

WRONGFUL DEATH LAW IN INDIANA: A SUMMARY

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A cause of action for wrongful death in Indiana did not exist at common law, and therefore all actions for wrongful death are purely creatures of statute. Durham v. U-Haul, Int'l., 745 N.E.2d 755, 758 (Ind. 2001). In this regard, Indiana recognizes three separate causes of action for wrongful death: (1) the “general” Wrongful Death Act (“WDA”), Ind. Code 34-23-1-1; (2) the Child Wrongful Death Act (“CWDA”), Ind. Code 34-23-2-1; and the Adult Wrongful Death Act (“AWDA”), Ind. Code 34-23-1-2. These three statutes create independent and mutually exclusive actions. They neither afford optionally alternative remedies nor are they actions that can be pursued together. Estate of Sears v. Griffin, 771 N.E.2d 1136, 1138 (Ind. 2002); See also: McCabe v. Commissioner, Ind. Dept. of Ins., 930 N.E.2d 1202 (Ind. Ct. App. 2010).

I. THE GENERAL WRONGFUL DEATH ACT

The general wrongful death statute was first enacted in 1852 and again in 1881, and it was amended in 1899, 1933, 1937, 1949, 1951, 1957, 1965, 1982, and 1998. Durham, 745 N.E.2d at 761 n.3. The current version of the statute provides as follows:

Ind. Code 34-23-1-1. Wrongful death.

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 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.

A. WHO MAY COMMENCE AN ACTION

An action for wrongful death under I.C. 34-23-1-1 can only be commenced through a personal representative. In re Estate of Hutman, 705 N.E.2d 1060, 1063 (Ind. Ct. App. 1999).

The failure to commence a wrongful death action through a duly personal representative within the applicable statute of limitations will result in the claim being barred. Hosler v. Caterpillar, Inc., 710 N.E.2d 193, 197 (Ind. Ct. App. 1999).

An exception to this rule exists for wrongful death claims prosecuted under the Medical Malpractice Act, which specifically allows a “patient or the representative of a patient” to bring a malpractice claim “for bodily injury or death.” Ind. Code 34-18-8-1. A “representative” is defined under the Medical Malpractice Act as “the spouse, parent, guardian, trustee, attorney, or other legal agent of the patient.” Ind. Code 34-18-2-25. Unlike the Wrongful Death Act (“WDA”), however, the Indiana Supreme Court has held that the Medical Malpractice Act does

not require that the “representative” be the legally appointed personal representative of the patient. See: Community Hospital v. McKnight, 493 N.E.2d 775, 776 (Ind. 1986); Ellenwine v. Fairley, 846 N.E.2d 657, 663 (Ind. 2006).

B. STATUTE OF LIMITATIONS

As noted in the WDA, the statute of limitations for wrongful death cases is generally two years from the date of death. Hopster v. Burgeson, 750 N.E.2d 841, 852 n.8 (Ind. Ct. App. 2001). However, where a wrongful death action arises in the context of an underlying medical malpractice or product liability claim, the Supreme Court has noted that “the Legislature's intent is that the limitations period provided in the WDA always serves as an outside limit on the amount of time that the personal representative of a person whose death is caused by the wrongful act or omission of another will have to file the lawsuit.” Technisand, Inc. v. Melton, 898 N.E.2d 303, 306 (Ind. 2008).

1. ***Medical Malpractice Causing Wrongful Death***

In Hopster v. Burgeson, 750 N.E.2d 841 (Ind. Ct. App. 2001), Patricia Hopster died suddenly at the age of 45 from a ruptured ascending aorta. Exactly two years after the date of her death, her husband filed a proposed complaint with the Department of Insurance alleging that various healthcare providers had failed to timely diagnose and treat the condition that caused her death. The health care providers moved for summary judgment on grounds that she was last seen or treated by them more than two years prior to her death, and as such, the claim was barred under the two year statute of limitations in the Medical Malpractice Act.

The Court of Appeals found in favor of the healthcare providers, citing to the earlier case of Fraday v. Hedgcock, 497 620, 622 (Ind. Ct. App. 1986), which held that “The statute of

limitations for the Medical Malpractice Act is applicable instead of the time period imposed for wrongful death actions. Therefore, an action for wrongful death based upon medical malpractice must be filed within two years of ‘the date of the alleged act, omission or neglect,’ not within two years of the date of the death.” Hopster, 750 N.E.2d at 852-53. See also: Ellenwine v. Fairley, 846 N.E.2d 657, 664-665 (Ind. 2006).

2. *Product Liability Causing Wrongful Death*

In Technisand, Inc. v. Melton, 898 N.E.2d 303 (Ind. 2008), Patty Melton was employed as an inspector and assembler for KIPT. In December 2001, she was diagnosed with chronic leukemia and died from the disease on July 25, 2002. In July of 2003, the attorney for Patty’s husband was provided with a letter from KIPT stating that Patty may have been exposed to a resin-coated sand manufactured by Technisand during her employment with KIPT, and this resin-coated sand could create formaldehyde fumes, a known carcinogen. On January 12, 2005, the lawyer received a letter from Patty’s doctor opining that formaldehyde exposure may have placed Patty at a higher risk for leukemia, and suit was filed against Technisand on February 16, 2005. Id. at 304.

