

# **Wrongful Death Actions in Indiana**

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In Indiana, actions for wrongful death are governed by the General Wrongful Death Statute (GWDS), Adult Wrongful Death Statute (AWDS), and the Child Wrongful Death Statute (CWDS). The contours of wrongful death actions have been defined by numerous judicial opinions interpreting the statutes and reconciling the statutory mandates with traditional common law principals. This article first lays out the statutory elements of wrongful death actions in Indiana and then explores the Indiana cases which address applicability of the statutes to specific fact patterns and define recoverable damages.

**STATUTES:** (1) The General Wrongful Death Act generally applies to adults with spouses or dependents. There is no cap on damages, but recoverable items are narrow;

(a) Lost earnings are not recoverable whenever a decedent has no living dependents or spouse, even where the dependents or spouse were living at the time of decedent's death;

(b) "Dependency" under the statute is defined as actual need for the support of the decedent—it can include pecuniary and non-pecuniary support as well as parental dependence on children;

(c) Evidence of love, care, and affection may be submitted only after dependence is established;

(d) Evidence of love, care, and affection should be reviewed for relevance and unfair prejudice on a case by case basis.

(2) The Adult Wrongful Death Act applies to unmarried adults without dependents. There is a \$300,000 cap on damages for loss of love and companionship. Lost wages are not recoverable;

(3) The Child Wrongful Death Act applies to "children" as defined by statute (*infra.*) and includes no cap on damages for lost love, care, and affection;

(a) Loss of love, care, and affection are available until the sooner of the child's twentieth (or sometimes 23rd) birthday or the life of the survivor(s) (parent, guardian);

(4) All wrongful death statutes prohibit damages for grief and pain and suffering;



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- (5) All wrongful death statutes prohibit punitive and treble damages;
- (6) Attorney fees are always permitted;
- (7) The statutes are meant to compensate survivors for pecuniary loss suffered as a result of the decedent's death. The value of decedent's love, care, and affection are pecuniary losses;
- (8) Fetuses are not considered children under the CWDS;
- (9) Wrongful death settlement proceeds should be paid to beneficiaries and death creditors pro-rata based on the damages estimates of the parties;
- (10) Wrongful death damages do not become part of a decedent's estate and are not subject to the claims of decedent's creditors. *Thomas v. Eads*, 400 N.E.2d 778, 783 (Ind. Ct. App. 1980).

**DISCUSSION:** Ind. Code 34-23-1-1 (1998), the **General Wrongful Death Statute (GWDS)**, creates a cause of action against a tortfeasor who causes the death of another person. The act provides as follows:

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



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reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.

*Id.* (emphasis supplied).

The GWDS has counterparts in the **Adult Wrongful Death Statute** (AWDS) and the Child Wrongful Death Statute (CWDS). The AWDS provides:

- (a) As used in this section, “adult person” means an unmarried individual:
  - (1) who does not have any dependents; and
  - (2) who is not a child (as defined in IC 34-23-2-1).
- (b) If the death of an adult person is caused by the wrongful act or omission of another person, only the personal representative of the adult person may maintain an action against the person whose wrongful act or omission caused the death of the adult person.
- (c) In an action to recover damages for the death of an adult person, the damages:
  - (1) must be in an amount determined by a:
    - (A) court; or
    - (B) jury;
  - (2) may not include:
    - (A) damages awarded for a person's grief; or
    - (B) punitive damages; and
  - (3) may include but are not limited to the following:
    - (A) Reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person's death.



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(B) Loss of the adult person's love and companionship.

(d) Damages awarded under subsection (c)(3)(A) for medical, hospital, funeral, and burial expenses inure to the exclusive benefit of the adult person's estate for the payment of the expenses. The remainder of the damages inure to the exclusive benefit of a nondependent parent or nondependent child of the adult person.

(e) Aggregate damages that may be recovered under subsection (c)(3)(B) may not exceed three hundred thousand dollars (\$300,000). A jury may not be advised of the monetary limits placed on damages under this subsection. If the jury awards the plaintiff damages under subsection (c)(3)(B) in an amount that exceeds three hundred thousand dollars (\$300,000), the court shall reduce that part of the damages awarded to the plaintiff to three hundred thousand dollars (\$300,000).

