

12 WRONGFUL DEATH CLAIMS

Wrongful death claims are statutorily authorized by AS 09.55.580. The personal representative of the estate of the decedent is authorized to maintain an action when the death was caused by the wrongful act or omission of another. The action shall be commenced within two (2) years after death.¹

If the decedent is survived by a spouse, children, or other dependents, the personal representative brings an action on their behalf, and the damages recoverable are measured by the losses they have sustained. The Alaska Supreme Court has held that the issue of dependency is a factual matter that must be determined according to the facts and circumstances existing at the time of death.² In a later case, the court confirmed that dependency is an issue of fact, not of legal relations. Consequently, a showing must be made of actual dependency for significant contributions over a sufficient period of time to justify the assumption that some contribution would have continued.³

The largest item of damage will be 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. In addition to damages for loss of support, the dependents may seek an award of damages for loss of assistance or services, loss of consortium, loss of prospective training and education, and medical and funeral expenses.⁴ Furthermore, a designated beneficiary can recover "prospective inheritance," meaning the inheritance he or she would have received if the deceased had not died prematurely.⁵

Under AS 09.17.040(b) and (c), the finder of fact must reduce future economic damages to present value. But when calculating the amount of wages that could have been earned in future years, the finder of fact may take into consideration future anticipated inflation and reasonably anticipated increases in earnings, unless the parties have entered into an agreement that the award of future damages will be computed without consideration of inflation and future wage increases (but also without any

¹ See AS 09.55.580(a).

² *In re Estate of Pushruk*, 562 P.2d 329, 332 (Alaska 1977).

³ *Greer Tank & Welding v. Boettger*, 609 P.2d 548, 551 (Alaska 1980).

⁴ See AS 09.55.580(c).

⁵ *Kulawik v. Era Jet Alaska*, 820 P.2d 627 (Alaska 1991).

reduction to present value).⁶ There is, however, no reduction to present value of future damages where the monies are to be used immediately.⁷

If the deceased is not survived by dependents, the personal representative brings the action on behalf of the estate. In such a case, damages are measured by the pecuniary loss to the estate, defined as the probable value of the decedent's estate had he or she not died prematurely, less the actual value of the estate at time of death. These damages are calculated by determining the decedent's probable future earnings, less the amount he or she would have spent on living expenses assuming an absence of dependents throughout the deceased's life expectancy.⁸ Consequently, plaintiff's economist may not assume that the decedent would have married and had children, so as to become a member of the most statistically probable household size, thereby reducing the decedent's expected lifetime personal living expenses.⁹

Non-dependent parents may recover damages for loss of society arising from the death of a child.¹⁰ The Alaska Supreme Court has confirmed that a claim for "loss-of-society" does not trigger a separate "per person" policy limit.¹¹ Also, under the wrongful death statute, non-dependent siblings are unambiguously barred from recovering non-pecuniary damages.¹²

Punitive damages may also be available under the language of AS 09.55.580(a) providing that the damages "shall be the damages the court or jury may consider fair and just" when there is clear and convincing evidence that the wrongdoer acted maliciously, fraudulently, or with wanton disregard for the decedent's safety.¹³

⁶ *Beck v. State, Dep't of Transp. and Pub. Facilities*, 837 P.2d 105 (Alaska 1992).

⁷ *Sherbahn v. Kerkove*, 987 P.2d 195, 201-02 (Alaska 1999) (plaintiff used portion of award for surgery just after trial).

⁸ *Osborne v. Russell*, 669 P.2d 550, 560 (Alaska 1983).

⁹ *Beck v. State of Alaska*, 837 P.2d 105 (Alaska 1992).

¹⁰ *Gillespie v. Beta Const. Co.*, 842 P.2d 1272 (Alaska 1992).

¹¹ *State Farm v. Houle*, 258 P.3d 833 (Alaska 2011); see also *Wold v. Progressive*, 52 P.3d 155, 165-166, n.36 (Alaska 2002). Under *Wold's* facts, the court found the parents' loss-of-society claim did not trigger a separate per-person claim. Rather, it was subsumed within payment of the per-person liability policy limit for the child's wrongful death. *Wold* indicated that future resolution of this issue might be case specific and hinge on a particular policy's choice of language in defining its scope of coverage.

¹² *Sowinski v. Walker*, 198 P.3d 1134, 1162 (Alaska 2008).

