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DEATH CLAIMS IN GEORGIA

Who has the claims for what damages?

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I. Introduction:

In Georgia, a death (the Georgia statute uses the word “homicide”) caused by the tortious act of another may give rise to an action for damages by certain survivors of the decedent.¹ When a person dies, two distinct causes of action may arise: one for wrongful death, which seeks to recover an amount sufficient to compensate for the whole value of the decedent measured from the decedent point of view, and the other for medical and funeral expenses and pre-death pain and suffering endured which goes to the estate of the decedent. The measurement of these damages has both actuarial and intangible components. Technically, the two causes of action always require different plaintiffs (the estate and the heirs) and sometimes dictate a difference in the division of the recovery.

II. Wrongful Death Claims

A. A Brief History of Wrongful Death Claims

Before the mid-nineteenth century, the common law followed the rule of “action personalis moritun cum persona”, which meant the right of action for tortious injuries died with

¹ O.C.G.A. 51-4-1(2) “Homicide” includes all cases in which the death of a human being results from a crime, from criminal or other negligence, or from property which has been defectively manufactured, whether or not as the result of negligence.

the injured party. This included both the wrongful death and the pre-death pain and suffering claims and meant there could be no recovery for wrongful death.² The increasing number of work-related deaths during Industrial Revolution of the 1800's gave rise to the first wrongful death statute - Lord Campbell's Act of 1846. Georgia followed shortly thereafter with its own wrongful death statute in 1850, 1850 Cobb's Digest 476, which placed the cause of action in the decedent's estate. Presently, the Georgia Wrongful Death statute is codified at O.C.G.A. § 51-4-1, et. seq., and 19-7-1, with other sections applicable in particular circumstances.

B. Who is the Plaintiff in a Wrongful Death Claim? (i.e., Who gets the money?)

1. Married at the Time of Death

If the decedent was married at the time of his/her death, then the wrongful death claim vests in his/her spouse. O.C.G.A. § 51-4-2 states in pertinent part:

- (a) The surviving spouse or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent...

While a surviving spouse alone has the cause of action and can discharge wrongdoers without the concurrence of any children, any recovery will be apportioned pursuant to O.C.G.A § 51-4-2(d)(1).

Generally, the surviving spouse will be wearing two hats; the surviving spouse in wrongful death action commonly acts as both an individual with an interest in the recovery and as a representative of the decedent spouse's children. Therefore, the surviving spouse may settle a claim without have to get permission or consent from the children, but she must act prudently. O.C.G.A. § 51-4-2(c); *Home Ins. Co. v. Wynn*, 1997, 229 Ga.App. 220, 493 S.E.2d 622 (1997).

² As a derogation of common law, this statute is strictly construed. *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976).

In fact, if the surviving spouse refuses to bring the action in the first place, there is nothing the children can do to compel him or her to do so. *See, e.g., Lawrence v. Whittle*, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

The children will share equally with the spouse, but a spouse will receive no less than 1/3 of the recovery. O.C.G.A. §51-4-2 (d) (2). For example, if there are 2 children, then the surviving spouse and each child gets one third. If, however, there are 4 children, the spouse still gets one third and the other children split the remaining two thirds (1/6th per child).

Children born out of wedlock may recover as well. O.C.G.A § 51-4-2(f). Common law marriages entered into before December 1997 are treated the same as ceremonial marriages for purposes of determining the rights of the spouse to control the claim. However, after common law marriages were abolished in December 1997, the law now only recognizes ceremonial marriages. If the common law marriage is valid, the decedent's common-law spouse, rather than the couple's children, have exclusive standing to bring any wrongful death action. O.C.G.A. § 51-4-2(a). *Georgia Osteopathic Hosp., Inc. v. O'Neal*, 198 Ga. App. 770, 403 S.E.2d 235 (1991). If there is no valid marriage, then the laws relating to husbands and wives do not apply and one must look to the laws relating to "father or mother" and "child" discussed below.

2. Unmarried but with living children at the time of death

Less than all of the surviving children can initiate claim, and the distribution of recovery can be adjusted later. *Adams v. Wright*, 162 Ga.App. 550, 293 S.E.2d 446 (1982). This sometimes results in a race to the courthouse as the first one there is the plaintiff in the wrongful death aspect of the claim. Of course, the estate's claim for pre-death pain and suffering can only be filed by the administrator of the estate. There is no legal requirement, however, that the wrongful death claim be delayed while waiting for estate issues to be resolved.