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

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

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

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

The **Child Wrongful Death Statute** (CWDS) provides:

(a) This section does not apply to an abortion performed in compliance with:

(1) IC 16-34; or

(2) IC 35-1-58.5 (before its repeal).

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

(1) less than twenty (20) years of age; or



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

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

(c) An action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of a child. The action may be maintained by:

(1) the father and mother jointly, or either of them by naming the other parent as a codefendant to answer as to his or her interest;

(2) in case of divorce or dissolution of marriage, the person to whom custody of the child was awarded; and

(3) a guardian, for the injury or death of a protected person.

(d) In case of death of the person to whom custody of a child was awarded, a personal representative shall be appointed to maintain the action for the injury or death of the child.

(e) In an action brought by a guardian for an injury to a protected person, the damages inure to the benefit of the protected person.

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

(1) for the loss of the child's services;

(2) for the loss of the child's love and companionship; and

(3) to pay the expenses of:

(A) health care and hospitalization necessitated by the wrongful act or omission that caused the child's death;

(B) the child's funeral and burial;



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(C) the reasonable expense of psychiatric and psychological counseling incurred by a surviving parent or minor sibling of the child that is required because of the death of the child;

(D) uninsured debts of the child, including debts for which a parent is obligated on behalf of the child; and

(E) the administration of the child's estate, including reasonable attorney's fees.

(g) Damages may be awarded under this section only with respect to the period of time from the death of the child until:

(1) the date that the child would have reached:

(A) twenty (20) years of age; or

(B) twenty-three (23) years of age, if the child was enrolled in a postsecondary educational institution or in a career and technical education school or program that is not a postsecondary educational program; or

(2) the date of the child's last surviving parent's death; whichever first occurs.

(h) Damages may be awarded under subsection (f)(2) only with respect to the period of time from the death of the child until the date of the child's last surviving parent's death.

(i) Damages awarded under subsection (f)(1), (f)(2), (f)(3)(C), and (f)(3)(D) inure to the benefit of:

(1) the father and mother jointly if both parents had custody of the child;

(2) the custodial parent, or custodial grandparent, and the noncustodial parent of the deceased child as apportioned by the court according to their respective losses; or

(3) a custodial grandparent of the child if the child was not survived by a parent entitled to benefit under this section.



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However, a parent or grandparent who abandoned a deceased child while the child was alive is not entitled to any recovery under this chapter.

(j) This section does not affect or supersede any other right, remedy, or defense provided by any other law.

I.C. 34-23-2-1 (2009).

### **Applicability of Adult Wrongful Death Statute over Another**

The AWDS, enacted in 1999, is a relatively recent addition to Indiana law. *Ind. Legis. Serv. P.L. 84-1999 (H.E.A. 1147)*. For the entirety of the last century prior to the AWDS, surviving adult children were left out of any recovery for the loss of their parent. Recovery would have been strictly limited to basic funeral, medical, and administrative expenses. *See e.g. Dillier v. Cleveland, C., C. & St. L. Ry. Co.*, 34 Ind. App. 52, 72 N.E. 271, 272 (1904).

Indiana law now, however, provides for a right of recovery dependent on the status of the decedent and his/her surviving statutory beneficiaries at the time of death. The AWDS applies where an unmarried adult dies leaving no dependents, but does leave surviving nondependent children and/or parents.

Recovery is still strictly limited if a decedent leaves no statutory beneficiaries or the sole statutory beneficiary dies shortly after the decedent. *Thomas v. Eads*, 400 N.E.2d 778, 779 (Ind. Ct. App. 1980). In *Thomas v. Eads*, a mother and her infant son were killed in an automobile accident. *Id.* The son died roughly 30 minutes after his mother. *Id.* at 779. The administratrix of the decedents' estates brought a wrongful death claim under a preceding version of the GWDS on behalf of both decedents. *Id.* The infant's suit was disposed of on summary judgment, but his mother's suit was not. *Id.*

The issue before the Court of Appeals was whether the GWDS applied to the infant's mother's estate where the mother predeceased her only dependent by only 30 minutes. *Id.* The defendant argued the application of the wrongful death statutes depends upon the existence of dependents at the decedent's death, while the estate argued that the issue turned on the existence of dependents at the time the wrongful death action is filed. *Id.* at 780.

