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Extending Wrongful Death Damages to Kinship-Care Relationships

Sonya Harrell Hoener, Florida Coastal School of Law
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Sonya Harrell Hoener*

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INTRODUCTION

Over six million children in the United States are growing up in households headed by grandparents or relatives other than their biological parents. These families face many difficulties not shared by traditional biological parent relationships, but have the same or even greater emotional bonds. While many states have recognized the prevalence of these relationships and made it easier for grandparents to take part in the

* Assistant Professor of Law, Florida Coastal School of Law.
1 Senate Bill 985 (Kinship Caregiver Support Act), 2005-2006
2 For instance, grandparents may not be able to obtain government benefits for their grandchildren, and may not be authorized to receive school or medical records. Copeland, Siegler & Mezey, eds., Encyclopedia of Elder Care 372 (Springer Pubs. 2008)
daily activities of raising their grandchildren,\textsuperscript{4} most states still ignore these relationships in the context of wrongful death actions.\textsuperscript{5}

Wrongful death statutes should allow recovery by survivors of decedents when a kinship-care relationship exists between the decedent and the survivors, and such recovery will not duplicate that of any other survivor. This minimal expansion of the class of beneficiaries will serve the compensatory and deterrent functions of tort law, and will fill a gap for an increasingly prevalent family structure in modern society.

All states and the federal government provide for recovery by family members in the event of wrongful death. In most of these states, however, the recovery is limited to immediate next-of-kin. In this article, I argue that legislatures should amend their wrongful death statutes to include grandparents, grandchildren, and other relatives in kinship care relationships within the class of survivors who may recover in wrongful death actions.\textsuperscript{6} First, I discuss the current status of wrongful death statutes in the United States. Next, I discuss the prevalence of kinship care relationships in the United States and why the class of beneficiaries should be expanded. Next, I discuss the impact of the few states that do allow kinship recovery in wrongful death actions. Finally, I discuss the difficult battle state legislatures face when seeking to expand wrongful death recovery in an era where tort reform efforts seek to limit other types of recovery, and propose rationales for even the most tort-reform-minded legislatures to modify their current statutes.

I. Overview of Wrongful Death

\textsuperscript{4} See generally SB 985, Troxler v. Granville; see also Jantz, Geen et al, “The Continuing Evolution of State Kinship Care Programs”, Urban Institute Discussion Paper, December 2002 (noting the use of kinship care as an alternative to the foster care licensing process)

\textsuperscript{5} Kinship care, of course, is not the only gap that needs to be filled in fully compensating survivors in wrongful death actions. See, e.g. Meredith A. Wegener, “Purposeful Uniformity: Wrongful Death Damages for Unmarried, Childless Adults,” 51 South Texas LR 339

\textsuperscript{6} The scope of this article is limited to kinship recovery. Although I use the terms “grandparents” and “grandchildren,” the principles apply equally to other relatives standing in loco parentis, to stepfamilies where no adoption has occurred, and other relationships that have not been formalized or otherwise acknowledged under state law.
A. Historical Background

The first wrongful death act provided for recovery by a wider range of beneficiaries than most modern legislation in the United States. Lord Campbell’s Act, enacted by the English Parliament in 1846, allowed an action to be brought for the benefit of, and damages recovered by, a wife, husband, parent and child, and expressly included grandparents in the definition of “parent” and grandchildren in the definition of “child.”\(^7\) At the time of Lord Campbell’s Act, even though the jurors could award “such damages as they may think proportioned to the [i]njury,”\(^8\) noneconomic damages were not contemplated.\(^9\) Therefore, neither a natural child nor a grandchild could recover noneconomic damages as a result of the death of the decedent; instead, a beneficiary could recover lost economic support and services. This amount was to be apportioned among the parties for whose benefit the action was brought.\(^10\)

In the United States, state legislatures followed the English Parliament and began adopting their own wrongful death statutes.\(^11\) Unlike their English counterpart, however, most state wrongful death statutes imposed gender-based restrictions on beneficiaries, providing only for recovery by wives and dependent children for the wrongful death of the male head of household.\(^12\) As family and gender roles changed, states expanded their wrongful death statutes to reflect new societal norms that allowed both husbands and wives to recover for the death of a spouse.\(^13\)

