the lifetime of the deceased" is the life that decedent actually lived. The finder of fact may award damages for amounts that the deceased probably would have accumulated during his or her continued life (from the date of

57. 727 P.2d at 1048. *See infra* text accompanying notes 69-74. Even though the supreme court in *Kavorkian* allowed recovery for mental anguish by the statutory beneficiaries, the court made it clear that the wrongful death statute "is not to be construed as open invitation to the jury to award damages from any or all injuries or losses resulting from the death." 727 P.2d at 1046. The court held that it was reversible error for the trial court to have instructed the jury: "In fixing the total amount of the loss for each beneficiary, there are several items of loss that each beneficiary may have suffered. I will describe each of these items for you, and you must consider, for each beneficiary, each of these items of loss that you find was legally caused by the acts of the defendants. *You may also consider other items of loss suffered by each beneficiary and supported by the evidence in this case.*" *Id.* at 1045 (emphasis in original). The court found the emphasized language "unnecessary and potentially confusing." *Id.* at 1046. The implication from the holding is that while the court is not necessarily limited to the six specifically included items of damage in the statute, the court must specifically instruct the jury for what losses it may award damages.

death to the end of probable life expectancy) and which would have been inherited by the beneficiaries, without regard to what the deceased may have saved during his or her lifetime (from date of birth until date of actual death). Read this way, the paragraph simply means that the finder of fact can find that the beneficiaries could have expected to receive pecuniary benefits, including inheritance, from the continued life of the decedent, had he or she not died, even though the decedent had not accumulated savings during his or her lifetime.[58]

Since the meaning of the statute is at best ambiguous, the court should interpret the statute in a way that will result in awards of those damages "which are the natural and proximate consequence of the negligent or wrongful act or omission" of the defendant and that "will fairly compensate for the injury resulting from the death." Such an award of damages should include loss of expectance of inheritance.

3. *Loss of Consortium.* Paragraph (c)(4) of the Alaska wrongful death statute directs the court or jury to consider loss of consortium in determining the amount of the damage award. The cause of action for loss of consortium has changed significantly over time. At common law, a cause of action for loss of consortium existed in a husband against a person who caused him to lose his wife's services, society, companionship, and related conjugal benefits.[59] The husband's cause of action for loss of consortium was incident to the marriage relationship and could not exist without it.[60] A wife, however, had no cause of action for loss of consortium of the husband.[61]

The Alaska Supreme Court held in *Schreiner v. Fruit*[62] that both a husband and a wife have a cause of action for loss of consortium caused by negligently inflicted injury to his or her spouse. In *Hibpshmam v. Prudhoe Bay Supply, Inc.*,[63] the supreme court extended the cause of action to allow minor children to recover for loss of parental consortium resulting from injuries tortiously inflicted on

58. If this interpretation of the statute is correct, the intent of the legislature in distinguishing "continued life of the deceased" from "the lifetime of the deceased" could have been to defeat arguments such as that presented by the defendant in Kreidler v. Ketchikan Spruce Mills, 10 Alaska 365, 369-72 (1943). In *Kreidler,* the decedent had accumulated only $410.55 during the 16 years between 1926 and 1942, the year of his death. At his death, decedent was 73 years old and had a life expectancy of 6 years. The defendant contended that the court could not award more than 6/16 × $410.55. The judge apparently found that decedent would have accumulated more during his "continued life" than he did during his "lifetime" because he awarded $1,600.00 as damages for pecuniary loss to decedent's estate.

59. 41 AM. JUR. 2D *Husband and Wife* § 450 (1968).

60. *Id.* § 447.

61. *Id.* § 457.

62. 519 P.2d 462, 466 (Alaska 1974).

63. 734 P.2d 991 (Alaska 1987).

the parent. Although *Hibpshmam* involved an injury, and not a death, of the parent, the court relied on paragraph (c)(4) of the Alaska wrongful death statute to recognize a minor child's claim for loss of parental consortium.[64] The court also recognized that the nature of a claim for loss of consortium is not inherently sexual.[65] The nature of a spouse's claim for loss of consortium today is primarily for the loss of the care, comfort, companionship, and solace of his or her spouse, and the nature of a child's claim for loss of parental consortium is the loss of enjoyment, care, guidance, love, and protection of a parent and for deprivation of a role model.[66]

4. *Grief and Anguish of Beneficiaries.* Prior to statehood, damages for grief and anguish probably were not recoverable under Alaska's wrongful death statute. In *Dralle v. Steele,*[67] the United States District Court for the Territory of Alaska, Third Division, held that where a decedent is survived by a spouse and children, the recoverable damages are the pecuniary loss to the survivors, even though no express limitation to "pecuniary loss" appeared in the statute. The limitation of damages to pecuniary loss was in accord with the then prevailing law in the majority of United States jurisdictions.[68] *Dralle,* however, was decided under the wrongful death statute as it existed prior to the important 1955 and 1960 amendments.

In *Tommy's Elbow Room, Inc. v. Kavorkian,* the Alaska Supreme Court for the first time addressed the issue of whether damages for grief and anguish of the surviving spouse, children, or other dependents of a decedent could be recovered in an action for wrongful death under the Alaska wrongful death statute as it presently exists.[69] The court noted that the 1955 amendments provide for loss of consortium and also for losses "which are the natural and proximate consequence of the negligent or wrongful act or omission"[70] of the defendant and

64. *Id.* at 994.

65. *Id.* at n.11.

66. *Id.* at 993-94.

67. 13 Alaska 680, 687-88 (1952).

68. *Id. See also* S. SPEISER, *supra* note 55, at § 3:1.