3. No spouse, no children? The claim vests in the parents.

If divorced, separated or living apart, the cause of action belongs to both parents. If one refuses or cannot be located, the other may proceed and bind the one who is not actively pursuing the claim. Judgment or recovery is divided equally between the parents unless a motion is made for a post judgment apportionment based on the parent's relationship with the deceased child.³

Parents who have abandoned or otherwise surrendered their parental rights and obligations, may not make the claim. *Pickett v. Amoco Oil Co.*, 735 F.2d 445 (11th Cir. 1984) rehearing denied 741 F.2d 1384; *Queen v. Carey*, 210 Ga.App. 41, 435 S.E.2d 264 (1993). Apportionment of proceeds of recovery is proportional to pre-death support.⁴

4. Unborn Fetus

In the case of an unborn fetus, the administrator of the fetus' estate has the claim pursuant to O.C.G.A. §§ 19-7-1 (c), 51-4-5.

C. Damages Recoverable in Wrongful Death Claims

³ O.C.G.A. § 19-7-1 (C)(6) For cases in which the parents of a deceased child are divorced, separated, or living apart, a motion may be filed by either parent prior to trial requesting the judge to apportion fairly any judgment amounts awarded in the case. Where such a motion is filed, a judgment shall not be automatically divided. A post-judgment hearing shall be conducted by the judge at which each parent shall have the opportunity to be heard and to produce evidence regarding that parent's relationship with the deceased child. The judge shall fairly determine the percentage of the judgment to be awarded to each parent. In making such a determination, the judge shall consider each parent's relationship with the deceased child, including permanent custody, control, and support, as well as any other factors found to be pertinent. The judge's decision shall not be disturbed absent an abuse of discretion.

⁴ Settlement in wrongful-death action was properly apportioned 95% to decedent's mother and 5% to decedent's father, where after divorce, mother retained custody of decedent, paid for day-to-day care, and maintained close relationship until decedent's death, but father failed to maintain significant contact with decedent, did not attend most important events, and had no meaningful

Wrongful death damages are those damages relating only to the value of the life of the decedent to the decedent themselves.⁵ The Wrongful Death Act provides for recovery of damages equal to the full value of the life of the decedent to the decedent, as shown by the evidence. This means the, “full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived.” *OB-GYN Associates of Albany v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989). However, the jury is allowed to provide for inflationary trends. *Harden v. U.S.*, 688 F.2d 1025 (5th Cir. 1982). Life expectancy of decedent should be considered and the Annuity Mortality Table for 1949 Ultimate is permitted into evidence, but jury is not bound by it. *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967).

Future Income can be one of the biggest items of damages, and it is the economic evaluation of future earning potential of decedent. There are several variables that should be considered including: Life Expectancy, Work Life Expectancy, Wage Rise Factor (7 - 10%), Discount Rate (4-6%). Expert witnesses usually can provide this information using Department of Labor Publications information and statistics. Other considerations include education, intelligence, motivation, past earnings, industry potential, etc.⁶ The bottom line is that the full value of the life of the decedent to him/her is determined by the enlightened conscience of the

relationship with decedent. O.C.G.A. § 19-7-1(c)(6). *Hall v. Bailey*, 2002, 253 Ga.App. 595, 560 S.E.2d 76

⁵ O.C.G.A. § 51-4-1(1) “Full value of the life of the decedent, as shown by the evidence” means the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived.

⁶ In determining amount of damages in wrongful death action, jury should consider age of decedent at time of his death, his health, habits, and expectation of life, the amount of money he was earning, probable loss of employment, voluntary abstinence from work, dullness in business, reduction of wages, increasing infirmities of age, and other elements which might contribute to

jury as applied to the evidence in the case, including the experience and knowledge of human affairs on the part of the jury.