B. Available Damages

Modern wrongful death statutes in the U.S. measure damages in two

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\(^7\) 9 & 10 Vict. Ch. XCIII (V).
\(^8\) Id.
\(^9\) Franklin v. Southeastern Railway, 157 E.R. 448 (1858)
\(^10\) 9 & 10 Vict. Ch. XCIII (I-II).
ways: by the losses to the survivors of the decedent (“loss-to-survivors” rule) or the losses to the estate of the decedent resulting from his or her premature death (“loss-to-estate”) rule.\(^\text{14}\) Loss-to-survivors statutes calculate lost support damages based on the decedent’s contributions to the survivors during his lifetime, while loss-to-estate statutes calculate lost support damages based on the decedent’s earnings during his lifetime.\(^\text{15}\) Both types of statutes may allow for recovery of additional types of pecuniary and nonpecuniary losses.\(^\text{16}\)

As American states adopted their own versions of Lord Campbell’s Act, they also varied the available damages through legislation or judicial interpretation. For instance, although statutes limited recovery to pecuniary losses, some courts recognized that the death of a child results not in lost income or support or other traditional pecuniary loss to a parent. Instead, these courts created a legal fiction defining the pecuniary loss of a child to encompass love, affection, and companionship.\(^\text{17}\) While courts are often willing to construe statutory language to expand the definition of “pecuniary” losses, the plain language of most statutes is limited to pecuniary damages.\(^\text{18}\)

\[C. \text{ Categories of Damages and Beneficiaries}\]

A minority of states rely on their intestacy statutes to provide wrongful death damages to surviving next-of-kin. Alabama, for instance, provides that a wrongful death suit must be brought by the personal representative of the estate and for the benefit of the estate\(^\text{19}\), and that damages shall be paid according to the statute of distributions.\(^\text{20}\)

\[\text{References}\]

\(^\text{14}\) Andrew Jay McClurg, It’s a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 Notre Dame L. Rev. 57, 62-63 notes 20& 21

\(^\text{15}\) Fischer, Understanding Remedies, 542-43.

\(^\text{16}\) Loss-to-estate jurisdictions may be especially amenable to expansion of non-pecuniary categories. See, e.g., Andrew Jay McClurg, Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages, 85 B.U. L. Rev. 1 note 154 (noting that of five jurisdictions who have recognized damages for loss of the life of the decedent, four are loss-to-estate jurisdictions).

\(^\text{17}\) Bullard v. Barnes, 468 N.E.2d 1228, 1233-34 (Ill. 1984); see also cases cited at 85 B.U.L. Rev. 1 note 114.

\(^\text{18}\) Fischer at 544 note 38.

\(^\text{19}\) Although considered part of the estate, an award of wrongful death damages is not subject to the liabilities of the decedent. Ala. Stat. 6-5-410.

\(^\text{20}\) Ala. Stat.43-8-41, 43-8-42
Most states, however, specifically identify the survivors who may recover, and further classify available benefits to each class of survivor. Under many wrongful death statutes, grandparents and even non-relatives can easily recover certain types of economic damages. For instance, the decedent’s medical and funeral expenses typically can be recovered by the person who paid those expenses. In addition, persons who were dependent on the decedent for financial support and who would have continued to receive that support can typically recover wrongful death damages for lost financial support. Grandparents are often included in this category.

The loss of the decedent’s companionship and society would seem to be in a category of noneconomic damages. However, even where the statute uses the term “services,” many courts have created a legal fiction that the only “services” provided by minor children in modern culture are love, society, and companionship. Twenty-seven states have statutes that expressly allow for recovery of these damages, while courts in twenty-one other states and the District of Columbia interpret the applicable wrongful death statutes to include these damages. In allowing damages to other types of survivors, some courts interpret “pecuniary damages” as including loss of society and companionship. Several states allow for recovery of loss of companionship in all cases, even though it is questionable whether these damages are different from damages for grief or bereavement.

Damages for grief, trauma, or bereavement suffered by the survivors present what may be the greatest yet most unmeasurable loss awarded for wrongful death. A minority of states allow damages for grief or mental pain and suffering of a limited class of survivors. Twelve states specifically allow grief damages, while courts in eleven states have interpreted wrongful death statutes to awards of damages for grief.