69. 727 P.2d 1038 (Alaska 1986). The issue was alluded to by the Alaska Supreme Court earlier in Ehredt v. DeHavilland Aircraft Co. of Canada, 705 P.2d 446, 453 (Alaska 1985). The supreme court observed that "the Alaska [wrongful death statute] does not *expressly* allow the widow and children to recover for their own mental anguish." *Id.* (emphasis added). In light of the court's subsequent decision in *Kavorkian,* it appears that the court's use of the adverb "expressly" to modify the verb "allow" was deliberate to leave open the question of whether the wrongful death statute impliedly allowed recovery for mental anguish and other non-pecuniary losses.

70. 727 P.2d at 1047.

that a court or jury should arrive at an award that "will fairly compensate for the injury resulting from the death."[71] The court further noted that the 1960 amendments add that recoverable damages should be the "damages as the court or jury may deem fair and just."[72] The court reasoned that "[i]f a jury can evaluate the intangible loss suffered from not having the decedent's care, comfort and companionship, then that same jury can be trusted to ascribe damages to grief" and held that "when a jury finds that damages for pain and suffering are necessary to 'fairly compensate for the injury resulting from the death' or to render the award 'fair and just,' it may award them under the wrongful death statute."[73]

5. *Punitive Damages.* The Alaska Supreme Court also held in *Kavorkian* that punitive damages may be awarded "when there is clear evidence that the wrongdoer acted maliciously, fraudulently, or with a wanton disregard for the decedent's safety."[74] The court observed that punitive damages are not favored in the law and that they are to be allowed only with caution and within narrow limits. However, the court emphasized its unwillingness to adopt the "incongruous result of treating wrongful death actions differently than common law tort actions" with regard to punitive damages.[75]

C. Allocation of Settlements

1. *Allocation Among Several Beneficiaries.* Alaska's wrongful death statute requires damages to be assessed according to the loss suffered by each statutory beneficiary.[76] If an action for wrongful death proceeds to trial, the trier of fact will make a separate award for each beneficiary based on each beneficiary's loss. Actions for wrongful death, however, like other tort actions, are usually settled without

71. *Id.*

72. *Id.*

73. *Id.* at 1048 (citing Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977)). The court noted that other jurisdictions (California, for example) have refused to allow recovery for pain and suffering in a wrongful death action. The court stated that it agreed with the reasoning of jurisdictions such as Arizona that hold that where a statute allows damages for loss of companionship, comfort, and guidance, as does Alaska's under the 1955 amendments, "it would be inconsistent to forbid recovery for the emotional pain suffered by a claimant as a result of the death." *Id.* (citing City of Tucson v. Wondergem, 105 Ariz. 429, 433, 466 P.2d 383, 387 (1970) (en banc) and Dawson v. Hill & Hill Truck Lines, 206 Mont. 325, 329, 671 P.2d 589, 592 (1983)).

74. *Id.*

75. *Id.*

76. *See supra* text accompanying notes 45-53. *See also* Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038, 1047 (Alaska 1987); Horsford v. Estate of Horsford, 561 P.2d 722, 727 (Alaska 1977).

trial, and the amount for which the actions are settled is determined by factors other than the losses suffered by each surviving beneficiary. Factors which influence the amount for which an action for wrongful death may be settled include the limits of liability insurance available to the defendant, risk of loss, and potential expenses of litigation. Where a personal representative has settled a claim for wrongful death for a lump sum on the behalf of several beneficiaries, the issue of allocation of the recovery among the beneficiaries becomes very real. If all of the surviving beneficiaries are within the same nuclear family, the apportionment and distribution of the recovery among them will ordinarily be agreed upon amicably. The interests of the beneficiaries may be adverse, however, in cases where the decedent is survived both by a spouse and by children of a prior marriage, or where the decedent is survived by an "other dependent" who may be outside of the nuclear family.

The issue of allocation of a settlement among multiple beneficiaries was directly presented to the Alaska Supreme Court in *Horsford v. Estate of Horsford.*[77] William Horsford died in an airplane crash, leaving a widow, Dorothy, and two children by a prior marriage, William, Jr., and Mary, ages sixteen and fourteen, respectively.

Dorothy was appointed administratrix of the estate and commenced an action on behalf of herself, William, Jr., and Mary for the wrongful death of William. The litigation was settled for the lump sum of $350,000 without allocation of the recovery among the beneficiaries. After payment of the court-approved costs and attorney's fees, the net proceeds of the settlement available for distribution to the beneficiaries was $225,864. Dorothy, as administratrix of William's estate, proposed an allocation formula which was adopted by the trial court. Under this formula, the court awarded to each of the beneficiaries a proportion of the settlement amount based upon the "reasonable and significant pecuniary expectations of the widow and the minor children had William Horsford not died."[78] The court first determined the years which each of the statutory beneficiaries "could reasonably have expected to receive significant benefits from the decedent."[79] The court determined that each of the children would receive benefits until he or she reached the age of majority, at that time nineteen years, and that the widow would receive benefits for the balance of William's life expectancy. The number of years of dependency of the widow and the number of years of dependency of the children were made numerators of two fractions. The sum of all the years of dependency of all beneficiaries was then made the denominator of the

77. 561 P.2d 722 (Alaska 1977).
78. *Id.* at 724.
79. *Id.*

fractions. The net proceeds of the settlement were then multiplied by the fraction attributed to each beneficiary. The products obtained were awarded to the beneficiaries accordingly. The results of this formula and the actual payments ordered by the court pursuant to the formula were as follows:[80]

| Beneficiary | Years of Dependency | Percent | Distribution |
|---|---|---|---|
| Dorothy | 27.80 | 27.80/35.05 or 79% | $179,144.00 |
| Children (Wm. Jr. & Mary) | 7.25 | 7.25/35.05 or 21% | $46,720.00 |
| Total | 35.05 | 35.05/35.05 or 100% | $225,864.00 |

