

DAMAGES FOR WRONGFUL DEATH OF AN ADULT.

While it is impossible to cover in this limited space all of the legal implications of the Indiana wrongful death laws, it is helpful to summarize some of the rules that may confront the attorney pursuing an action for wrongful death:

I. The Legal Difference Between Death of An Adult and Death of A Child. The Indiana statutes dealing with the death of an adult are somewhat different from the law dealing with the death of a child. The materials below concern the rules that apply to the death of an adult.

II. Who Is Entitled To Bring The Action? The wrongful death laws generally require that the personal representative of the estate bring the action. The action is brought for the benefit of a surviving spouse and/or the dependent children of the decedent. Dependent next of kin in certain instances are also beneficiaries. The law also has made provision for the death creditors of a decedent, i.e., those to whom bills are owed for medical or hospital services and funeral or burial expenses or expenses of administering the decedent's estate.

III. The Case of A Death Involving No Spouse and No Dependents. In a recent change, Indiana law now provides a limited right of recovery for certain other survivors of an adult victim of wrongful death. For instance, a non-dependent parent or child may recover up to an aggregate total of \$300,000 for the loss of love and companionship of the decedent, provided there was a genuine, substantial and on-going relationship with the adult person. Damages for grief and for lost income are not recoverable. See Ind. Code 34-23-1-2.

IV. Consortium. Loss of consortium is a proper element of damages in a wrongful death action for the death of a spouse; the surviving spouse is entitled to damages for the loss of care, love, and affection. *Durham v. U-Haul International*, 745 N.E.2d 755, 764 (Ind. 2001). The courts have used various terms to describe this element of damage including fellowship, companionship, company and comfort. *Id.* For a surviving spouse, loss of consortium also includes the loss of sexual relations. *Id.* The period of time to be measured is the date of death through the earlier of when the decedent was expected to die or when the surviving spouse was expected to die. *Durham*, 745 N.E.2d at 766. Dependent children and dependent next of kin are also entitled to an award for emotional losses such as the loss of care, love and affection. *Ed Wiersma Trucking Company v. Pfaff*, 678 N.E.2d 110 (Ind. 1997), *adopting* 643 N.E.2d 909, 913 (Ind. Ct. App. 1994).

V. Loss of Income. Another element of damage in a wrongful death action for the death of a spouse or the death of an adult with qualified dependents is the loss of income suffered by the survivors. When an economist estimates the loss of income caused to a survivor by a person's untimely death or injury, the economist must estimate how much the decedent's income would have grown over the years remaining until that decedent was statistically likely to have retired or to have died. *Ollis v. Knecht*, 751 N.E.2d 825, 829 (Ind. Ct. App. 2001) , citing Henry N. Butler, *Economic Analysis for Lawyers* 188-

208 (1998). Then the economist must discount that income to its present value. *Id.* There are a number of methods available for determining the growth rate applied to predict what the decedent's income would have been in the future and for determining the discount rate applied to reduce that future income to its present value. *Id.* The economist must arrive at a calculation of the probable future earnings of the decedent based on his age, health, strength, occupation, habits, opportunities and capability. See *Elmer Buckta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 943 (Ind. 2001). Economists who testify as to these matters must first satisfy the gatekeeping requirements of Ind. Evidence Rule 702(b) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). See, e.g., *Ollis*, 751 N.E.2d at 829. Once the economist has properly determined the present value of the lost income, the economist must also carve out from the total the amount that the decedent would have spent on himself rather than the beneficiaries; the economist is required to carve-out an amount for personal maintenance expenses. *Elmer Buckta Trucking, Inc.*, 744 N.E.2d at 943.

VI. Death Creditors. Medical, hospital, funeral and burial expenses are generally recoverable by the estate.

VII. Punitive Damages. Punitive damages from the wrongful death are usually not available.

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