The final category provides compensation for losses to the decedent’s estate itself. These damages often include loss of earnings

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21 Stein on Personal Injury Damages, §§ 3.3, 3.4
22 Bullard v. Barnes
23 85 B.U. L. Rev. at nn 129-131
25 85 B.U. L. Rev. at 9-11. (noting that grief may be even more severe when the survivors have little forewarning of the death or where the death occurs in a violent manner.)
26 85 B.U. L. Rev. at 8, note 31
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(calculated using either the decedent’s net income over the remainder of his life or the decedent’s net accumulations) but rarely include loss of enjoyment of life by or hedonic damages of the decedent. The availability of these damages depends in part on whether a wrongful death statute focuses on the loss to the estate or the loss to survivors of the decedent.

Through either express statutory language or judicial construction, forty-eight states and the District of Columbia allow for the recovery of loss of society, while twenty-three states allow recovery of damages for grief, sorrow, or mental anguish suffered by statutory survivors as a result of the wrongful death of the decedent. As discussed below, in many of these states, the category of survivors who may recover for their own grief resulting from the death of the decedent is much narrower than the category of survivors who may recover loss of support, services, or society.

To varying degrees, states also award punitive damages and damages for loss of inheritance. Damages for loss of the life of the decedent himself, also referred to as “hedonic damages,” are awardable in only five jurisdictions: Connecticut, Hawaii, Mississippi, New Hampshire, and New Mexico. Most jurisdictions allow for payment of medical, funeral and burial expenses by any survivor who paid them.

II. THE EXPANSION OF THE FAMILY AND THE NEED FOR REFORM

A. Example and Varying Results


28 85 B.U. L. Rev. at 6: “life [is] priceless, so we treat it as worthless.”

29 Statutes collected at 85 BULR 1, 25-27 notes 129-131.

30 Statutes collected at 85 BULR 1, 26-27 at notes 133-135.

31 McClurg, 85 BULR at 29, notes the arbitrary nature of the classification: Embittered persons who were scheduled to file for divorce the day after the accident can recover, while optimistic couples scheduled to get married the same day cannot. … Statutory rules on who can recover wrongful death damages discriminate even within closely related families. In several states, even parents and siblings are barred from recovering grief damages if the decedent left behind a surviving spouse or children.

32 85 B.U.L.Rev. at notes 22-28

33 Fischer at 549 note 69.
Consider two people killed in a car accident, Pat and Lee. Pat is the single parent of two children under twelve, while Lee is raising two grandchildren under twelve. Both Pat and Lee have stable and loving relationships with the children in their household. Lee’s child left the two grandchildren with Lee when they were toddlers and has had contact with neither the children nor Lee since that time. Instead, Lee’s grandchildren think of Lee as their parent. In some states in a wrongful death action, Pat’s children can receive noneconomic damages. Lee’s grandchildren, on the other hand, will receive only pecuniary damages for lost support and services, despite their close familial relationship with Lee, the closest thing to a parent they have ever known.

For instance, in Florida, Pat’s children may receive noneconomic damages, including their own mental pain and suffering resulting from Pat’s death, while Lee’s grandchildren may recover only the support and services they have lost as a result of Lee’s death. Florida allows certain survivors, including blood relatives, to recover economic damages when those survivors partly or wholly depended on the decedent for support or services. The Florida statute, however, specifically excludes survivors other than immediate next-of-kin from recovering noneconomic damages.34

If Pat and Lee died in Oklahoma, the results would be similar. Oklahoma’s wrongful death statute allows pecuniary losses to be recovered by the surviving spouse, children, and next of kin, while grief and loss of companionship may be recovered only by the children and parents of the decedent.35

In Colorado, all surviving heirs may recover pecuniary losses and may in many cases recover the full amount of nonpecuniary losses sustained. If the decedent left no surviving spouse, child, or parent, however, the nonpecuniary recovery of the other surviving heirs is capped at $250,000.36 Therefore, if Lee died in Colorado with no surviving spouse and children (including the parent of the grandchildren), the grandchildren would be subject to a cap on damages. The cap would not apply, though, if Lee’s child – the parent of the grandchildren – were still alive but had

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34 See also Jonah Levine, Florida’s Wrongful Death Act: Should Grandparents or Persons Standing In Loco Parentis Be Permitted to Recover Damages? (2008 unpublished; available at bepress).
35 12 Okl.St.Ann. § 1053
36 CRS 13-21-203
abandoned the children. The same familial bonds may exist, but the damages are worth less if there are no first-degree surviving heirs.