The children objected to this formula and argued that it conflicted with Alaska's laws of intestate succession, which provide that in cases where a decedent leaves a surviving spouse and children, one half of the estate passes to the children and one half to the surviving spouse. The Alaska Supreme Court rejected this contention and affirmed the distribution ordered by the trial court. The supreme court stated that "damages in a wrongful death case are to be assessed according to the actual losses of each qualified surviving beneficiary" and that it would be "illogical to infer that the legislature . . . intended that distribution of such damages was to be based on the fortuitous applications of Alaska's laws controlling inheritance of intestate estates."[81] The court held that "the superior court's findings of fact which supplied the foundational basis upon which the [allocation] formula was applied are not clearly erroneous."[82]

Justice Erwin dissented from the majority opinion.[83] Justice Erwin's primary objection to the majority opinion was that "it approvingly allows a presumption founded upon the father's legal obligation to support his children to control on the issue of 'actual loss' when figuring the beneficiary children's reasonable expectable years of dependency or loss."[84] Justice Erwin argued that children, and particularly children who were not in the custody of a decedent at the time of death, could reasonably have expected economic benefits from the deceased parent after they attained their age of majority. Also, Justice

80. *Id.* at 725.
81. *Id.* at 726-27.
82. *Id.* at 728.
83. *Id.* at 730-31 (Erwin, J., dissenting).
84. *Id.* at 730 (Erwin, J., dissenting).

Erwin believed that the statistical probability of remarriage of decedent's surviving spouse could create as much of a cut-off to her expected dependency as could attainment of the age of majority by the children.

It should be emphasized that the only holding of *Horsford* was that the allocation formula adopted by the trial court was not "clearly erroneous" under the specific facts of that case. The allocation formula employed in *Horsford* should not be followed slavishly in apportioning damages where a decedent is survived by a spouse and children or other dependents. As the court emphasized in *Greer Tank and Welding, Inc. v. Boettger,* dependency under the Alaska wrongful death statute is a question of fact, not a question of legal dependency.[85] Often it can be proved that the probable factual dependency of a surviving child or other dependent would have existed long after the age of majority, but for the wrongful death. Furthermore, a surviving spouse, child, or other dependant may have expectations of inheritance from the decedent. In such a case, the provisions of the decedent's will, or, if he left no will, the laws of intestate succession, must be considered in allocating an award among the surviving beneficiaries. Finally, the surviving beneficiaries may have incurred substantial grief, anguish, and suffering as a result of the death of decedent. The apportionment of such damages would depend upon the individual relationship of each surviving beneficiary to decedent and would have little, if any, relation to the years of legal dependency of the surviving beneficiaries.

2. *Allocation of Survival and Wrongful Death Claims.* When the decedent has lived for a substantial period of time after injury, the personal representative usually joins an action for damages on behalf of the surviving spouse, children, or other dependents with one for personal injuries to decedent suffered between time of injury and time of death. Actions for damages for personal injuries suffered by decedent prior to his death are brought by the personal representative under the Alaska survival statute, which reads as follows:

> All causes of action by one person against another, whether arising on contract or otherwise, except those involving defamation of character, survive to the personal representatives of the former and against the personal representatives of the latter, but this shall not be construed so as to abate an action for a wrong where any party has died after the verdict or to defeat or prejudice the right of action given by AS 09.15.010. The personal representatives may maintain

85. 609 P.2d 548, 550-52 (Alaska 1980). *See supra* text accompanying notes 30-34.

> an action thereon against the party against whom the cause of action accrued, or, after the party's death, against the personal representatives of the party.[86]

The recoverable items of damage under the survival statute are those which decedent could have recovered but for his wrongful death, including both special and general damages. The damages recovered by the personal representative under the survival statute are not held by the personal representative as a trustee for the exclusive benefit of the surviving spouse, children, or other dependents but, rather, are true assets of the decedent's estate. As a true asset of the estate, the recovery is subject to claims of creditors and is distributed to the heirs of decedent according to decedent's will or, in the absence of a will, according to the laws of intestate succession. The allocation of the proceeds of a settlement between the tort claims of decedent which survive to decedent's personal representative and the tort claims of a surviving spouse, children, or other dependents can be especially significant due to the different treatment accorded each recovery.

The Alaska Supreme Court has addressed damages under the survival statute in only one case, *Horsford v. Estate of Horsford,* and there only in the context of the proper allocation of an award. In *Horsford,*[87] the supreme court affirmed the allocation of an entire lump-sum settlement for the wrongful death of a husband and father to losses of the surviving spouse and children, with no part of the lump-sum settlement allocated to the personal injury action of the decedent which survived to his personal representative. The surviving children attacked the superior court's allocation, contending that at least part of the lump-sum settlement should have been allocated to the claim of

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86. ALASKA STAT. § 09.55.570 (1983). Prior to 1959, actions for personal injury were specifically excluded from survival. Sections 61-7-1 and 61-7-2 of the Alaska Compiled Laws Annotated 1949 read:

> A cause of action arising out of an injury to the person dies with the person of either party, except as provided in Section 61-7-3, but the provisions of this chapter shall not be construed so as to abate the action mentioned in Section 55-3-13, or to defeat or prejudice the right of action given by section 55-3-8.
>
> All other causes of action by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. When the cause of action survives, as herein provided, the executors or administrators may maintain an action thereon against the party against whom the cause of action accrued, or, after his death, against his personal representatives.

In 1959, the legislature amended these two sections to read as does the present survival statute.

It seems clear that the purpose of the amendment was to permit survival of actions for personal injury, particularly since actions for defamation are specifically excluded. If tort actions were not contemplated within "arising on contract or otherwise," the exclusion of actions for defamation would be meaningless.