Technisand moved for summary judgment on grounds that suit was not timely filed within two years of Patty’s death as is required under the WDA. Her husband countered that under the Product Liability Act, a cause of action must be filed within two years after the action accrues, and an action “accrues” under the Product Liability Act once a plaintiff’s doctor expressly informs the plaintiff that there is a “reasonable possibility, if not a probability” that an injury was caused by an act or product. Patty’s husband therefore argued that since he did not learn of a potential action against Technisand until the doctor’s letter of January 12, 2005, his

suit was timely filed pursuant to the Product Liability Act. Id.

The Supreme Court concluded that a lawsuit must be brought within the statute of limitations period of the substantive tort underlying the wrongful death claim, but in situations where the limitations period of the wrongful death claim expires before the limitations period of the substantive tort, the claim must be filed before the limitations period of the wrongful death claim. The Court concluded that Patty's claim against Technisand for products liability terminated at her death pursuant to the Survival Act. As such, the WDA required that her wrongful death claim be brought within two years of the date of her death. Since this did not occur, the Court concluded that the claim was time-barred. Id. at 306.

C. BENEFICIARIES AND RECOVERABLE DAMAGES

The WDA provides for recovery by three different classes: (1) spouse or dependent children; (2) dependent next of kin; and (3) service providers. The statute further provides that damages shall be in such an amount as may be determined by the court, including, but not limited to, reasonable medical, hospital, funeral, and burial expenses, lost earnings, and the costs of bringing the wrongful death action, including attorney fees. Only the first and second classes may recover damages resulting from lost earnings and from the non-pecuniary loss of love, care, and affection. Necessary v. Inter-State Towing, 697 N.E.2d 73, 76 (Ind. Ct. App. 1998). Accordingly, if the decedent had no surviving spouse, dependent children or dependent next of kin, the statute limits damages to hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees. Chamberlain v. Walpole, 822 N.E.2d 959, 961 (Ind. 2005).

1. *Medical, hospital, funeral and burial expenses.*

The statute provides that those damages which are recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. Inlow v. Inlow, 916 N.E.2d 664, 666 (Ind. 2009). Although the WDA provides that these damages inure to the benefit of the decedent's estate, none of the damages recovered in a wrongful death action actually become a part of the decedent's estate, and they are not subject to the claims of decedent's creditors. See: In re the Estate of Bruck, 632 N.E.2d 745, 748 (Ind. Ct. App. 1994); Goldman v. Jin S. Cha, 704 N.E.2d 157, 158 (Ind. Ct. App. 1999).

2. *Pecuniary and Intangible Damages*

As noted above, if the decedent dies leaving a surviving spouse or dependent children or dependent next of kin, intangible damages are recoverable. Necessary, 697 N.E.2d at 76. Particularly before the enactment of the Adult Wrongful Death Act in 1999, a number of cases focused upon what level of dependency was required in order to recover intangible damages, since a parent generally had no effective remedy for the death of an emancipated child, and an emancipated child had no effective remedy for the death of a widowed or divorced parent. In this regard, it is well-established that partial dependency will enable a beneficiary to recover intangible damages under the WDA. Necessary v. Inter-State Towing, 697 N.E.2d 73, 76 (Ind. Ct. App. 1998).

To prove dependency, it must be shown that "a need or necessity of support [existed] on the part of the person alleged to be dependent . . . coupled with the contribution to such support by the deceased." Id. Dependency is not measured by monetary contributions alone, "but may include keeping the family and home in a condition and with surroundings suitable to their

station in life.” Dependency can also be established through love, affection, and services, rather than just financial contribution. Id. However, emotional support, standing alone, is insufficient to show dependency. Terry v. Stephens, 921 N.E.2d 516, 521 (Ind. Ct. App. 2010); Deaconess Hospital, Inc. v. Gruber, 791 N.E.2d 841, 847 (Ind. Ct. App. 2003). Additionally, payments of board, lodging or other accommodations, mere gifts, or acts of generosity standing alone are not sufficient to establish dependency on the part of the recipient. Necessary, 697 N.E.2d at 77. Dependency is based on a condition and not a promise, and such dependency must be actual, amounting to a “necessitous want” on the part of the beneficiary and a recognition of that necessity on the part of the decedent, an actual dependence coupled with a reasonable expectation of support or with some reasonable claim to support from decedent. Id. at 78.