Further inconsistent results would occur in Louisiana and South Carolina, where the wrongful death act allows surviving grandparents to recover damages only if a decedent left no surviving spouse, child, parent, or sibling. In these states, the grandchildren would recover nothing as a result of Lee’s death, while Lee could recover for the death of a grandchild only if they left no other survivors. If the abandoning parent survived them, Lee would recover nothing as a result of the wrongful death of the grandchildren, despite the close familial bonds.

Several jurisdictions have recognized the injustice in allowing a voluntarily abandoning parent to recover any type of wrongful death damages upon the death of a child. For instance, although Ohio’s wrongful death statute creates a rebuttable presumption of recovery for surviving spouse, child, or parent of decedent, and also allows other next-of-kin to recover damages including loss of society and mental anguish suffered by the next of kin, the statute specifically precludes recovery by a parent who abandoned a minor child who is the decedent. Other states, however, have expressly held that statutory language requires a distribution of wrongful death damages to an abandoning parent through intestacy statutes.

B. Kinship Care Statistics

The inconsistencies in the availability of damages for lost relationships affect an increasing number of families consisting of children raised by non-parent relatives. Between 1990 and 1998, the number of families in grandparent-headed households without either parent present

37 Louisiana Code 2315.2; South Carolina Code 15-51-10 et seq.
38 See, e.g., Perry v. Williams, 70 P.3d 1283 (N.M. App. 2003); Baker v. Sweet, 637 S.E.2d 474 (Ga. App. 2006). Ancient Roman Law recognized the concept of indignitas—that one who would otherwise receive property from the deceased is deemed unworthy because of certain actions and therefore cannot receive the property. Rather than focusing on indignitas, an exclusion of an abandoning parent in a wrongful death action actually prevents compensation for loss of a relationship that does not exist.
39 Ohio Stat 2125.02
40 Anne-Marie E. Rhodes, Abandoning Parents Under Intestacy, 27 Ind. L. Rev. 517, 524 n. 24
increased by 52 percent.41 While these families include “skipped generation” families headed solely by grandparents without any parents of grandchildren present, grandparents also provide care through multigenerational grandparent-headed families with at least one parent of the grandchildren present.42 Divorce, teenage pregnancy, incarceration, substance abuse, war, and economic difficulties all contribute to the increase in the involvement of grandparents in the daily lives of their grandchildren. Such caregiving creates closer emotional bonds between grandparents and grandchildren, while keeping families somewhat intact and avoiding the vagaries of the foster care and child welfare systems. In such circumstances, legally formalizing the relationship may not be a viable option. Grandparents may not want to terminate the parental rights of their children, and families may lack the financial resources necessary to seek legal assistance. When the relationship is not legally recognized, most wrongful death statutes will not allow for compensation of nonpecuniary losses sustained on the death of one of the parties to the relationship.

As the population in the United States grows more diverse, there is a corresponding diversity in family structures, with many cultures traditionally having large extended families living in the same geographic areas or even the same home. Hispanic families, for instance, often have grandparents (their abuelos) living in the same neighborhoods or homes with grandchildren, assisting with decisionmaking in the lives of their grandchildren, and being ready to raise their grandchildren when necessary.43 Asian families also often have extended families living in the same household for a variety of reasons, including traditions of respect for the elderly and child care needs. Three-generation households are somewhat common, especially among Chinese-American and Korean-American families.44 Asian Indian-American families often bring grandparents to the United States from India to help care for young children.45

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45 Id.
extended families is especially prominent in the African-American community, with roots in precolonial African society that continued throughout the slavery era and after emancipation. African-American children are now more likely than Caucasian or Hispanic children to live with a grandparent; one study from the early 1990s showed that more than 25 percent of African-American grandmothers had been custodial grandparents. The bonds formed within these close extended families, which have been referred to as familial capital, remain uncompensated when lost as the result of the wrongful death of a grandparent or grandchild.