¹³ *Tommy's Elbow Room v. Kavorkian*, 727 P.2d 1038 (Alaska 1986); see also *Portwood v. Copper Valley Elec. Ass'n*, 785 P.2d 541 (Alaska 1990).

Appendices:

AS 09.17.040

AS 09.55.580

Sec. 09.17.040. Award of damages; periodic payments. (a) In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

- (1) past economic loss;
- (2) past noneconomic loss;
- (3) future economic loss;
- (4) future noneconomic loss; and
- (5) punitive damages.

(b) The fact finder shall reduce future economic damages to present value. In computing the portion of a lump-sum award that is attributable to future economic loss, the fact finder shall determine the present amount that, if invested at long-term future interest rates in the best and safest investments, will produce over the life expectancy of the injured party the amount necessary to compensate the injured party for

(1) the amount of wages the injured party could have been expected to earn during future years, taking into account future anticipated inflation and reasonably anticipated increases in the injured party's earnings; and

(2) the amount of money necessary during future years to provide for all additional economic losses related to the injury, taking into account future anticipated inflation.

(c) Subsection (b) of this section does not apply to future economic damages if 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).

(d) In an action to recover damages, the court shall, at the request of an injured party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment.

(e) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(f) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will.

(g) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments required under (d) of this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees. (§ 1 ch 139 SLA 1986)

Revisor's notes. — In 1986, the number "665" was substituted for "655" to correct a manifest error in subsection (c). In 1988, a reference to "(d) of this section" was substituted for "(c) of this section" to correct a manifest error in subsection (g).

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49 and 58, see §§ 5 and 7, respectively, ch. 139, SLA 1986, in the Temporary and Special Acts.

NOTES TO DECISIONS

Legislative intent. — Although the plain language of subsection (b) does not specifically designate

the categories of damages that must be reduced to present value, the legislative intent appears to have

been that the trier of fact should so reduce all future economic damages. *Sherbahn v. Kerkove*, 987 P.2d 195 (Alaska 1999).

No Reduction where damages to be used immediately. — Since courts are obliged to avoid construing a statute in a way that leads to a glaringly absurd result, and since the purpose of reducing future damages is to avoid overcompensating a plaintiff for future loss, where the plaintiff would be using the entire award for medical treatment almost immediately, that award should not be reduced to present value. *Sherbahn v. Kerkove*, 987 P.2d 195 (Alaska 1999).

Prejudgment interest not awarded as to future damages. — Prejudgment interest should be awarded only as to past damages; it should not be awarded as to any future damages, discounted or nondiscounted, except as to future damages which

were discounted to a date earlier than the date of trial. *McConkey v. Hart*, 930 P.2d 402 (Alaska 1996).

Future damages in wrongful death cases. — The clear legislative purpose of subsection (b) is to require the reduction of present value of future economic damages in wrongful death cases in the absence of an agreement of the parties to do otherwise. *Beck v. State, DOT & Pub. Facilities*, 837 P.2d 105 (Alaska 1992).

Future medical costs. — There was no error in calculating future medical costs by taking into account projected inflation, since the use of that method did no more than recognize the same realities as the statute which provides that "future anticipated inflation" should be taken into account before applying a market discount rate. *Stone v. Fluid Air Components*, 990 P.2d 621 (Alaska 1999).

Sec. 09.17.050. [Renumbered as AS 09.65.170.]

Sec. 09.55.580. Action for wrongful death. (a) Except as provided under (f) of this section, 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. 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 decedent 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 the facts and circumstances and from them fix the award at a sum which 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:

(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 or what the deceased may have saved during the lifetime of the deceased;

(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.

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

(e) The right of action granted by this section is not abated by the death of a person named or to be named the defendant.

(f) A person whose act or omission constitutes the felonious killing of another person may not recover damages for the death of that person either directly or as a personal representative of that person's estate. In this subsection, a "felonious killing" means a crime defined by AS 11.41.100 — 11.41.140. (§ 4 ch 78 SLA 1972; am §§ 1, 2 ch 164 SLA 1988)

Revisor's notes. — In 1992, "or" was substituted for "of" after "accumulations" in paragraph (c)(1) of this section to correct a typographical error in the 1962 codification of § 61-7-3, ACLA 1949, as amended.

Editor's notes. — This section was taken from former AS 13.20.340 which, in turn, was taken from § 61-7-3, ACLA 1949, as amended.