Punitive, or exemplary damages, are not allowed as such as part of the recovery in a wrongful death claim. By not deducting living expenses from future earnings, has a punitive characteristic and thus allowing additional punitives would be an improper double punishment of the tortfeasor.⁷ Additionally, punitive damages are not available in a wrongful death claim, since the relevant statute, to the extent that it permits recovery of more than actual loss to survivor, is itself punitive. O.C.G.A. §§ 19-7-1, 51-4-1(1), 51-4-4. *Ford Motor Co. v. Stubblefield*, 171 Ga.App. 331, 319 S.E.2d 470 (1984).

D. Scenarios Giving Rise to Wrongful Death Claims:

The list of causes of death giving rise to a wrongful death claim is virtually unlimited. In fact, any negligence that is actionable at common law. *Caskey v. Underwood*, 89 Ga.App. 418, 79 S.E.2d 558 (1953). The basic questions which should be answered include:

a) But for the negligence, or carelessness, of another, would the decedent still be alive?

b) But for the dangerous propensity of some product, would the decedent still be alive?

The facts underlying the incident are also important. When someone is killed while in the scope of employment, there still may be a wrongful death claim against a third party. One should ask questions like: Was he/she killed by a machine or other defective product? Was he/she on someone else's property? Was he/she under someone else's control? Was he/she driving a company vehicle? The overriding concern is whether anyone other than his/her employer caused

illustration of gross earnings of a lifetime. *Pollard v. Boatwright*, 57 Ga.App. 565, 196 S.E. 215 (1938).

⁷ The statute authorizing recovery for death of wife or mother is punitive in so far as the one from whom recovery is sought is concerned, and compensatory as to the persons seeking

the injury.

If the answer to any of these questions is "yes", there may be a cause of action available to the decedent's survivors.⁸

III. Claims Vested in the Estate

The administrator of the estate has the claims for funeral, medical and other necessary expenses resulting from the death of the child, and he/she also has the claim for the child's pain and suffering. O.C.G.A. §§ 51-4-5(b) and 9-2-41. These claims are those which existed in the child before death, and because the child would have been entitled to pursue had she lived, the claims flow to the administrator of the child's estate. *Gay v. Piggly Wiggly Southern*, 183 Ga.App. 175, 180, 358 S.E.2d 468 (1987); *Complete Auto Transit v. Floyd*, 214 Ga. 232, 237-238, 104 S.E.2d 208 (1958). "As such, the medical expenses are sought as 'an item of special damage incident to the recovery for the injury to the person [of the deceased]' and funeral expenses are sought as expenses resulting from the wrongful death of the deceased." *Velez v. Bethune*, 219 Ga.App. 679, 466 S.E.2d 627 (1995) (quoting *Gay, supra* at 180, 358 S.E.2d 468).

Pre impact fright, post impact pain and suffering are not compensable in a wrongful death matter, but would survive as an estate claim. Pre-impact fright is also referred to as the decedent's fear of his/her imminent death; in many cases, this claim can be the most valuable.

In Georgia, solatium, sense of loss caused by one passing, is not compensable. *See, Young Men's Christian Ass'n v. Bailey*, 112 Ga.App. 684, 146 S.E.2d 324 (1965).

recovery. Code 1933, § § 105-1306, 105-1308. *Pollard v. Kent*, 1938, 59 Ga.App. 118, 200 S.E. 542.

⁸ Wrongful death statute does not incorporate in its entirety the strict liability statute for purpose of creating wrongful death cause of action authorized by strict liability statute. O.C.G.A. § § 51-1-11, 51-4- 1(2). *Stiltjes v. Ridco Exterminating Co.*, 1986, 178 Ga.App. 438, 343 S.E.2d 715, certiorari granted, affirmed but criticized 256 Ga. 255, 347 S.E.2d 568, adopted 180 Ga.App. 700, 350 S.E.2d 856, on subsequent appeal 192 Ga.App. 778, 386 S.E.2d 696.

	<u>Vests in?</u>	<u>Damages Recoverable</u>
Wrongful Death	<ol style="list-style-type: none"> 1. The surviving spouse 2. If no surviving spouse, the decedent's children 3. If no spouse or children, the decedent's parents 4. If none of the above, the administrator of the estate 	<ul style="list-style-type: none"> √ The whole value of the decedent's life measured from the decedent point of view √ Future lost income
Estate Claim		<ul style="list-style-type: none"> √ Funeral expenses √ Medical Expenses √ Other necessary expenses √ Pre-death pain and suffering and fear of imminent death