After a lengthy analysis of legislative and judicial history regarding the issue, the Court of Appeals found that, although the mother's wrongful death action was proper, the scope of the recovery included only damages sufficient to pay the mother's death creditors. *Id.* at 780-783. No damages for lost wages or other, similar damages that would inure to the sole benefit of a dependent are recoverable if no dependents remain alive at the time of the judgment. *Id.* at 784.





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The applicability of *Thomas v. Eads* is narrow. In 2001, the Indiana Supreme Court reversed the law on available damages where a wrongful death victim’s statutory beneficiary, dies before judgment is entered on the wrongful death claim, permitting the statutory beneficiary to recover wrongful death damages. *Bemenderfer v. Williams*, 745 N.E.2d 212 (2001). In order to recover wrongful death damages, the statutory beneficiary need only survive the wrongful death victim. *Id.*

In *Bemenderfer*, The Eighty-four-year-old spouse of the decedent sued the decedent’s health care provider, alleging malpractice from the puncture of the decedent’s colon during a surgical procedure, resulting in the decedent’s death. The spouse died shortly after suit was filed, and the healthcare provider moved for partial summary judgment on damages, contending that under the wrongful death statute, the estate was entitled only to medical, hospital, funeral, and burial expenses.

Citing a combination of public policy concerns and the statute’s plain language, the Supreme court held that “the statutory beneficiary’s claim does not abate if death ensues prior to verdict.” *Id.* In support, the court noted, “the wrongful death defendant should not benefit from the early death of a beneficiary, and certainly not from a death that was likely accelerated by a defendant’s own wrongdoing.” *Id.* at 217. Continuing, the Court stated, “the wrongful death defendant should not be allowed to avoid compensation to a beneficiary merely because the beneficiary, as an elderly person profoundly affected by the death of a spouse, is more vulnerable than the average person. It is a staple of tort law that the tortfeasor takes her victim as she finds him.” *Id.*

While *Bemenderfer* broadly stands that status under the Acts is determined at the time of death, if the State of Indiana is the only statutory beneficiary when the only other statutory beneficiary pre-deceased a verdict mid suit, recovery will be strictly limited to medical and funeral costs *See Horejs v. Milford*, No. 45A03-1709-CT-2173, at \*3 (Ind. Ct. App. June 14, 2018)

### **“Dependents” Under the Wrongful Death Act**

The applicability of the ADWS over the GWDS turns on whether or not the decedent is married or has dependents. The term “dependents” is undefined in the statutes, so Indiana’s courts must interpret its meaning.

In *Terry v. Stephens*, 921 N.E.2d 516 (Ind. Ct. App. 2010), the decedent hanged himself in the Morgan County jail and his estate sued a nurse who treated him for medical malpractice. *Id.* at 519. The decedent was declared disabled by the Social Security Administration in 1991 due to severe and untreatable mental illness. *Id.* at 518-519. He was divorced in 2001 and his divorce decree provided that he have no contact with his three minor children and spouse for at least six years after the decree. *Id.* at 519. Although the decree provided for child support, the decedent never made any support payments before his death. *Id.* The decedent’s estate sought to recover



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under the GWDS, but the trial court dismissed the action on the grounds that the decedent’s children were not his dependents. *Id.*

The Court of Appeals observed that there is a two-part test for “dependency” traditionally applied to such questions. “Dependency” under the GWDS requires (1) a need or necessity of support on the part of the alleged dependent; and (2) actual contribution to such support by the deceased. *Id.* at 520. Such support is often pecuniary in nature, but not always. *Id.* at FN3. The estate presented evidence that the decedent loved his children, despite his mental and financial handicaps, but it did not present evidence that the decedent meaningfully contributed to his children’s support. *Id.* at 521. The Court, therefore, found that the decedent had no dependents because his children did not receive any funds from him to establish financial support. *Id.*

The Court clarified the relationship between dependency and damages for loss of love, care, and affection. It explained that once dependency is established, then evidence of loss of love, care, and affection is admissible and damages for such losses are recoverable. *Id.* at 520.