87. 561 P.2d 722, 729 (Alaska 1977).

decedent for the conscious pain and suffering that he endured immediately prior to the airplane crash in which he was killed. As pointed out in the discussion of *Horsford* above,[88] the trial court awarded only 7.25/35.05 (twenty-one percent) of the settlement to the claims of the surviving children. This award was based on a factual finding of the probable years of dependency of the children and surviving spouse, had decedent lived his probable life expectancy. If, however, a substantial portion of the lump-sum settlement could be allocated to the surviving tort claim of decedent, then the proceeds of that portion of the settlement must be awarded according to the laws of intestate succession, i.e., fifty percent to the children and fifty percent to the surviving spouse. The trial court refused to allocate any of the settlement to the surviving claim of decedent for conscious pain and suffering because although "[i]t may very well be true that the decedent suffered substantial pain, suffering and mental anguish arising out of the accident in question . . . it is equally true that this pain, suffering, anguish and other elements that are normally connected with a survivor action came quickly and decisively to a tragic termination when the plane hit the ground. . . . [A]ny portion of the total settlement that could be allocable to the survivorship portion of the action would be insignificant in terms of the entire settlement amount."[89] The Alaska Supreme Court affirmed the allocation of the trial court, finding that "there is nothing in the record which indicates that any pain and suffering which William Horsford may have suffered was other than momentary."[90] The clear inference from the case is that where decedent did suffer substantial pain prior to death, recovery for that pain may be made under the survival statute.

While the decision not to allocate any of the settlement to decedent's surviving claim for conscious pain and suffering was probably correct under the facts of *Horsford,* the case is illustrative of problems that can arise when allocating a lump-sum settlement to the wrongful death claims of a surviving spouse and children and to the surviving personal injury claim of the decedent. Due to the fact the monies that are recovered by the personal representative as trustee for the claims of the surviving spouse, children, and other dependents are not subject to claims of decedent's creditors or to estate and inheritance taxes, whereas those recovered on behalf of the estate for the surviving claims of the decedent are, a plaintiff's attorney should seek to allocate

88. *See supra* text accompanying notes 77-82.
89. 561 P.2d at 730 n.22.
90. *Id.* at 729-30.

as much of the award as possible to the wrongful death claim of the surviving spouse, children, and other dependents.[91]

## IV. DAMAGES WHERE DECEDENT IS NOT SURVIVED BY A SPOUSE, CHILDREN, OR OTHER DEPENDENTS

### A. Loss to the Estate

The Alaska wrongful death statute does not specify what damages are recoverable in an action for wrongful death when a decedent is not survived by a spouse, children, or other dependents. The statute, in pertinent part, provides:

> When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the decedent but shall be limited to pecuniary loss.[92]

The language, "the amount recovered shall be administered as other personal property of the decedent," originates in the Oregon statute from which the Alaska wrongful death statute evolved and has survived basically unchanged in the existing Alaska statute.[93] The early Oregon cases and the Alaska territorial cases measured pecuniary loss to the estate by the difference between the value of the decedent's estate at the time of death and the probable value of the estate had the decedent survived to the end of probable life expectancy. The trier of fact determined this loss by considering

> what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his life, and which, as representing his net savings, would have gone to the benefit of his estate, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures.[94]

In *In re Estate of Pushruk*,[95] the Alaska Supreme Court adopted loss to the estate as the measure of damages where the decedent is not

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91. An action for wrongful death may also be joined with one for personal injuries to decedent where decedent is not survived by a spouse, children or other dependents. In such a case, however, no problem of allocation to the separate claims exists because damages recovered for both claims are true assets of the estate, subject to creditors' claims and taxes, and distributed in accordance with decedent's will or, in the absence of a will, in accordance with the laws of the intestate succession. *See infra* note 97.

92. ALASKA STAT. § 09.55.580 (1983).

93. The Alaska statute has not changed, with the exception of the two years between 1955 and 1957 when the statute provided that if decedent left "no husband, wife or children surviving then in that event, [the amount recovered, if any, shall be exclusively] for the benefit per capita of the child or children of the decedent's child or children, if any, and the surviving parent or parents of the decedent." *See supra* text accompanying notes 15-17.

94. Kreidler v. Ketchikan Spruce Mills, 10 Alaska 365, 367 (1943). *See supra* notes 11-12 and accompanying text.

95. 562 P.2d 329 (Alaska 1977).

survived by a spouse, children, or other dependents. The court in *Pushruk* stated that "if the deceased is not survived by the beneficiaries named in the statute . . . [d]amages are limited to the loss to the estate," and cited Alaska territorial cases in support of this proposition.[96] The contested issue in *Pushruk,* however, was not the proper measure of damages, and therefore the statement was not a holding.[97]

The issue of the proper measure of damages in cases where the deceased is not survived by a spouse, children, or other dependents was directly presented to the court in *Osborne v. Russell.*[98] In *Osborne,* the decedent died in an industrial accident. The decedent was not survived by a wife or children. The defendant argued that the proper measure of damages under the Alaska wrongful death statute "is loss to the beneficiaries, such loss being equal to the value of probable contributions which the deceased would have made to the beneficiaries had he lived," whether or not the deceased leaves a wife, children, or other dependents.[99] The supreme court rejected this argument and held that "if the deceased is not survived by the beneficiaries named in the statute, . . . *[d]amages are limited to the loss to the estate* and are distributed as other personal property of the deceased."[100]

*Osborne* is of greater interest, however, for its holding as to how damages for pecuniary loss to the estate may be computed. The trial court in *Osborne* instructed the jury as follows:

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96. *Id.* at 331.

97. The primary issue in *Pushruk* was whether the proceeds of a $100,000 settlement for the wrongful death of Mrs. Pushruk's son went directly to Mrs. Pushruk as a "dependent" of the decedent or whether it went to the estate and, as such, was subject to claims of creditors of the decedent. The court held that Mrs. Pushruk was not a dependent of the decedent at the time of his death. 562 P.2d at 332-33. *See supra* text accompanying notes 22-23.

98. 669 P.2d 550 (Alaska 1983).

99. *Id.* at 559-60.