Despite the lack of recognition of these bonds in wrongful death statutes, states have recognized and promoted the importance of relationships between grandparents and grandchildren in many other contexts. For instance, at the time of the Court’s decision in *Troxel v. Granville* striking down grandparent visitation statutes, fifty states had enacted some form of a grandparent visitation statute. The Court acknowledged the “changing realities of the American family” and the

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46 Ruiz, Dorothy Smith. *Amazing Grace: African American Grandmothers as Caregivers and Conveyors of Traditional Values* at 2-7 (Praeger 2004)

47 Id. at xiv.

48 Id. at 16.

49 Tara J. Yosso, “Whose culture has capital? A critical race theory discussion of community cultural wealth” 8 *Race Ethnicity and Education* 69, 79 (March 2005):

*Familial capital* refers to those cultural knowledges nurtured among *familia* (kin) that carry a sense of community history, memory and cultural intuition (see Delgado Bernal, 1998, 2002). This form of cultural wealth engages a commitment to community well being and expands the concept of family to include a more broad understanding of kinship. Acknowledging the racialized, classed and heterosexualized inferences that comprise traditional understandings of ‘family’, familial capital is nurtured by our ‘extended family’, which may include immediate family (living or long passed on) as well as aunts, uncles, grandparents and friends who we might consider part of our *familia*. From these kinship ties, we learn the importance of maintaining a healthy connection to our community and its resources. Our kin also model lessons of caring, coping and providing (*educación*), which inform our emotional, moral, educational and occupational consciousness (Reese, 1992; Auerbach, 2001, 2004; Elenes *et al.*, 2001; Lopez, 2003).

caregiving provided by grandparents and other relatives. Formal adoption is a long-standing traditional legal recognition of these emotional bonds, relegating “mere genetics” to a nonexistent factor in determining the parentage of a child and instead focusing on the intent to parent rather than biology. Wrongful death statutes should similarly recognize and promote these relationships, avoid biology as the determinative factor, and compensate for emotional rather than biological loss.

C. Promoting Goals of Torts

The award of wrongful death damages promotes both the corrective and the deterrent goals of tort law. The corrective function of tort law recognizes that the defendant has harmed the plaintiff in a recognizable way and corrects the harm by requiring the defendant to compensate the plaintiff for the losses resulting from the defendant’s act. While it is axiomatic that money damages cannot resurrect the dead or restore a lost relationship, the tort system recognizes that money damages are the only adequate substitute. The legislatures in many states acknowledge that the purpose of wrongful death statutes is to compensate the families of the decedent and shift the burden of the loss from the family to the wrongdoer. An award of damages to a survivor in a kinship-care relationship validates the genuineness of the relationship and recognizes that the survivor has been deprived of a real benefit as a result of the wrongful death of the decedent. The expansion of benefits to kinship-care relationships also shifts the burden of those losses from the family of the decedent to the tortfeasor.

In addition, the expansion of benefits may promote the deterrence goals of tort. Tortfeasors should be required to absorb all costs of their injury-causing behavior. The deterrence goal promotes the idea that people avoid conduct that leads to tort liability. When a class of potential victims is limited, the risk of tort liability is reduced. The class of beneficiaries in wrongful death actions is already necessary limited, which in theory makes

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51 Id. at 64
52 Hulett v. Hulett, 544 NE 2d 257, 263 (Ohio 1981) (Brown, concurring)
53 Dobbs section 9
54 See, e.g., Fla. Stat. 768.17
55 See note 13 supra
56 Dobbs section 11
it even “cheaper to kill a man than maim him.” Therefore, any deterrent
effect of a wrongful death statute is limited by any reduction in the class of
survivors and the corresponding damages payable.

III. STATES SPECIFICALLY ADDRESSING KINSHIP RECOVERY

A. Statutory Provisions

Arkansas has perhaps the broadest wrongful death statute. Available
beneficiaries under the Arkansas wrongful death statute include anyone
standing in loco parentis to the deceased and anyone to whom the decedent
stood in loco parentis at any time during the life of the decedent. The
beneficiary may be a minor or an adult.