Where a decedent dies leaving behind a surviving spouse or dependent child or dependent next of kin, several types of damages are recoverable beyond medical, hospital, funeral and burial expenses. Surviving spouses may recover damages for loss of consortium, which has been defined to include both tangible and intangible elements. Durham v. U-Haul, Int’l., 745 N.E.2d 755, 765 (Ind. 2001). Tangible losses include money, services, or other material benefits rendered by the deceased prior to his death. Id. (quoting Andis v. Hawkins, 489 N.E.2d 78, 82 (Ind. Ct. App. 1986)). Intangible losses include the loss of love, care and affection, along with the loss of services, society, and sexual relations. Durham, 745 N.E.2d at 765-66.

Dependent children can recover for the pecuniary damages occasioned by a parent’s death, as well as for intangible damages such as the loss of the decedent’s love, care and affection, and the training and guidance of children. Necessary, 697 N.E.2d at 76; FMC Corp. v. Brown, 551 N.E.2d 444, 449 (Ind. 1990). The same pecuniary and intangible damages are also

recoverable by dependent next of kin. Ed Wiersma Trucking Co. v. Pfaff, 649 N.E.2d 909, 913 (Ind. Ct. App. 1995), *affirmed on transfer*, 678 N.E.2d 110 (Ind. 1997); Necessary, 697 N.E.2d at 77.

3. *Attorney's Fees*

The WDA clearly contemplates that a personal representative may recover attorney's fees, although the statute is not clear as to whether those fees are recoverable when a decedent dies without a surviving spouse or dependent children or next of kin. However, in the very recent case of Hillebrand v. Estate of Large, 914 N.E.2d 846 (Ind. Ct. App. 2009), the Court of Appeals examined the statute as a whole and observed that the language of I.C. 34-23-1-1 provides that "damages may include ***but are not limited to*** the following . . .". On the basis of this inclusive language, the Court concluded as follows:

Because this list of recoverable damages in a wrongful death action is expressly illustrative and not exclusive, we interpret the statute to allow in every situation – regardless whether the decedent leaves a widow or widower, dependents or dependent next of kin – the recovery of the reasonable costs of administering the decedent's estate and prosecuting or compromising the action, including attorney fees.

Id. at 850.

D. RESTRICTIONS UPON DAMAGES

1. *Where Decedent Leaves No Surviving Spouse or Dependents*

As previously stated, if a person dies without a surviving spouse, dependent children or dependent next of kin, the WDA limits damages to hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees. Chamberlain v. Walpole, 822 N.E.2d 959, 961 (Ind. 2005).

2. *Punitive Damages*

The WDA does not explicitly provide for the recovery of punitive damages. In Durham v. U-Haul, Int'l., 745 N.E.2d 755 (Ind. 2001), the Indiana Supreme Court examined whether punitive damages were recoverable under the WDA, and concluded that because the wrongful death statute is in derogation of the common law, it is to be construed strictly against the expansion of liability. Id. at 759. The Court therefore held that punitive damages were not recoverable under the WDA. Id. at 763.

3. *Deduction for Personal Consumption of the Decedent*

In Elmer Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939, 942 (Ind. 2001), the Indiana Supreme Court held that “the statute has long been understood to contemplate a deduction for the amount of personal maintenance expenses that the decedent would have incurred over the remainder of his lifetime.”

II. THE CHILD WRONGFUL DEATH ACT

A statute recognizing the right of a parent to recover for the death of a child was first enacted in 1881, and the current version of the CWDA provides as follows:

34-23-2-1. Wrongful death or injury of child.

- (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

- (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;
 - (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.

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.

A. WHO MAY COMMENCE AN ACTION

The CWDA recognizes three categories of individuals who may commence an action for the wrongful death of a child: If the child's parents are still married, subsection (c)(1) gives a cause of action to both parents jointly or either of them individually, so long as the other is named to answer as to his or her interest. If the child's parents are no longer married, subsection (c)(2) gives a cause of action to the custodial parent. If the child has a guardian, subsection (c)(3) gives a cause of action to the guardian. King v. King, 610 N.E.2d 259, 264 (Ind. Ct. App. 1993).

If the claim is brought by a parent under subsection (c)(1) and the parent fails to join the other parent as a defendant to answer as to his or her interest, the claim may be subject to dismissal for failing to join a necessary party. City of Terre Haute v. Simpson, 746 N.E.2d 359, 364-65 (Ind. Ct. App. 2001). A non-custodial parent is entitled to commence an action under subdivision (c)(1), but the custodial parent must be joined in the action as a defendant. Chamness v. Carter, 575 N.E.2d 317, 321 (Ind. Ct. App. 1991). Conversely, where a child's parents are divorced and the custodial parent brings the action under subdivision (c)(2), the statute does not impose the requirement that the non-custodial parent be joined in the action. Johnson v. Parkview Health Sys., 801 N.E.2d 1281, 1286 n.3 (Ind. Ct. App. 2004).