100. *Id.* at 560 (quoting *In re Pushruk,* 562 P.2d 329, 331 (Alaska 1977) and citing Leavitt v. Gillaspie, 443 P.2d 61, 69 (Alaska 1968)) (emphasis in the original). *Leavitt* did not discuss the measure of damages in cases where the deceased is not survived by a spouse or children, although the case was tried on the assumption that such was the proper measure of damages. On appeal, the defendant contended that the trial court erred in admitting into evidence certain charts prepared by an economist that contained statistical data showing the average annual income of males in Alaska in certain age groups, certain areas, and in certain educational levels. The supreme court upheld the admission of the charts, stating:

> In determining the loss to an estate in a wrongful death action, the jury at some point must make an estimate as to the decedent's lifetime income expectations. This must be arrived at largely through probabilities, and any evidence that would reasonably tend to indicate the decedent's earning capacity in the future had he lived would be of assistance to the jury. We believe that Professor Haring's data presented to the jury a reasonable basis for assisting them in estimating the probable future earnings of the decedent.

443 P.2d at 70.

> In a case such as this where the deceased leaves no wife or children surviving him, compensatory damages recoverable on behalf of the estate of the deceased are limited to the following:
>
> (1) pecuniary loss to the estate of the deceased;
>
> (2) damages for any pain and suffering experienced by the deceased prior to death and caused by the accident.
>
> . . .
>
> Pecuniary loss to the estate is the amount of decedent's probable future earnings diminished by the amount he would have spent for his own living expenses had he lived.
>
> Grief, sorrow, and loss of companionship, comfort or society are not to be regarded as items of pecuniary loss for the purpose of any award.[101]

Defendant objected to this instruction because it failed to apply a "net accumulations" measure of damages for loss to the estate.[102] The net accumulations measure of damages for loss to the estate is the measure that had been adopted by the early Oregon cases interpreting the statute from which the Alaska wrongful death statute evolved and by the Alaska territorial cases.[103] Under the net accumulations theory, the loss to the estate is what the deceased would have accumulated and saved from the earnings that he probably would have made between the time of death and the end of probable life expectancy. In other words, the recoverable damages under the net accumulations theory is the difference between the value of decedent's estate at the time of death and the probable value of the estate had decedent lived to the end of probable life expectancy. The court noted that the net accumulations theory "is in contrast to the more prevalent theory, and the one applied by the [trial] 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."[104] The court went on to state that:

> 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.[105]

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101. 669 P.2d at 559.

102. *Id.* at 560.

103. Perham v. Portland Gen. Elec. Co., 33 Or. 451, 467, 53 P. 14, 19 (1898); Carlson v. Oregon Short-Line Ry., 21 Or. 450, 457-58, 28 P. 497, 499 (1892); Dralle v. Steele, 13 Alaska 680, 684-87 (1952). *See also* Macey v. United States, 454 F.2d 684, 687 (D. Alaska 1978) (adopting the net accumulations measure of damages where a spouse, children, or other dependents do not survive the decedent).

104. 669 P.2d at 560 (citing S. SPEISER, *supra* note 55, § 3:12, at 122-24.

105. *Id.*

The court noted that under the Alaska wrongful death statute, where decedent is not survived by a spouse, children, or other dependents, the amount which the deceased would have expended on dependents between the time of his death and the end of his probable life expectancy is necessarily equal to zero because the decedent had no dependents at the time of his death and the possibility that he later would have acquired dependents on whom he would have expended earnings is too speculative a matter for the trier of fact to consider. Therefore, the court reasoned that in cases where a decedent is not survived by a spouse, children, or other dependents, the net earnings theory and the net accumulations theory result in an identical damage calculation.[106]

The reasoning of the supreme court is theoretically and logically correct. However, as a practical matter, measuring damages by a net earnings theory results in a much larger award than measuring damages by a net accumulations theory because under Alaska law, the amount that the decedent would have paid in taxes is not deducted from decedent's probable future earnings in calculating loss of future earnings.[107] On the other hand, the trier of fact must base an award of damages for loss to the estate on some evidence if the award is to be something other than pure speculation. Statistics from the United States Department of Labor and from the Alaska State Department of Labor as to earnings and consumption patterns of classes of workers in the United States and Alaska are available to calculate net earnings.[108] Such statistics may not be available as to net accumulations of people in Alaska. Therefore, the calculation of loss to the estate by equating such loss to decedent's probable future earnings, diminished by the amount he would have spent for his own living expenses, is probably as good a measure of damages for loss to the estate as is possible given the statistical information presently available.

## B. Parent's Action for Wrongful Death of a Minor Child

In many cases brought under the Alaska wrongful death statute where the decedent is not survived by a spouse, children, or other dependents, the decedent is a minor child. In such cases, the parent of

106. *Id.*

107. Beaulieu v. Elliott, 434 P.2d 665, 673 (Alaska 1967); State v. Guinn, 555 P.2d 530, 545 (Alaska 1976). *See supra* note 37. The United States District Court in Macey v. United States, 454 F. Supp. 684, 689 (D. Alaska 1978), held that reduction of an award for loss to the estate by the amount of taxes that decedent would have paid in the future "is inherent in the 'net' [accumulations] concept," and, therefore, in wrongful death actions against the United States under the Federal Tort Claims Act, awards for loss to the estate will be reduced by the amount of taxes that decedent would have paid in the future.