As a final note, “dependency” is not limited to the traditional assumption that children are dependent on parents. In one Indiana case, evidence supported the finding that a mother was “dependent” next of kin of the 16-year-old decedent, so as to sustain award of damages under an adult wrongful death statute in effect at the time and preclude an award under a child wrongful death statute in effect at the time, where the mother testified that the decedent helped maintain the house, made regular monetary contributions to mother, and that his support helped her attend nursing school while working full time and part time job. *City of Indianapolis v. Taylor*, 707 N.E.2d 1047 (Ind. Ct. App. 1999).

### **Pecuniary Damages**

At common law, claims for personal injury died with the decedent, so Indiana’s wrongful death statutes operate in derogation of common law to create a cause of action for situations where one person is killed by the negligence of another. *Id.* at 780. Statutes in derogation of the common law are to be strictly construed. *Id.* The fundamental principle used to determine damages in wrongful death actions is that recoverable damages reflect pecuniary loss. In *Louisville, N.A. & C. Railroad Co. v. Goodykoontz*, 21 N.E. 472 (Ind. 1889), the guardian of a minor decedent brought a wrongful death claim—pursuant to one of Indiana’s earliest versions of the statute—after the decedent was killed by a train.

Discussing recoverable damages, the Supreme Court declared that no principle or precedent sustained a recovery of damages for the death of a human being, no matter how caused, simply for the purpose of enhancing the value of the decedent’s estate. *Id.* The action is given to afford compensation for those who have sustained pecuniary loss by the death, and not for the benefit of the decedent’s estate. *Id.* The concept that wrongful death actions are intended to afford



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compensation for “pecuniary loss” is a theme that carries through subsequent case law. *See Durham ex rel. Estate of Wade, infra.*

### **Punitive Damages, including Treble Damages are Prohibited in Wrongful Death Actions**

Perhaps the clearest application of the “pecuniary loss” principle is made with respect to punitive damages. Under all three wrongful death statutes, the items for which recovery is permitted are narrowly circumscribed, and Indiana’s courts have affirmed such limits on recovery. First, punitive damages are prohibited in wrongful death actions. In *Durham ex rel. Estate of Wade v. U-Haul International*, 745 N.E.2d. 755 (Ind. 2001), Kathy Wade was killed in a head-on collision. Her husband was named a co-executor of her estate, as was the father of her two children. *Id.* at 757. Both the husband and the father suit on behalf of the estate. *Id.* They brought a wrongful death claim under the GWDS and sought punitive damages. *Id.* Wade also asserted a claim for loss of consortium on his own behalf. *Id.*

The Supreme Court granted transfer after the Court of Appeals found that punitive damages were recoverable under the GWDS and that Wade’s loss of consortium claim was permissible. *Id.* at 758. The Supreme Court reversed the Court of Appeals on both issues. *Id.* The Supreme Court’s discussion of punitive damages in wrongful death addressed the legislative history of the wrongful death statutes, interstate trends, and the relationship of their decision to such factors.

Fundamentally, the Supreme Court declined to engraft permission to recover punitive damages in the GWDS because the legislature repeatedly failed to amend the statute in the wake of prior cases barring punitive damages in wrongful death actions. *Id.* at 763. Addressing the persuasive authority allowing punitive damages in wrongful death, the Court noted that, although the number of states permitting punitive damages had grown in the years before this decision, that growth was strongly correlated with statutory provision for punitive damages in other states. *Id.* at 762. The Court noted that most states prohibit punitive damages in wrongful death actions if their respective wrongful death statutes are silent on the matter. *Id.* Finally, the Court disposed of the estate’s public policy argument that it should not be cheaper to kill than to maim by noting, first, it is not inexpensive to do either and, second, defendants probably find it difficult to gauge the extent of the injuries their negligent acts might inflict. *Id.*

Thus, the Court declared, for statutory, historical, and policy reasons, that punitive damages are not recoverable under the GWDS. *Id.*; *See also Forte v. Connerwood*, 745 N.E.2d 796, 800 (Punitive damages are not recoverable under the CWDS).