Unlike cases brought under the WDA or the AWDA, cases brought under the CWDA are not commenced through a personal representative. In Johnson, the decedent's mother erroneously brought a child wrongful death claim as the personal representative of her son's estate. Id. at 1283. The Court of Appeals concluded that this was improper:

Comparing the [Wrongful Death Statute] and the [Child Wrongful Death Statute], we see that the legislature has made different choices regarding who may pursue an action for wrongful death under the respective statutes. When an action is

brought under the WDS, it must be brought by the personal representative of the decedent. When an action is brought under the CWDS, it must be brought by the decedent's parents, by the parent who has custody of the child following a divorce or dissolution of marriage, or the guardian of the child. The personal representative of the decedent's estate may not maintain the cause of action except upon the death of the person to whom custody of the child was awarded. No other result may be obtained according to the language employed by our legislature.

Id. at 1285.

B. WHO QUALIFIES AS A “CHILD” UNDER THE CWDA

Subsection (b) describes who qualifies as a “child” for claims commenced under the CWDA:

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

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

The requirements for being a “child” under subsection (b) are strictly construed, sometimes with inequitable results. In Randles v. Indiana Patient’s Compensation Fund, 860 N.E.2d 1212 (Ind Ct. App. 2007), Seandre was a pregnant, unmarried, nineteen-year-old high school student and the daughter of Randles. Seandre was diagnosed with preeclampsia and was instructed to go to the emergency room. After her admission to the hospital, Seandre collapsed in a restroom and was found unconscious and without a pulse at 4:15 p.m. Efforts were made to resuscitate Seandre, and her baby, Sean, was delivered by caesarean section at 4:57 p.m. Resuscitation efforts continued on Seandre until 5:29 p.m., when she was declared dead. Sean lived until the following day when his

life support was discontinued. Id. at 1215-16.

Randles brought suit under the provisions of the CWDA for Seandre's death. However, the trial court concluded that at the time of her death, Seandre was not a "child" under the Child Wrongful Death Act, because she died leaving behind Sean, a dependent next of kin. The trial court therefore limited the recoverable damages for Seandre's wrongful death claim to the recovery of medical, funeral, burial and administration expenses.

The Court of Appeals examined the Uniform Determination of Death Act ("UDDA"), I.C. 1-1-4-3, to assist in the determination of when Seandre died. Under the UDDA, the Court focused upon when Seandre "sustained an irreversible cessation of her circulatory functions" to determine whether she was alive or dead when she delivered her baby. Id. at 1223. Although the medical evidence presented to the trial court was conflicting in this regard, the Court of Appeals ultimately concluded that the trial court's decision that Seandre was still alive at the time of her son's birth was not clearly erroneous. As a result, the Court found that Seandre had a dependent when she died and thus she did not qualify as a "child" under the Child Wrongful Death Act. Id. at 1228.

In Howard v. E & B Paving, Inc., 920 N.E.2d 693 (Ind. Ct. App. 2010), Amber Howard graduated from high school in June of 1999. Following graduation Amber enrolled at Ivy Tech as a general studies major, but her enrollment was not consistent. She did not enroll for classes in the fall of 2002 or during the summer of 2002. Moreover, Amber did not register for any classes for the spring 2003 semester, even though the registration period commenced on October 21, 2002. Id. at 694.

On November 13, 2002, Amber was involved in a motor vehicle collision and she died as a result of her injuries. Her parents brought a claim against E & B for damages under the CWDA,

and the trial court ultimately granted summary judgment in favor of E & B on grounds that Amber was not a “child” for purposes of the CWDA. Id. at 694-95. On appeal, the Howards argued that although Amber had not enrolled at Ivy Tech for the fall semester of 2002 or the spring semester of 2003, she intended to return to school. Citing to the earlier case of Ledbetter v. Ball Memorial Hospital, 724 N.E.2d 1113 (Ind. Ct. App. 2000), the Court of Appeals held that “the mere intent of a person to pursue a degree is not the same as the enrollment required by the [CWDA].” Howard, 920 N.E.2d at 697. As such, the Court of Appeals affirmed the decision of the trial court that Amber was not a “child” under the CWDA because she was not “enrolled in a postsecondary educational institution.” Id. at 699.

Effective July 1, 2009, subsection (b) now defines a “child” to include a fetus that has attained viability. In Britt v. Sears, 277 N.E.2d 20, 27 (Ind. Ct. App. 1971), the Court of Appeals concluded that a parent could recover for the death of a viable fetus under an earlier version of the CWDA. However, in Bolin v. Wingert, 764 N.E.2d 201 (Ind. 2002), the Indiana Supreme Court concluded that only a child born alive qualified as a “child” under the current version of the CWDA. Consequently, until the General Assembly expanded the definition of a “child” under the CWDA in 2009, there was no cause of action under the CWDA for the death of a viable fetus. See: Ramirez v. Wilson, 901 N.E.2d 1 (Ind. Ct. App. 2009).

C. STATUTE OF LIMITATIONS

Unlike the WDA, the CWDA does not contain an express statute of limitations. However, Indiana’s appellate courts have concluded that the statute of limitations for cases arising under the CWDA is generally two years after the date of death. State v. Guziar, 680 N.E.2d 553, 555 (Ind. Ct. App. 1997); Ellenwine v. Fairley, 846 N.E.2d 657, 663 (Ind. 2006). As

Ellenwine discusses, however, the general two year statute of limitations can be modified under circumstances where the child's death was caused by medical malpractice.