108. *See, e.g.*, State v. Guinn, 555 P.2d 530, 546-47 (Alaska 1976); Greer Tank and Welding v. Boettger, 609 P.2d 548, 552 (Alaska 1980).

the child may have a direct action for losses resulting from the wrongful death of the child, in addition to the personal representative's action for loss to the child's estate. The statute which provides for this parental cause of action states:

> A parent may maintain an action as Plaintiff for the injury *or death* of a child below the age of majority. A guardian may maintain an action as Plaintiff for the injury *or death* of a ward.[109]

At common law, a parent had no cause of action for his or her losses as a result of the wrongful death of a child. A parent did, however, have a cause of action for loss of services of a child and for medical and other expenses incurred in curing or attempting to cure a child who suffered wrongful personal injury.[110]

Whether the statute creates a substantive cause of action on behalf of the parent for the wrongful death of a minor child, or whether it merely provides a procedural device allowing a parent to bring an action on behalf of the estate of the child for loss to the estate, is an issue that has yet to be addressed by the Alaska Supreme Court. In *State Farm Mutual Insurance Co. v. Wainscott,*[111] the United States District Court for the District of Alaska held that the section was procedural only and did not create an independent right of recovery in the parent. Also, Justice Connor in a dissent in *Wainscott v. Ossenkop*[112] stated that he thought "the federal court was correct in characterizing this statute as 'of a procedural nature creating no independent right of recovery in the parent.' "

In *State Farm,* the court analyzed and discussed in some detail *Mayhew v. Burns,*[113] an 1885 Indiana case interpreting a similar Indiana statute. The court in *Mayhew* held that the Indiana statute did create an independent right of recovery in the parent, but the district court chose not to follow that decision, reasoning: "If the court were to read the section in question as creating substantive rights there is nothing that would tie it to the limitations contained in the general wrongful death statute. AS § 09.55.580."[114] Surprisingly, the court did not discuss the early Oregon cases decided under the Oregon statute from which the Alaska statute was taken verbatim when Congress enacted Alaska's Civil Code in 1900. The early Oregon cases construed the statute as supplementary to the Oregon wrongful death statute (under which the measure of damages was loss to the estate) and as

109. ALASKA STAT. § 09.15.010 (1983) (emphasis added).

110. PROSSER & KEETON ON THE LAW OF TORTS § 125, at 934 (W. Keeton 5th ed. 1984); 59 AM JUR. 2D, *Parent & Child,* §§ 97, 99 (1987).

111. 439 F. Supp. 840, 842-43 (D. Alaska 1977).

112. 633 P.2d 237, 248 (Alaska 1981) (quoting State Farm Mut. Ins. v. Wainscott, 439 F. Supp. at 843). The majority opinion in this case did not address the issue.

113. 103 Ind. 328, 2 N.E. 793 (Ind. 1885).

114. 439 F. Supp. at 843.

creating in the parent a new right of action "for the death of the child, as a right of action existed at common law for an injury to the child for loss of services and incidental expenses . . . ."[115]

The decisions of the Oregon Supreme Court interpreting this statute prior to 1900 are more than merely persuasive authority. Thomas Carter, who compiled an annotated code for Alaska in 1900, wrote: "The codes were mainly copied from the statutes of the State of Oregon, *and to the end that adjudications by the Supreme Court of that state might remain as directly in point as possible,* changes were sparingly made in the text of the sections."[116] In *City of Fairbanks v. Schaible,*[117] the supreme court held that with respect to those statutes, such as Alaska Statutes section 09.15.010, that were taken from the Oregon laws and enacted into the Alaska code in 1900, "it is presumed that [such statutes were] adopted with the interpretation that had been placed [on them] by the Oregon Supreme Court prior to 1900."[118] The interpretation placed upon the Oregon predecessor to Alaska Statute section 09.15.010 by the Oregon court prior to 1900 was that the statute created a right of action in the parent for loss of services and incidental expenses resulting from the death of the child. When the statute was enacted as part of the Alaska code in 1900, it was enacted with the interpretation that had been placed upon it by the Oregon Supreme Court prior to 1900. Therefore, this writer believes that *State Farm* was wrongly decided by the United States district court. If the issue comes before the Alaska Supreme Court, the court should reject *State Farm* and the comment by Justice Connor in the dissent in *Wainscott v. Ossenkop* and adopt the construction of the statute placed upon its Oregon predecessor by the Oregon Supreme Court prior to 1900.[119]

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115. Schleiger v. Northern Terminal Co., 43 Or. 4, 8-13, 72 P. 324, 326-27 (1903); Craft v. Northern Pac. R.R., 25 Or. 275, 285, 35 P. 250 (1894); Putman v. Southern Pac. Co., 21 Or. 230, 235-40, 27 P. 1033, 1035-36 (1891), *aff'd on rehearing,* 21 Or. 244, 27 P. 1037 (1891).

116. T. CARTER, ANNOTATED ALASKA CODES xviii (1907) (emphasis added) (quoted in City of Fairbanks v. Schaible, 375 P.2d 201, 207 (Alaska 1962)).

117. 375 P.2d 201 (Alaska 1962).

118. *Id.* at 207-08.

119. Gerald Salk and Robert Griffin argue that the language of subsection (c)(3) of the wrongful death statute allowing recovery for "loss of . . . services irrespective of age . . . of decedent to the beneficiary or beneficiaries" creates a cause of action in the parent for loss of services of a wrongfully killed minor child. Since permitting a parent to recover for this loss of services under both subsection (c)(3) of the wrongful death statute and Alaska Statutes § 09.15.010 would result in a double recovery, Salk and Griffin argue that the 1955 amendment to the wrongful death statute "which supplied the specifically enumerated items of recovery impliedly repealed *Alaska Statutes* § 09.15.010." Salk & Griffin, *Measure of Damages in Alaska for the Unlawful Death of a Minor,* 8 UCLA-ALASKA L. REV. 1, 13 (1978). Whatever merit the argument might have had when written, it certainly is not sustainable since Osborne v.