Other states expand the classes of beneficiaries beyond relatives
while imposing restrictions on the time of the survivor’s dependency. For
instance, Delaware allows persons to recover for mental anguish for the loss
of someone with whom they stood in loco parentis at the time of the
injury. Hawai‘i allows recovery for pecuniary injury and for loss of love
and affection by the decedent’s surviving spouse, reciprocal beneficiary,
children, father, mother, and by any person wholly or partly dependent on
the decedent.

Virginia has a comprehensive (if rather convoluted) list of
beneficiaries in its wrongful death statute. Potential survivors include
spouses, children, children of deceased children, and parents if there are no
surviving children or grandchildren. Even if there are beneficiaries in
these categories, the Virginia statute permits recovery of all awardable
damages by a relative who was dependent on the decedent and resided in
the same household.

B. Court Construction

57 Jonathan James, Denial of Recovery to Nonresident Beneficiaries Under
Washington’s Wrongful Death and Survival Statutes, 29 Seattle L. Rev. 663 n. 2
58 Ark. Code 16-6-102(d)
59 Delaware 3724(a), (b)
60 Hawai‘i Rev. Stat. 663-3(b).
61 Virginia Code 8.01-53(i), (iii)
Ohio’s expansive wrongful death statute has been expanded even further by the courts. While Ohio courts have held that the statute specifically contemplates recovery by grandparents, the court in one case broadly construed the term “parent” to include a non-blood, non-formalized relationship. At the time, Ohio’s wrongful death statute provided for action for exclusive benefit of surviving spouse, child, or parent of decedent. The Ohio court recognized that the purposes of the wrongful death statute included compensating for the deprivation of a relationship, requiring tortfeasors to bear cost of wrongful acts, and deterring harmful conduct.

The court declined to use the concept of equitable adoption as a means for allowing the caregiver to recover wrongful death damages, choosing instead to construe the language of the statute with regard to “parent” to meet the purpose of the statute. The court devised a four-part test for determining whether a caregiver could be considered a “parent” under the statute:

1. The natural parents of the child have disclaimed or abandoned parental rights to the child;
2. The one claiming to be parent has performed the obligations of parenthood for a substantial period of time;
3. The child and the one claiming to be parent have held

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64 Lawson v. Atwood, 536 N.E.2d 1167 (Ohio 1989). In this case, the child’s biological father was unknown, and the mother had turned child over to the caregiver and his wife when the child was about two years old. Although the biological mother signed an adoption consent form when the child was four, the caregiver and his wife never completed adoption proceedings. The child had no contact with the biological mother after the age of four. When the caregiver and his wife divorced, the caregiver was awarded custody of the child. The child used the surname of the caregiver, and he was listed as her father on school records.

The evidence is undisputed that Gina, from age two until her death sixteen years later, lived with appellant and that he loved and treated her as if she were his natural child. He received Gina's society, companionship and filial obedience. He represented Gina to the world as his child and he received the benefits of her love and affection as though he were her natural father. Gina performed services in the home and was treated the same as appellant's other children. From the time that Gina first entered appellant's home at the age of two until she died at age eighteen, appellant was Gina's sole means of support and guidance.

65 The Ohio wrongful death statute did not define “parent.” See In re Bonfield, 780 N.E.2d 241, 244 (Ohio 2002), also noting that WD act was remedial and had to be construed to compensate for the loss of a relationship (id. at 247).
themselves out to be parent and child for a substantial period of time; and

(4) The relationship between the child and the one claiming to be parent has been publicly recognized.

Using this test and applying a clear and convincing statute, the court found that the caregiver was, under the statute, the “parent” of the deceased child.