In Ellenwine, Michelle Ellenwine gave birth to a son, Dustin, on December 19, 1996. Complications arose during the delivery causing oxygen deprivation and brain damage. Dustin died from these complications on February 2, 1999, when he was two years old. On October 12, 1999, two years and 45 days after the malpractice, but only 10 months after Dustin's death, the Ellenwines filed a proposed medical malpractice complaint against Dr. Fairley. Dr. Fairley filed a motion for summary judgment, arguing that the action was barred by the two year statute of limitations. The trial court agreed and granted the motion. The Court of Appeals reversed, holding that the two-year medical malpractice statute of limitations could not be constitutionally applied to bar the Ellenwines' wrongful death claim because the wrongful death claim did not arise until after the two-year period had lapsed. Ellenwine v. Fairley, 818 N.E.2d 961, 969-70 (Ind. Ct. App. 2004).

On transfer, Dr. Fairley argued that the Ellenwine's claim was untimely because the exception in the Medical Malpractice Act allowing a child to file until his eighth birthday could only apply if the child was alive at the time suit was filed. The Supreme Court disagreed, holding that "We see nothing in the language of the MMA that suggests that the 'eighth birthday' exception only applies to children who are living, just as there is nothing in the language of the generally applicable two-year provision that suggests that it only applies to living patients." Id. at 665. The Court noted that the Survival Act (not the Medical Malpractice Act) terminates a child's malpractice claim if the death is caused by the malpractice. Id. As such, the Court concluded that the operations of the Medical Malpractice Act and Child Wrongful Death Act

required the Ellenwines to get their claim on file within the first to expire either of the medical malpractice limitations period (Dustin's eighth birthday) or of the child wrongful death limitations period (two years from date of death). Because the Ellenwines filed their claim within 10 months of Dustin's death, and before his eighth birthday, the Court held that the erred in granting Dr. Fairley summary judgment on statute of limitations grounds. Id. at 666.

Lastly, the Court considered the scenario where a child with a medical malpractice claim dies in infancy or in the first few years of life from causes *other than* the malpractice. Under the Survival Act, the Court noted that the malpractice claim survives. The Court concluded that any Child Wrongful Death claim must be brought no later than two years of the date of death pursuant to the clear language of the statute. As to the medical malpractice claim, the Court noted ("Recognizing that it is only dicta for purposes of this case") that "the fairest and most workable rule is one closely analogous to the one described above: that both the malpractice claim and the CWDA claim must be brought within the first to expire either of the MMA limitations period (the child's eighth birthday) or of the CWDA limitations period (two years from date of death)." Id. at 666-67.

At the end of its opinion, the Court summarized its conclusions with respect to a child patient who is the victim of medical negligence prior to the child's sixth birthday who dies prior to the child's eighth birthday. (1) If the death was caused by the malpractice, (a) the malpractice claim terminates at the child's death; and (b) any wrongful death claim must be filed within the first to expire of either the MMA limitations period (the child's eighth birthday) or the CWDA limitations period (two years from the date of death). (2) If the death was from a cause other than the malpractice, both (a) the malpractice claim and (b) any wrongful death claim must be filed

within first to expire either of the MMA limitations period (the child's eighth birthday) or of the CWDA limitations period (two years from date of death). Id. at 667.

D. BENEFICIARIES AND RECOVERABLE DAMAGES

There are three categories of recoverable damages under the CWDA: (1) loss of the child's services; (2) loss of the child's love and companionship; and (3) expenses and debts arising out of the child's death.

1. *Loss of the Child's Services*

This element of damages has its origins in English common law and arose from a time when children were considered "property." Under the common law, the injury or death of a child was regarded as a compensable property loss, similar to a master's loss of services of his servant. Forte v. Connerwood Healthcare, Inc., 745 N.E.2d 796, 801-02 (Ind. 2001). As embodied within the CWDA, the loss of a child's services is still in the nature of "injuries to property" as opposed to injuries to a person. Id. at 802. As such, a claim for loss of services differs from loss of consortium because loss of services does not expand to include intangible losses; i.e., the parent has no claim for loss of the child's society and companionship. Id. at 801, n. 8.

In modern times where children rarely provide pecuniary services to their parents, a claim for loss of a child's services frequently will not apply, except in situations where children provide services on a family farm or business. If such damages are applicable, they are limited from the time of the child's death until either (1) the age of 20; (2) the age of 23, if the child was enrolled in a postsecondary educational institution; or (3) the date of the child's last surviving parent's death, whichever comes first. I.C. 34-23-2-1(g)(1). These damages inure to either (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 the CWDA. I.C. 34-23-2-1(i).