### **Treble Damages Punitive in Nature and Not Recoverable in Wrongful Death Action**

*Estate of Kuba by Kuba v. Ristow Trucking Co.*, 508 N.E.2d 1 (Ind. 1987), was certified to the Supreme Court by 7<sup>th</sup> Circuit Court of Appeals. Kuba and an employee of Ristow Trucking were



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both killed in a head on collision between their trucks. *Id.* Kuba’s estate sought treble damages in conjunction with its wrongful death claim, because the Ristow Trucking’s driver was drunk at the time of the collision. *Id.*

The Supreme Court observed the nature of remedies provided by the wrongful death statutes—reasonable medical, hospital, burial, and funeral expenses and lost earnings—are all expenses that reflect a deprivation and are compensable in nature. *Id.* at 2. In contrast, the Court observed that treble damages are punitive in nature. *Id.* Therefore, the Court determined that, as such, treble damages are not recoverable in wrongful death. *Id.* at 3.

### **Consortium and Wrongful Death**

The Supreme Court next took up Wade’s loss of consortium claim, *Durham ex rel. Estate of Wade*. The court held that Wade could not maintain an independent loss of consortium claim, from which he would pursue punitive damages, because loss of consortium is a claim derivative of a personal injury claim. *Id.* at 764. Therefore, the loss of consortium claim must attach to the wrongful death action, and as a result, punitive damages were unrecoverable. *Id.* at 765.

To calculate damages for a loss of consortium claim the Court ruled as a matter of first impression that the damages should run from the time of the accident to the end of the shorter of the two spouses’ life expectancy. *Id.* at 765. This represents a partial overruling of *Burk v. Anderson*, 109 N.E.2d 407 (Ind. 1952), which held that loss of consortium damages were limited by the actual lifespan of the injured spouse after the accident, effectively curtailing recovery to zero.

### **Attorney Fees are Recoverable in Wrongful Death Actions**

On some issues, the courts have expanded or limited potential recoveries in unexpected ways.

Under the GWDS, attorney’s fees are not recoverable if the decedent is survived by a spouse and/or children. *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675, 677 (Ind. 2015). In *SCI Propane*, the decedent’s spouse and dependent child survived the decedent. The trial court awarded attorney fees, and the Court of Appeals affirmed, basing its opinion on *McCabe v. Commissioner, Indiana Dept. of Insurance*, 949 N.E.2d 816 (Ind. 2011) (holding that for decedents falling under the AWDS, attorney fees are recoverable). The Court, however, in *SCI Propane*, distinguished *McCabe* on the basis that *McCabe* applies to the AWDS, which was to be read in harmony with the GWDS and CWDS. Distinguishing decedents with a spouse or dependent children from decedents with neither, the Court in *SCI Propane* held the decedents fell under the AWDS, which meant damages must be in an amount determined by a court or jury. Such damages “may not include damages awarded for a person’s grief or punitive damages,” but may include “reasonable medical, hospital, funeral, and burial expenses necessitated by the



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wrongful act or omission that caused the adult person’s death [and] loss of the adult person’s love and companionship.”

Under the AWDS, previously, Indiana’s Courts of Appeals was split on the issue of whether attorney fees were recoverable. However, the Supreme Court resolved the question in *McCabe v. Commissioner of the Ind. Dept. of Ins.*, 949 N.E.2d 816 (Ind. 2011), finding attorney fees recoverable under the AWDS. In *McCabe*, a son sued his deceased mother’s medical provider for malpractice and settled in an amount which permitted him to petition the Indiana Patients’ Compensation Fund for additional compensation. *Id.* at 817. He sought to recover for the loss of love and companionship, for medical expenses, burial expenses, plus costs, expenses, and attorney fees. *Id.* at 817-818. The Fund argued that attorney fees are not permitted under the AWDS, and the trial and appellate courts agreed, noting that the AWDS and GWDS are mutually exclusive remedies and that, of the two, only the GWDS specifically permits attorney fees. *Id.* at 818. Thus, the lower courts concluded that, because McCabe brought his suit under the AWDS, attorney fees were not permitted. *Id.*