If the Alaska Supreme Court adopts the view urged here and holds that Alaska Statutes section 09.15.010 creates an independent right of action in the parent for injury to the child for loss of services and incidental expenses, the potential recovery under that statute could be substantial. Earnings of a child during minority belong to the parent and are recoverable as loss of services. Although there is authority to the contrary, under the majority rule the parent is entitled to the gross value of the services lost to him as a result of the wrongful death, including loss of earnings of the child, without deduction for the cost of supporting the child.[120] Often, substantial prospective earnings of a once healthy, but wrongfully killed, minor can be proved. In addition to the actual earnings of the minor, the loss of the services in working in a family business or even around the home may be large, particularly when the cost of hiring substitute labor is shown.[121] In addition to the loss of services, the parent may recover all medical, funeral and other incidental expenses occasioned by the wrongful death since the parent is legally obligated to provide these necessaries.[122]

Moreover, in addition to economic losses resulting from the wrongful death of a minor child, a parent should be able to recover damages for loss of consortium of the child. As discussed above, *Hibpshmam v. Prudhoe Bay Supply, Inc.* held that, in Alaska, not only does a spouse have a common law cause of action for loss of consortium caused by negligently inflicted injury to his or her spouse, but also a child has a common law cause of action for loss of parental consortium resulting from injuries inflicted on a parent.[123] Although *Hipbshmam* does not expressly hold that the parent has a cause of action for loss of filial consortium resulting from injuries inflicted on a

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Russell, 669 P.2d 550, 560 (Alaska 1983), which held that "if the deceased is not survived by the beneficiaries named in the statute . . . [d]amages are limited to the loss to the estate . . . ." *See supra* notes 98-106 and accompanying text. *See also* Macey v. United States, 454 F. Supp. 684, 687 (D. Alaska 1978) (holding that subsection (c) of the wrongful death statute does not apply to actions for wrongful death of a minor child who is not survived by dependents).

120. 59 AM. JUR. 2D *Parent and Child,* § 104 (1987); Annotation, *What Items of Damages On Account of Personal Injury to Infant Belong to Him, and What to Parent,* 32 A.L.R. 2D 1060 (1953).

121. This writer is aware of no recovery in Alaska under the statute. However, in the New York case of Florence v. Goldberg, 57 A.D. 2d 914, 395 N.Y.S. 2d 57 (App. Div. 1977), *aff'd,* 375 N.E.2d 763, 404 N.Y.S. 2d 583 (1977), a mother received a jury verdict of $206,297.30 for loss of services of a six-and-one-half-year-old son who was injured in an automobile accident. The appellate division found the award excessive and reduced the jury verdict in her favor to $125,000.00.

122. 59 AM. JUR. 2D *Parent and Child,* § 103 (1987).

123. 734 P.2d 991, 993-94 (Alaska 1987). *See supra* text accompanying notes 63-66.

child, the reasoning in the case certainly implies that such a right exists.[124] If, as is argued here, Alaska Statutes section 09.15.010 gives to a parent a right to recover for damages resulting from death of a child to the same extent that at common law a parent could recover for injury to a child, it follows that if a parent suffers loss of filial consortium due to the wrongful death of a child, that parent has a right to recover for the loss of that consortium.[125]

## V. EVALUATION OF ALASKA'S WRONGFUL DEATH STATUTE

Although the Alaska wrongful death statute is, at best, inartfully worded, its interpretation and application by the Alaska Supreme Court usually results in fair and just awards of damages for wrongful death where decedent is survived by a spouse, children, or other dependents. Each beneficiary is entitled to the damages that he or she can prove to have suffered as a result of the wrongful death of the decedent. These damages include the loss of contributions for support that the beneficiary could have expected to have received from the decedent during his probable life expectancy and, if the argument advanced in this article is correct, any amounts that the beneficiary can prove would have passed to him or her by will or intestacy. In addition, the beneficiary can recover damages for such intangibles as loss of consortium and grief and anguish resulting from the wrongful death of decedent.

In contrast, the dichotomous nature of the Alaska wrongful death statute often results in unfair and unjust awards where a decedent is not survived by a spouse, children, or dependents. In such cases, the recoverable damages are not measured by the loss to any person, but

124. A parent had no cause of action at common law for loss of consortium resulting from injury to a child, and this rule has been followed by all jurisdictions until recently. Recent decisions, however, have begun to recognize a cause of action in a parent to recover for loss of filial consortium due to injury to a child. Frank v. Superior Court, 150 Ariz. 228, 722 P.2d 955 (1986); Sizemore v. Smock, 155 Mich. App. 745, 400 N.W.2d 706 (1986), *rev'd,* 430 Mich. 283, 422 N.W.2d 666 (1988); Norvell v. Cuyahoga County Hosp., 11 Ohio App. 3d 70, 463 N.E.2d 111 (1983); Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

125. It should be noted that the cause of action under Alaska Statutes section 09.15.010 is not brought by the parent in a representative capacity as personal representative of the estate of the minor, but is brought by him as an individual for his personal loss. It is a separate cause of action and is brought separately from actions under the wrongful death or survival statutes. Schleiger v. Northern Terminal Co., 43 Or. 4, 8-13, 72 P. 324, 326-27 (Or. 1903). However, under Rule 20 of the Alaska Rules of Civil Procedure, a parent may join an action under Alaska Statutes section 09.15.010 with an action by the personal representative under the wrongful death or survival statutes.

rather by the loss to an artificial and abstract entity known as the estate. That measuring damages by loss to the estate may lead to unfair and unjust results may be seen by considering some hypothetical cases.

Case 1

The decedent at time of death was a young, unmarried medical school graduate interning in a highly paid medical specialty. His mother is deceased. He left no will. His sole heir under Alaska's law of intestate succession is his father, from whom his mother was divorced early in the decedent's life and with whom the decedent has had hardly any contact since the divorce. A projection of the decedent's expected future income, diminished only by his probable future consumption during his probable life expectancy, will result in a projected pecuniary loss to the estate of millions of dollars. If the trier of fact faithfully follows the instruction approved in *Osborne v. Russell,*[126] it will award this projected pecuniary loss as damages for the loss to decedent's estate. The entire award will be distributed to the father, as decedent's sole heir, although the father has suffered no real loss.