2. *Loss of the Child's Love and Companionship*

The recovery of damages for the loss of a child's love and companionship is a relatively new development in Indiana wrongful death law. Prior to 1987, the "pecuniary loss rule" was followed, which restricted damages to those elements upon which a pecuniary value could be placed (e.g., loss of the child's services, monetary contributions or other material benefits). Damages were thus restricted solely to economic losses, and a parent could not recover for the loss of a child's love and companionship. Further, those pecuniary damages which were recoverable were restricted from the time of death to the date upon which the child would have reached the age of majority. Miller v. Mayberry, 507 N.E.2d 7, 11 (Ind. 1987).

In 1987 the General Assembly modified the CWDA to permit the recovery of damages for loss of love and companionship. Although these damages were originally capped at \$100,000.00, after October 31, 1990, there was no restriction upon the amount that could be recovered for this loss. Robinson v. Wroblewski, 704 N.E.2d 467, 473 (Ind. 1998). Most significantly, damages for the loss of a child's love and companionship are explicitly permitted from the death of the child until the date of the child's last surviving parent's death. I.C. 34-23-2-1(h); Robinson, 704 N.E.2d at 476. These damages inure to either (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 the CWDA. I.C. 34-23-2-1(i).

3. *Expenses and Debts Arising from the Child's Death*

I.C. 34-23-2-1(f)(3) lists the following expenses and debts that can be recovered following the death of a child: (A) health care and hospital expenses; (B) funeral and burial expenses; (C) expenses of psychiatric a psychological counseling incurred by a surviving parent or minor sibling; (D) uninsured debts of the child, including debts for which a parent is obligated on behalf of the child; and (E) costs of administering the child's estate, including reasonable attorney's fees. Damages recovered under subsections (f)(3)(C) and (f)(3)(D) inure to either (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 the CWDA. I.C. 34-23-2-1(i).

The CWDA explicitly permits the recovery of "reasonable attorney's fees." The right to recover attorney's fees in cases brought under the CWDA has very recently been acknowledged in McCabe v. Commissioner, Ind. Dept. of Ins., 930 N.E.2d 1202, ____ (Ind. Ct. App. 2010): "It is clear that the GWDS and the CWDS explicitly provide for the option of recovery of reasonable attorney fees."

4. *Offsetting for Child-Rearing Expenses*

As noted above, in cases brought under the WDA it is appropriate to offset damages for the personal consumption of the decedent. Elmer Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939, 942 (Ind. 2001). Prior to the enactment of the 1987 version of the CWDA, it was recognized that the recoverable damages in a child death case should be offset by the cost of

support and maintenance of the child. Forte v. Connerwood Healthcare, Inc., 745 N.E.2d 796, 799 (Ind. 2001). However, as noted by the Indiana Supreme Court in Robinson v. Wroblewski, 704 N.E.2d 467 (Ind. 1998), an offset for child-rearing expenses was purposefully excluded from the final version of the 1987 CWDA:

The bill as introduced provided that damages recoverable for loss of a child's services would be reduced by the parents' reasonable expenses that would have been incurred in rearing the child. The Senate Judiciary Committee deleted this offset for child rearing expenses; the full Senate restored this offset; the House Judiciary Committee made the offset for child-rearing expenses permissive rather than mandatory; and the bill passed the full House in this fashion. The bill as passed contained no offset for child-rearing expenses.

Id. at 472. As the Robinson Court further observed, the omission of an offset for child-rearing expenses in the CWDA was the result of considerable legislative negotiation and compromise:

There was extensive give-and-take between the supporters and opponents of expanded recovery for the wrongful death of a child: the age of covered children, the expenses recoverable as damages, the offset for child-rearing expenses, and, most of all, the cap on damages for loss of love and companionship – all were "in play." This give-and-take resulted in the compromise that was the final bill.

Id. at 473. Based upon this legislative history, it appears that the General Assembly did not intend to permit an offset for child-rearing expenses under the current version of the CWDA.

E. RESTRICTIONS UPON DAMAGES

1. *Punitive Damages*

As with the WDA, punitive damages are not recoverable in cases brought under the CWDA. See: Forte v. Connerwood Healthcare, Inc., 745 N.E.2d 796, 798 (Ind. 2001).

2. *Abandonment*

As I.C. 34-23-2-1 clearly provides, a parent or grandparent who abandoned the child prior to death is not entitled to recover damages under the CWDA. I.C. 34-23-2-1(i).

III. THE ADULT WRONGFUL DEATH ACT

The AWDA is the most recent of the wrongful death statutes, having been enacted by the General Assembly in 1999. Prior to that time, there was effectively no remedy for the death of a person who died without a surviving spouse, dependent child or dependent next of kin, or who did not qualify as a "child" for purposes of the CWDA. The AWDA provides as follows:

34-23-1-2. "Adult person" defined -- Right of action -- Damages.

- (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.

- (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).