The Supreme Court disagreed. In a 3-2 decision, the Court reasoned that the AWDS’s language that permissible damages “may include but are not limited to” various types of damage did not necessarily prohibit attorney fee awards, and a harmonious reading of the AWDS and GWDS suggests that attorney fees would be appropriate in the AWDS, considering the provision for attorney fees provided by the GWDS. *Id.* at 821. Thus, the Supreme Court held that the remedy afforded by the AWDS includes attorney fees and all other damages permitted under the GWDS. *Id.*

In their dissent, Justices Shepard and Rucker argued, first, that the “American Rule” says that each party to a lawsuit pays his or her own attorney fees unless there is a statute, court rule, or agreement between them that provides otherwise, so parties to the AWDS should pay their own attorney fees absent statute, court rule, or agreement to the contrary. *Id.* at 822. Second, a statute “in derogation of common law must be strictly construed,” so in the absence of an express provision for attorney fees, the Court should not permit them. *Id.*

Under the CWDS, The Indiana Court of Appeals recently upheld the award of attorney fees in a child’s wrongful death case, citing to *McCabe v. Commissioner*, for the principle that relief for the death of a dependent child was more in line with the remedies available under the GWDS for decedents who leave no spouse or dependents. *Angel Shores Mobile Home Park, Inc. v. Crays*, 78 N.E.3d 718, 727 (Ind. Ct. App. 2017). Furthermore, the defendant in the action, found only 5% at fault, was not allowed to reduce fees to that of a pro rata share, instead being found liable for the full litigation costs, serving as a strong incentive to settlement for later litigants.

### **Damages for Loss of Love and Affection in CWDS**



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Damages for loss of love, care, and affection are expressly permitted under CWDS and considered an outgrowth of the pecuniary loss principle. This element of damages is relatively new, however. Cite. Furthermore, the provision for such damages raises difficult evidentiary issues.

First, the statute provides that damages under the CWDS are recoverable for the shorted of the following time periods: (1) the twentieth birthday of the child or, if the child is enrolled in a post-secondary education program, his or her twenty-third birthday, or (2) the date of death of the child's last surviving parent.

In order to prove loss of love, care, and affection, the parties may offer evidence of such love, care, or affection. *Lustick v. Hall*, 403 1128 *Indiana Mfg. Co. v. Coughlin*, 115 N.E. 260 (Ind. App. 1917). However,

### **Fetuses**

Generally speaking, an unborn fetus is not considered a "child" for purposes of the Child Wrongful Death Act. *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2001); *Ramirez v. Wilson*, 901 N.E.2d 1 (Ind. Ct. App. 2009); *cf. Horn v. Hendrickson*, 824 N.E.2d 690 (Ind. Ct. App. 2005).

### **Wrongful Death Damages Allocation Post-Settlement**

If a settlement is reached in a wrongful death action, then the issue of how settlement funds are divided between beneficiaries may arise. In *In re Estate of Inlow*, 916 N.E.2d 664, 667 (Ind. 2009), Inlow was killed by a helicopter propeller and his widow argued that none of the wrongful death settlement proceeds should be paid into the estate for funeral and burial expense. The court noted that such a result is obviously not contemplated by the statute. *Id.*

The Court determined that to resolve such disputes with respect to payment of medical, hospital, funeral, and burial expenses in the case, a court should direct payment from the pre-trial wrongful death settlement that part of the medical, hospital, funeral, and burial expenses that corresponds to the ratio of the total of such expenses to the estimated total damages sustained. *Id.* The Court also acknowledged that evidentiary hearings may be necessary to determine such ratios. *Id.*

### **Application of AWDS Cap**

Indiana courts have not yet addressed the issue of whether the AWDS cap on damages is applied per defendant or per claim, but persuasive authority and the statutory language suggest the cap is to be applied per claim.