A federal court in Puerto Rico similarly acknowledged the importance of kinship-care relationships by interpreting an already broad negligence statute even more broadly. In *Correa v. Hospital San Francisco*⁶⁶, the estate filed suit against a hospital for failing to provide medical treatment to decedent in its emergency room and attempting to shunt her to a local clinic in violation of EMTALA. Grandchildren as well as estate and children of decedent awarded damages. Applying the Puerto Rican negligence statute,⁶⁷ which encompasses a broad range of wrongful acts and potential plaintiffs,⁶⁸ the court construed the statute as allowing close relatives to bring suit for intangible losses. Thus, although the statute simply allows recovery by anyone who suffers damage caused by an act or omission without specifically delineating survivors or beneficiaries, the court affirmed the award for the death of the family matriarch in whose home her grandchildren – the children of her recently deceased son – had lived most of their lives.⁶⁹ The court described the defendant’s action and the surviving plaintiffs’ damages as having “the trunk of the family tree … cut down” and specifically relied on the close-knit family structure of the extended family.⁷⁰

New Mexico could be the next state to expand wrongful death benefits judicially to kinship-care relationships, since both its legislature and judiciary have specifically recognized the special nature of these relationships in the context of negligent infliction of emotional distress and

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⁶⁶ 69 F.3d 1184 (1st Cir. 1995).
⁶⁷ EMTALA provides for an award of “those damages available for personal injury under the law of the State in which the hospital is located.” 69 F.3d at 1196-97 (affirming “generous” interpretation of EMTALA to extend statute to apply to survivors.)
⁶⁸ P.R. Stat. T. 31 s 5141
⁶⁹ 69 F.3d at 1197.
⁷⁰ Id.
loss of consortium.\textsuperscript{71} For instance, the court in \textit{Fernandez} recognized the special legal status granted to grandparents and grandchildren with regard to visitation privileges,\textsuperscript{72} and noted that it was “not uncommon” for multiple generations of a family to live in the same home. In light of the recognition of these special relationships, the Fernandez court held that the foreseeability required for an action for negligent infliction of emotional distress existed where the victim was a minor, the plaintiff was a family member such as a parent or grandparent who resided with the victim, the victim suffered serious physical injuries or died, and the plaintiff sustained emotional injuries due to the loss of the companionship, comfort, and society. Significantly, the court also noted that the expansion of the duty based on foreseeability “impose[d] no new obligation of conduct on potential defendants.”\textsuperscript{73} A New Mexico appellate court subsequently listed other similar factors in determining whether a consortium-type injury was foreseeable and thus created a duty.\textsuperscript{74}

Other courts, however, have refused to expand wrongful death

\textsuperscript{71} Fernandez v. Walgreen Hastings Co., 968 P.2d 774 (N.M. 1998); NMSA §40-9-2(A).

\textsuperscript{72} Citing NMSA 1978, § 40-9-2(A) (1993)

\textsuperscript{73} Fernandez, citing Romero, 872 P.2d 840, 844 (N.M. 1994), quoting Ramirez, 673 P.2d 822, 826 (N.M. 1983)

\textsuperscript{74} Fitzjerrell v. City of Gallup, 79 P.3d 836, 840-41 (N.M. App. 2003)

In order to determine whether a claimant has a sufficiently close and intimate relationship with the victim, this Court should consider several factors, including but not limited to: duration of the relationship; mutual dependence; common contributions to a life together; shared experience; living in the same household; financial support and dependence; emotional reliance on each other; qualities of their day to day relationship; and the manner in which they related to each other in attending to life’s mundane requirements.\textit{Lozoya}’s “mutual dependence” factors include[, in our view, emotional, physical, and financial support and dependence. \textit{Lozoya} makes clear that a relationship that creates a compensable interest is one that is intimate, protective, interdependent, and intertwined in functional (the way the people in the relationship meet day-to-day situations together), financially interdependent, and temporal ways (spending time together at least to the extent of living together in the same household).... When added to the elements of the cause of action enunciated in Fernandez, these factors form a cogent picture of the legal requirements that are necessary to maintain a claim for loss of consortium. It is clear that the purpose of this cause of action is not to compensate claimants for grief they suffer as a result of their own upset, but to compensate an injury to a relationship they shared with the injured or deceased person. Loss of consortium is thus derivative of other injuries and not an injury in and of itself.... Accordingly, a duty to a prospective plaintiff springs from the foreseeability of injury to that close and intimate bond.
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Statutes to include a greater class of beneficiaries. For instance, the Iowa Supreme Court specifically rejected kinship recovery under the plain language of its wrongful death statute. In Hutchinson v. Broadlawns Medical Center, the court held that the grandchild of the decedent could not recover under any aspect of the wrongful death statute even though the grandparent had been appointed custodian and provided parental-type services. The Iowa court also refused to allow a common-law claim for consortium. While acknowledging the relationship was stable and substantial, the court refused to consider the grandfather as occupying the same status as a parent. The court stated its preference for formalizing these types of “informal relationships” through adoption, and expressed concern that a contrary holding would result in an extension of benefits to stepparents and anyone else standing in loco parentis.

