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Pecuniary Loss in a Wrongful Death Action

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Pursuant to EPTL 5-4.4(a), damages in a wrongful death action belong to the distributees of decedent who sustained a pecuniary loss. Pursuant to EPTL 5-4.1, the personal representative of a decedent who is survived by distributees may maintain the action. EPTL 5-4.3 provides that the damages to be awarded for a wrongful death claim are limited to the "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought."

An action arising out of a decedent's wrongful death should include not only the wrongful death claim for pecuniary loss by the next of kin but also a separate cause of action for decedent's conscious pain and suffering prior to death, sometimes referred to as decedent's survival claim. Any recovery on the survival claim is an estate asset and will be distributed either in accordance with decedent's will or intestate distribution in the absence of a will.

The measure of damages in a cause of action for wrongful death is pecuniary loss to the next of kin (distributees). It may include claims for loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death. In *Gonzalez v. New York City Housing Authority*, 77 N.Y.2d 663, 569 N.Y.S.2d 915 (1991), the Court of Appeals stated that the pecuniary loss arising from the death of a wage earner "may be calculated, in part, from factors relevant to the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributees." In the case of a decedent who was not a wage earner, pecuniary injuries may be calculated, in part, from the increased expenditures required to continue the services provided by the decedent.

The court in *Gonzalez* further stated that pecuniary loss may also include compensable losses of a personal nature, such as loss of guidance. However, it does not include recovery for grief, loss of society, affection, conjugal fellowship and consortium. *Liff v. Schildrout*, 49 N.Y. 2d 622 (1980). The calculation of the precise amount to be awarded for pecuniary loss is a question for the jury. *Parilis v. Feinstein*, 49 N.Y.2d 984 (1980). Distinguishing a compensable claim for loss of guidance from a claim for loss of companionship or consortium, which is not compensable in New York, has been extensively examined by the courts. Loss of guidance was analyzed in depth in *Gonzalez* and will be discussed later in this column.

Distributees

In order to pursue a wrongful death claim, the beneficiary must be a distributee of the decedent and must have sustained a pecuniary loss. Distributees are the persons entitled to take or share in the estate or property of an intestate decedent as determined by EPTL 4-1.1, which is the statute governing descent and distribution. It should be noted, however, that pursuant to EPTL 5-4.4, where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees for purposes of the wrongful death action, even though EPTL 4-1.1 provides that where there is a spouse and no children, the spouse is the sole distributee for purposes of intestate descent and distribution. Non-marital children are distributees in accordance with EPTL 5-4.5.

Parents may recover pecuniary loss for the death of a child. Factors taken into account may include evidence of decedent's predisposition to help his or her parents if they were in need and a reasonable expectation by the parents of future support. Damages are for the jury to determine. For example, in *Zelizo v. Ullah*, 2 A.D.3d 273, 769 N.Y.S.2d 255 (1st Dept. 2003), decedent had a close relationship with his parents, was trying to repay them for his college expenses, and had even sent them on an all-expenses-paid vacation. This was some evidence of a predisposition to help his parents should they be in need, and of a reasonable expectation of future support.¹

If decedent's siblings are the distributees, they may recover if a showing is made of pecuniary loss. For example, in *Johnson v. Richmond University Medical Center*, 101 A.D.3d 1087, 956 N.Y.S.2d 568 (2d Dept. 2012), claims were made by siblings where there was evidence that decedent gave money and provided house sitting to one and provided baby-sitting services for another.

Pecuniary Loss

Pecuniary loss is not limited to financial support and loss of compensable services. The New York courts have recognized that pecuniary advantage results from parental guidance and care, as well as physical, moral and intellectual training. The loss of those benefits may be considered in the calculation of pecuniary injury, frequently with respect to infants. However, loss of parental "companionship" is not compensable. *Kenavan v. City of New York*, 120 A.D.2d 24 (2d Dept. 1986), *aff'd* 70 NY2d 558.² For example, in *Zygmunt v. Berkowitz*, 301 A.D.2d 593 (2d Dept. 2003), although decedent's work schedule often kept him away from home, testimony established that decedent was a "wonderful dad" who always helped out whenever he could and spent considerable time with his children. He taught his children to play baseball, read to them, and took them to the movies, bowling, ice skating, to the park, to the zoo, and to any place "a child would enjoy." This unrefuted testimony established that the decedent played a role in providing the children with nurture and care, as well as physical, moral, and intellectual training.