A. WHO MAY COMMENCE AN ACTION

As with the WDA, an action commenced under the AWDA can only be brought by the personal representative of the decedent's estate. In Bush v. State Farm Mut. Ins. Co., 905 N.E.2d 1003, (Ind. 2009), the Supreme Court noted that "A claim under that statute may be asserted only by the decedent's estate. This is no mere technicality."

B. WHO QUALIFIES AS AN “ADULT” UNDER THE AWDA

Section (a) provides that an "adult person" means an unmarried individual who does not have any dependents and who is not a “child” as that term is defined under the CWDA. Estate of Sears v. Griffin, 771 N.E.2d 1136, 1138 n.2 (Ind. 2002).

C. STATUTE OF LIMITATIONS

The AWDA does not provide a statute of limitations within its provisions, and to date, no appellate court has squarely addressed this issue. However, in Newkirk v. Bethlehem Woods Nursing & Rehab. Center, 898 N.E.2d 299 (Ind. 2008), the Indiana Supreme Court implies that the limitations period is two years from the date of death, consistent with claims brought under the WDA and the CWDA. Such a reading is also consistent with the general statute of limitations for injuries to the person as found in Ind. Code 34-11-2-4.

As with the WDA and the CWDA, the statute of limitations for claims brought under the AWDA may be abbreviated in cases of medical malpractice resulting in death. In Newkirk, Martha O’Neal was the victim of multiple acts of malpractice at the defendant’s facility. She was then moved to a hospital and subsequently died from her injuries. O’Neal’s personal representative brought a claim against the facility within two years after her death, but more than two years after the acts of malpractice occurred.

Relying upon its decision in Ellenwine, the Supreme Court held that the medical malpractice claim terminated at O’Neal’s death, and the wrongful death action had to be filed by the Estate within two years of the alleged malpractice, not within two years of the date of her death. As such, the Court held that the Estate’s claim was not timely filed.

D. BENEFICIARIES AND RECOVERABLE DAMAGES

There are two categories of recoverable damages specified under the AWDA: (1) expenses caused by the death; and (2) loss of love and companionship.

1. *Expenses Caused by the Death*

Subsection (c)(3)(A) provides that the personal representative may recover the reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person's death. 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. I.C. 34-23-1-2(d).

In Butler v. Ind. Dept. of Insurance, 904 N.E.2d 198 (Ind. 2009), the Supreme Court considered whether an Estate could recover the amount of medical bills charged by the decedent's healthcare providers in a claim brought under the AWDA, versus the amount actually accepted by the healthcare providers after insurance write-offs or discounts. In its analysis, the Court focused upon language of Section (c)(3)(A) which allows the personal representative to recover "the reasonable medical, hospital, funeral and burial expenses *necessitated* by the wrongful act or omission that caused the adult person's death." (Emphasis added). Based upon the legislature's use of the word "necessitated," the Court concluded as follows:

We find the language in Section 2(c)(3)(A) to be unambiguous. It specifies that damages are allowable for "[r]easonable medical, hospital . . . expenses necessitated by" the wrongful conduct that caused the death. The statutory language does not employ the common law standard to generally authorize recovery for the reasonable *value* of medical care and treatment. Nor is the scope of permissible damages merely "reasonable expenses," which in conjunction with Evidence Rule 413 could be understood to include the total amounts billed.

Rather, the language of this statutory wrongful death action authorizes recovery only of reasonable medical "expenses necessitated" by another's wrongful conduct. Where charges for medical services are initially billed but thereafter settled for a lower amount pursuant to agreements with health insurers or government agencies, the difference is not a "necessitated" expense.

Id. at 202.

2. *Loss of love and companionship*

Subsection (c)(3)(B) permits the recovery of damages for loss of the adult person's love and companionship. Under subsection (d), these damages inure to the exclusive benefit of a nondependent parent or nondependent child of the adult person. This is an important limitation on the recovery of damages under the AWDA, since only a parent or child of an adult person may recover damages for loss of love and companionship. For example, if the adult person dies without a nondependent parent or child, damages for loss of love and companionship are not available for other close family members such as siblings, grandparents, aunts, uncles, nieces or nephews.

Additionally, in order for a nondependent parent or child to recover damages for loss of the adult person's love and companionship, subsection (f) provides that "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." Subsection (i) further requires that a trier of fact shall make a separate finding with respect to damages awarded for loss of love and companionship under subsection (c)(3)(B).

3. *Attorney's Fees*

Unlike the WDA and the CWDA, the AWDA does not expressly provide that attorney's fees are recoverable. Whether such fees are recoverable has been the subject of three recent decisions of the Indiana Court of Appeals, with varying results. In Hillebrand v. Estate of Large, 914 N.E.2d 846 (Ind. Ct. App. 2009), the Court of Appeals focused upon the language of I.C. 34-23-1-2(c)(3) which provides that "damages . . . may include ***but are not limited to*** the following." On the basis of this inclusive language, the Court concluded that attorney's fees are recoverable under the AWDA, and further held that these damages inured to the exclusive benefit of the estate for payment of such costs. Id. at 851.