Case 2

The decedent at the time of death was the same age as the decedent in Case 1, but instead of being a medical intern was a subsistence hunter and fisher residing in rural Alaska. His father is deceased. His sole heir is his mother with whom he has lived since birth and with whom he is extremely close. Although the mother is not dependent upon the decedent at the time of death, it is probable that when she became older, decedent, had he lived, would have been her primary provider through his subsistence hunting and fishing. Decedent's projected probable future earnings, when diminished by his probable future consumption, will result in a very small pecuniary loss to the estate. Since his mother was not dependent on decedent at the time of death, she cannot recover the value of what decedent would have contributed to her in her old age. Furthermore, because she was not dependent on decedent at time of death, she may not recover for her grief and anguish at the death of her son nor for the loss of filial consortium. Although the mother has suffered very real losses, the award that will be distributed to her will be very small.[127]

126. 669 P.2d 550, 559 (Alaska 1983). *See supra* text accompanying note 101.

127. This hypothetical case is based on *In re Estate of Pushruk,* 562 P.2d 329 (Alaska 1977). *See supra* text accompanying notes 22-23, 95-97.

Case 3

Decedent at time of death was a wealthy, highly paid oil company executive with a probable work-life expectancy of twenty years. He is not survived by a spouse but is survived by adult children, none of whom were receiving contributions for support from decedent and none of whom had any expectation of receiving contributions for support in the future. Prior to his death, and with the belief that his children were adequately provided for, deceased made a will leaving all of his estate to a charity. Since decedent is survived by children, the damages recoverable will be measured by the losses to the children. The children will be entitled to recover damages (probably small) for their loss of parental consortium and for their grief and anguish at the death of their parent. The children will not be entitled to any recovery for economic loss because they suffered no loss of contributions for support and, because of the parent's will, they had no expectation of inheritance. The charity that was the beneficiary of the will will not be entitled to any recovery because it is not a surviving spouse, child, or other dependent.

Case 4

The facts are the same as in Case 3, except that the decedent was not survived by adult children. Because decedent is not survived by a spouse, children, or other dependents, the measure of damages is the loss to his estate, or an amount equal to decedent's probable future earnings during his twenty-year probable life expectancy, diminished only by the amounts he probably would have consumed during that period. A projection of damages by this measure will result in a large award. The amount recovered will go to the charity as the beneficiary of decedent's will, as will the other personal property of the estate.

Something seems wrong in each of these hypothetical cases. Why should a mother that suffers very real losses, both economic and emotional, recover a small award, where a father, who suffered little or no economic or emotional loss, would recover a large award? Why should a damage award be significantly larger where a decedent leaves no children than when he leaves non-dependent adult children? No matter how intuitively wrong these results appear, they are inexorably mandated by the Alaska wrongful death statute, at least as it has been interpreted thus far by the Alaska Supreme Court.

The purpose of tort law is to compensate victims of wrongdoing for the losses actually suffered by them. As the Alaska Supreme Court stated in *Beaulieu v. Elliott*: "The general principle underlying the assessment of damages in tort cases is that an injured person is entitled

to be placed as nearly as possible in the position he would have occupied had it not been for the defendant's tort."[128] An award of damages to the personal representative of an estate for an alleged loss to a decedent's estate is the only area in tort law where this principle is not applied.

It seems that a more fair and just approach to assessment of damages for wrongful death would be to broaden the class of beneficiaries entitled to recover damages for wrongful death to include not only a surviving spouse, children, and other dependents, but also beneficiaries entitled to inherit under the decedent's will, or, in the absence of a will, under the laws of intestate succession; and to abolish loss to the estate as a measure of damages for wrongful death. Such an approach to the hypothetical cases stated above will achieve much more fair and just awards.

In Case 1, damages will be measured by the loss to the father, as decedent's sole heir under Alaska law of intestate succession. The award will be small because the father lost no contributions for support, was deprived of no expectation of pecuniary benefits in the future, and had little loss of filial consortium or grief and anguish over the death of his son. On the other hand, in Case 2, measuring the damages to the mother of decedent by the economic and emotional losses she suffered will result in a substantial award. Although she was not dependent on her son at the time of his death, she may be able to prove substantial loss of future contributions for support and deprivation of the expectation of pecuniary benefits. Calculating the amount of money necessary for the mother to purchase substitute food, clothing, and shelter in the future that would have been provided to her by her son had he lived his probable life expectancy will show a substantial loss. Also, since she was close to the decedent, the amount of money damages to compensate her for loss of filial consortium and for grief and anguish over the death of her son will be substantial.

In Case 3, the adult children will recover for their loss of parental consortium and for their grief and anguish over the death of their parent. The charity, the sole beneficiary of decedent's will, will recover for its deprivation of the expectation of pecuniary benefits, which are the accumulations that decedent would have saved from the actual time of death until the end of his probable life expectancy. In Case 4, the award to the charity will be the same as it was in Case 3, but the total award will be smaller than in Case 3 because there will not be an award to the adult children for loss of parental consortium and grief and anguish.

128. 434 P.2d 665, 671 (Alaska 1967) (citing *inter alia* RESTATEMENT OF TORTS § 924 comment d, at 634-35 (1939) and C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 86, at 304 (1935).

To achieve such results under the wrongful death statute will require amendment of the statute. Such an amendment, however, would serve the salutary purpose of allowing those actually injured by the wrongful death of a person to be placed as nearly as possible in the position that they would have been had it not been for the wrongful death and, also, of eliminating the unfair and unjust results that can arise by the application of Alaska's dichotomous wrongful death statute.[129]

129. For another and contrary view of the proper measure of damages for wrongful death, see S. SPEISER, *supra* note 55, at § 15 (containing Speiser's Model Wrongful Death and Survival Statute). Speiser argues that the measure of pecuniary damages should always be the loss to the estate. Issues of pecuniary loss to specific beneficiaries, according to Speiser, should pertain only to the distribution of the award, not to the quantum of damages recoverable. Speiser also believes that non-pecuniary damages, such as those for loss of consortium and for grief and anguish, should be based on each beneficiary's loss.