Accordingly, the court set aside the jury verdict in favor of the defendant on the issue of damages for loss of parental guidance and directed a new trial on that issue. In *Plotkin v. New York City Health & Hosps. Corp.*, 221 A.D.2d 425 (2d Dept. 1995), decedent's earnings were low, but the evidence established decedent's close relationship with her five children, the youngest of whom was 4 years old at the time of her mother's death. The court held that the loss of parental nurture and care, as well as physical, moral, and intellectual training, could be included in determining pecuniary injury. In *Leger v. Chasky*, 55 A.D.3d 564, 865 N.Y.S.2d 616 (2d Dept. 2008), the court held that an infant was entitled to damages for loss of parental guidance where decedent, a non-custodial parent, provided support and spent considerable time talking to his daughter, taking her to school functions, doctor's appointments and on vacations.

Loss of parental guidance as a compensable element of pecuniary loss can result in significant recoveries. For example, in *Bogen v. State*, 5 A.D.3d 521, 772 N.Y.S.2d 869 (2d Dept. 2004), the award was \$1.25 million for past and future loss of parental care and guidance. In *Paccione v. Greenberg*, 256 A.D.2d 559, 682 N.Y.S.2d 442 (2d Dept. 1998), the awards for loss of parental guidance to decedent's two minor children were \$1.5 million each.³ These cases as well as those listed in the footnote were decided years ago, and damages may be significantly higher today.

'Gonzalez' Case

Compensation to self-supporting adult distributees for pecuniary loss may also include loss of guidance. One of the most significant decisions on this issue was *Gonzalez v. New York City Housing Authority*, 77 N.Y.

663, 569 N.Y.S.2d 915 (1991). In this wrongful death action arising from the murder of plaintiffs' grandmother, the Court of Appeals held that plaintiffs' status as adult financially independent grandchildren did not preclude recovery of pecuniary damages. As distributees of the decedent, they were members of the class permitted to maintain an action for pecuniary loss which would include loss of parental guidance. Their recovery was not barred solely because they were self-supporting adults at the time of their grandmother's death.

Decedent had raised both grandchildren due to the death of her son and the mental illness of her daughter-in-law. Although decedent had retired from work several years before her death, she remained active. She prepared meals for her ill daughter-in-law as well as for her grandchildren. She also helped her granddaughter in other ways. When the granddaughter was having marital problems, she lived with decedent. At the time of decedent's murder, the granddaughter was pregnant, and it was intended that decedent would care for the child while she returned to school.

The Court of Appeals in *Gonzalez* referred to its prior decisions and stated that the argument that an adult distributee could not state a claim for pecuniary injuries based upon the loss of a parent's guidance had been rejected long ago.⁴ It also rejected defendants' contention that recovery for loss of guidance should be restricted to a decedent's children. The Court held:

[T]he statute defines the class entitled to recover in a wrongful death action as distributees (see, EPTL 5-4.1[1]; 5-4.4[a]). There is no question that decedent's grandchildren were her distributees, and thus that they are members of the class the Legislature intended should be permitted to maintain this action.... Nor is recovery barred solely because plaintiffs were self-supporting adults at the time of their grandmother's death. The argument that an adult distributee cannot state a claim for pecuniary injuries based on the loss of a parent's guidance was long ago rejected by this court.

Post-*Gonzalez*, the courts have generally allowed the claims of adult children for pecuniary losses. In *Pullman v. Pullman*, 216 A.D. 2d 886, 629 N.Y.S.2d 577 (4th Dept. 1995), the court held that decedent's adult children had sustained a pecuniary loss where there was undisputed evidence that decedent cooked, cleaned, and ironed for her adult children and baby-sat her grandchildren. In *Ramos v. La Montana Moving & Storage*, 247 A.D.2d 333, 669 N.Y.S.2d 529 (1st Dept. 1998), plaintiff established pecuniary injuries where the proof demonstrated that decedent regularly provided baby-sitting services to his daughter's infant children and imparted family, cultural and language traditions to these grandchildren. He also provided regular counseling, guidance, and emergency financial assistance to his children.

In *Clark v. Weinstein*, 23 A.D.3d 1054, 804 N.Y.S.2d 183 (4th Dept. 2005), decedent was survived by his wife, his daughter, and his daughter's two children. He and his wife had cared for their grandchildren since birth and been awarded custody. He provided them with full financial support until his death. During that time, the children had only minimal contact with their mother, who provided no financial support for them. The issue was whether decedent's daughter, a distributee, had a claim resulting from the pecuniary loss of support provided by decedent to her children. The court held that decedent's daughter was legally obligated to provide support for her children despite the fact that her parents had been awarded custody. Thus, the loss of decedent's voluntary support to the grandchildren resulted in a direct loss to her as she would have to replace the support that he previously provided.