The reasoning employed by the Hillebrand Court was very recently adopted by another panel of the Court of Appeals in Hematology-Oncology of Ind., P.C. v. Fruits, ___ N.E.2d ___ (Ind. Ct. App. 2010) (No. 49A05-0910-CV-556, Decided August 18, 2010). In Fruits, the Court observed that "the AWDA explicitly *prohibits* only two categories of damages, namely damages for grief and punitive damages, then explicitly provides available damages under that section 'are not limited to' the named categories of 'reasonable medical, hospital, funeral, and burial expenses' and 'loss of the adult person's love and companionship.'" (Emphasis original). Noting that the legislature could have excluded attorney's fees in the list of prohibited damages if it wished to do so, the Court held that "the legislature did not intend that the AWDA implicitly take away a category of damages explicitly permitted in the WDA," and concluded that attorney's fees were recoverable under the AWDA.

Conversely, in McCabe v. Comm'r, Ind. Dep't of Ins., 930 N.E.2d 1202 (Ind. Ct. App. 2010), another panel of the Court of Appeals reached a different conclusion than in Hillebrand

and Fruits. The McCabe Court focused upon the decision in Bulter v. Ind. Dept. of Insurance, 904 N.E.2d 198 (Ind. 2009), wherein the Supreme Court examined the non-limiting language in subsection (c)(3) of the AWDA which provides that “damages . . . may include but are not limited to the following.” In Butler, the Court interpreted this language as follows:

This open-ended phrase permits recovery of damages other than those items designated in subsections (c)(3)(A) and (c)(3)(B), but does not direct the expansion of the circumscribed damages defined within (A) and (B). The "include but not limited to" phrase does not expand the class of such necessitated expenses.

Id. at 202-03. Based upon this discussion from Butler, the McCabe Court concluded as follows:

[T]he Butler Court limited its holding allowing for recovery of damages not specifically provided for in the AWDS when it stated that the phrase at issue “does not direct the expansion of the circumscribed damages defined” in the AWDS. Importantly, the court concluded that the “include but not limited to” language *does not expand* the class of such necessitated expenses." We believe that allowing the recovery of attorney fees under the AWDS would do just that, expand the circumscribed damages defined by the General Assembly.

Transfer was not sought following the Hillebrand decision, and that opinion was certified on November 24, 2009. Transfer has been requested, but not yet granted, in McCabe, and it is anticipated that it will also be sought in Fruits.

E. RESTRICTIONS UPON DAMAGES

1. ***Cap on Damages for Loss of Love and Companionship***

Subsection (e) of the AWDA provides that damages for loss of love and companionship may not exceed \$300,000.00. Ind. Patient’s Comp. Fund v. Patrick, 929 N.E.2d 190, 191 (Ind. 2010). This section also provides that a jury may not be advised of the cap on these damages, and further states that if a jury awards more than \$300,000.00 for loss of love and companionship, a trial court must reduce that part of the award to \$300,000.00.

2. *Other Non-Recoverable Damages*

Beyond the cap on damages for loss of love and companionship, the subsection (c)(2) of the AWDA prohibits the recovery of punitive damages, as well as damages for a person's grief. Additionally, subsection (g) provides that 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.

In Ind. Patient's Comp. Fund v. Patrick, 929 N.E.2d 190 (Ind. 2010), the Supreme Court recently examined whether negligent infliction of emotional distress damages were recoverable pursuant to the "bystander rule" under the AWDA. In Patrick, Christopher Patrick was injured in an automobile crash, and was treated at a hospital and discharged the next day. He started vomiting blood that evening and his father, Gary Patrick, called 911. By the time EMS arrived, Gary observed blood coming out of his son's nose and mouth and his eyes rolling back in his head. Christopher then collapsed, and was pronounced dead due to an untreated ruptured colon. Christopher was 31 years old at the time, had no dependent survivors and lived with his father.

Gary filed a proposed complaint for his son's death, as well as his own emotional distress under the bystander rule set forth in Groves v. Taylor, 729 N.E.2d 569 (Ind. 2000). The trial court ultimately awarded \$300,000 for the loss of Christopher's love and compassion, \$16,531.66 for medical and funeral expenses, and \$600,000.00 to Gary for his emotional distress claim. Patrick, 929 N.E.2d at 191.

On transfer, Gary argued that he should be able to recover damages for negligent infliction of emotion distress because such damages are recoverable by bystanders in medical malpractice cases. See: e.g., Ryan v. Brown, 827 N.E.2d 112, 123 (Ind. Ct. App. 2005). The Supreme Court disagreed, relying upon its decision in Chamberlain v. Walpole, 822 N.E.2d 959

(Ind. 2005), in which the Court held that the Medical Malpractice Act did not create a cause of action for medical malpractice resulting in death that was independent of the underlying wrongful death action. Id. at 963. Applying Chamberlain, the Court concluded that Gary's negligent infliction of emotional distress was improper because claims for emotional distress are not recognized under the AWDA.