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Unlike Indiana’s other wrongful death statutes, the AWDS is quite restrictive by legislative intent. It specifically disallows recovery for grief, lost earnings of the decedent and punitive damages and caps the loss of the adult person’s “love and companionship” to an aggregate of \$300,000. Ind. Code § 34-23-1-2 (2013). Obviously, the legislature intended to place specific limits in this statute which applies to a limited class of actions. For that reason, the plain language of the AWDS clearly limits the aggregate damages that may be recovered for “love and companionship.” The applicable section specifically states that the aggregate damages “may not exceed three hundred thousand dollars.” Ind. Code § 34-23-1-2(e) (2013) (emphasis added). In addition, it also states that juries may not be told of the monetary limits placed on damages per this section. *Id.* If the jury awards the plaintiff damages that exceed the cap, the statute states that the court shall reduce that part of the damages to \$300,000. *Id.* This plainly does not allow courts the discretion to award more than the cap but instead instructs them that they shall reduce any damages for “love and companionship” for the wrongful death of the individual to the stated cap of \$300,000. The unambiguous language of the AWDS clearly indicates that the legislature intended for plaintiffs to recover on a per claim basis and not a per defendant basis. Any other interpretation of the statutory language would significantly expand the damages in this case and give plaintiffs a windfall greatly in excess of the limited amount per claim clearly specified in the statute.

A survey of the wrongful death statutes in all fifty states revealed that the State of Colorado was the only state with not only a similar cap on non-pecuniary damages to the AWDS but also case law directly on point to the issue discussed in this memorandum. Many states do not allow caps in their wrongful death statutes, some have been ruled unconstitutional and of those that still have them, they have not addressed whether or not the cap should apply on a per claim or per defendant basis. Most case law regarding caps on wrongful death non-pecuniary damages is related to whether or not the caps are constitutional. The cap in the AWDS has yet to be challenged on constitutional grounds. <sup>1</sup>

As stated previously, Colorado law is instructive on the present issue. In *Lanahan v. Chi Psi Fraternity*, 175 P.3d 97 (Colo. 2008), a mother filed a wrongful death action against the Chi Psi Fraternity and its members after her son died following a fraternity hazing event. The defendants argued that the noneconomic damages cap of \$250,000 in the Colorado Wrongful Death Act applied on a per claim basis and, conversely, the mother argued it should apply on a per defendant basis. The Colorado Supreme Court found that under the plain language of the statute, the noneconomic damages cap applied on a per claim basis. *Id.* at 100. The relevant language of the statute states:

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<sup>1</sup> Of note, Indiana’s Medical Malpractice Act cap has been constitutionally challenged many times and been upheld each time by the Indiana Courts. In addition, it is an *occurrence-based* statute and not a per defendant/medical provider statute, which plainly supports our position that the AWDS cap applies on a per claim and not a per defendant basis.



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There shall be only one civil action under this part 2 for recovery of damages for the wrongful death of any one decedent. Notwithstanding anything in this section [13-21-203] or in section 13-21-102.5 to the contrary, there shall be no recovery under this part 2 for noneconomic loss or injury in excess of two hundred fifty thousand dollars...

Colo. Rev. Stat. § 13-21-203(1)(a) (2013) (emphasis added). Stated concisely, this section permits one action per decedent to recover a maximum of \$250,000 in noneconomic damages. Lanahan, 175 P.3d at 100. Because the plaintiff brought one action seeking recovery for the death of one person, she could not recover more than \$250,000 in noneconomic damages, regardless of the number of defendants from whom she was entitled to recover such damages. Id. at 101. That would have created a recovery in excess of the cap, which the plain language of the statute prohibited. Id. Plaintiff's recovery was the total amount she was entitled to, regardless of whether the source of that recovery was one or more defendants. Id.

In summary, based on the unambiguous statutory language a plaintiff should not recover more than the \$300,000 cap regardless of the number of defendants. This would create a windfall recovery in excess of the cap, which the AWDS clearly prohibits.