In *Carter v. New York City Health and Hospitals Corporation*, 47 A.D.3d 661, 851 N.Y.S.2d 588 (2d Dept. 2008), the court set aside the award of damages for past economic loss to certain of the decedent's grandchildren. As all of her children were still alive at the time of her death, none of the decedent's grandchildren qualified as a distributee. However, the court directed a new trial, stating that the damages improperly awarded to the grandchildren might well have been intended as a lawful award to the proper distributees—i.e., that it was a pecuniary loss to the parents of the grandchildren where they would no longer receive the support for their children.

The *Gonzalez* decision, despite its sweeping statement that an adult distributee can state a claim for pecuniary injuries based on the loss of a parent's guidance, has left an ambiguity unresolved. Although the Court of Appeals did not specifically address the issue of whether an adult distributee must demonstrate a proven loss of "compensable services" in order to recover for loss of guidance, it made specific reference to *Bumpurs v. New York City Housing Auth.*, 139 A.D.2d 438 (1st Dept. 1988). *Bumpurs* was cited by

defendants to support their contention that an adult distributee could not claim pecuniary injury for loss of parental guidance.

In *Bumpurs*, the Appellate Division held that minor children could allege a pecuniary injury from the premature loss of parental educational training, instruction and guidance because that loss could have a financial effect on their future well-being, but stated this would not be so with adult children. However, the rejected claim in *Bumpurs* was not for loss of guidance but for the "loss of companionship, comfort and assistance." The reported decision does not indicate that there was any claim specifically for loss of guidance.

Rather than addressing the validity of the premise upon which *Bumpurs* was decided, the *Gonzalez* court merely distinguished the facts in *Bumpurs* from those in *Gonzalez* by stating that the decedent in *Bumpurs* had provided no services to her adult children. However, the claim in *Bumpurs* was different from that in *Gonzalez*. The court in *Bumpurs* addressed a claim for loss of companionship, comfort and assistance which was more akin to a loss of nurture claim, which the court held was not compensable.

Bumpurs is difficult to reconcile with *Kiker v. Nassau County*, 175 A.D.2d 99, 571 N.Y.S.2d 804 (2d Dept. 1991), where the court held that claims for loss of guidance for adult children were properly submitted to the jury. The testimony at trial established that plaintiff's decedent Grace Kiker had provided financial support and homemaking services for the two minor children. There was evidence that Kiker had provided all the children, including the adult children, with parental guidance and advice, as well as nurture and care. There was no mention of compensable services other than loss of guidance to the adult children.

The evident confusion created by the *Gonzalez* decision in not clearly stating that a self-supporting adult child may present a claim for loss of guidance as a compensable service, even in the absence of other compensable services, is apparent in the recent trial court decision in *Garcia v. Eurobungy-USA*, 40 Misc.3d 1223(A), 2013 WL 4007233 (N.Y. Sup. Ct. Kings Co. 2013). The court held that the adult plaintiffs, whose affidavits discussed no measurable services performed by their father, were essentially asserting claims for loss of consortium, a claim which was not compensable in a wrongful death cause of action.

Clearly, the proof in any wrongful death claim should include as much evidence as possible of the compensable services provided by decedent to his or her distributees. This is especially important in assessing the pecuniary loss to a self-supporting adult distributee. There must be sufficient proof to show a compensable pecuniary loss that cannot be misconstrued as loss of consortium which is not compensable.

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Endnotes:

1. See also *Hahn v. Canty*, 2013 WL 3851282, 40 Misc.3d 1217(A) (N.Y. Sup., 2013); *Kelley v. Cacace*, 43 A.D.2d 573 (2d Dept. 1973).
2. See also *De Long v. County of Erie*, 89 A.D.2d 376 (4th Dept. 1982), *aff'd* 60 N.Y.2d 296 (1983).
3. See also *Bryant v. New York City Health and Hospitals Corp.*, 250 A.D.2d 797, 673 N.Y.S.2d 471 (2d Dept. 1998), \$250,000 was awarded for past lost parental guidance and \$850,000 for future lost parental guidance. In *Adderley v. City of New York*, 304 A.D.2d 485, 757 N.Y.S.2d 735, (1st Dept. 2003) \$1 million was awarded for future loss of parental guidance. In *Campbell v. Diguglielmo*, 148 F.Supp.2d 269, 275 (S.D.N.Y. 2001), an award of \$1.5 million for loss of parental care and guidance was upheld.
4. See *Tilley v. Hudson Riv. R.R.*, 29 N.Y. 252 (1864); *McIntyre v. New York Cent. R.R.*, 37 N.Y. 287 (1867) and *Countryman v. Fonda, Johnson & Gloversville R.R.*, 166 N.Y. 20 (1901); *Gross v. Abraham*, 306 N.Y. 525 (1954), in support of pecuniary loss for self-supporting adult distributees.