The Iowa court, however, ignores the difficulty some families may have in formalizing these relationships. For instance, if a grandparent wants to adopt a grandchild, the grandparent will have to terminate the rights of the parent – the grandparent’s own child. In most instances, this will require the grandparent to prove in court that the parent is unfit. The same economic circumstances that led to the necessity of the grandparent’s involvement may also mean limited resources to legally formalize the relationship.

In addition, Tennessee has rejected the extension of a state’s wrongful death statute to allow grandparents to recover for the death of their minor grandchild. Although the grandparents had physical and legal custody of the child for the seven years before the child’s death, the child’s parents had maintained their parental rights. The Tennessee court strictly construed that state’s wrongful death statute, which allows recovery only by the next of kin.

Arizona courts have similarly refused to broadly define “parent” in its wrongful death statute; although the court refused to allow a wrongful death claim by foster parents, other Arizona courts would probably construe the statute in a similar manner to preclude recovery in any kind of kinship-care relationship where there remains a living but absent parent. The court acknowledged the reality of the losses by the caregivers, but refused to

75 459 N.W.2d 273 (Iowa 1990). The terms of the grandfather’s appointment as the child’s guardian required him to provide these types of services.

76 In re Estate of Dobbins, 987 S.W.2d 30 (Tenn. App. 1998)
extend the plain language of the wrongful death statute to provide a remedy for those losses, stating that if the legislature had intended to limit recovery only to surviving next of kin. The court reasoned that a natural parent has duties, rights, and responsibilities fixed by law, while those acting in loco parentis owe no such duty and may stop performing those voluntarily assumed duties at any time. Even the siblings in that case were precluded from recovery, because the natural parent was still alive and therefore a beneficiary under the statute.

IV. MODEL LEGISLATION; CHANGING HEARTS AND MINDS

Although many state courts have broadly interpreted statutes to include kinship relationships and other caregivers, statutory language is necessary to ensure consistency, especially since wrongful death statutes are in derogation of the common law.

Since expansion of the categories of beneficiaries in 1981, Arkansas has engaged in several tort reform efforts with significant impact on awardable damages. None of those tort reforms have restricted the class of beneficiaries, even though the environment has been favorable for such a restriction. To the contrary, the expansive class was clarified in 2001 legislation that passed unanimously in both houses of the Arkansas Assembly. Even while enacting major tort reform legislation in 2003, which abolished joint and several liability and restricted punitive damages, the Arkansas Assembly did not deem the expanded wrongful death categories worthy of restriction.

In 2007 and 2008, Washington legislators attempted to amend their state’s wrongful death statute by allowing an action to be maintained for the benefit of any individual who is the sole beneficiary of the decedent’s life insurance and who had significant involvement in the life of the decedent. The bill defined “significant involvement” as demonstrated emotional, psychological, or financial support within a relationship at or reasonably near the injury or death. The bill would have allowed for recovery of both economic and noneconomic damages.

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80 HB 1873 (2008 Regular Session)
In 1977, the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws proposed a Uniform Model Survival and Death Act that would have allowed recovery of wrongful death damages by the surviving spouse, ascendants, descendants, and any relatives or household members who were wholly or partly dependent on the decedent for support. The model act limited recovery for the pain and suffering of the decedent and for mental anguish and loss of companionship to “closely-related survivors,” defined as the surviving spouse, ascendants, and descendants. The model act therefore acknowledged the potential for losses suffered by grandparents outside the caregiving context, while eliminating recovery for foster parents and similar non-lineal caregivers. The ULC withdrew the model act in 2009 on the grounds that it was obsolete, and no jurisdiction appears to have adopted it verbatim, but it still serves as a starting point for discussion and acknowledgment of grandparents and grandchildren in kinship-care relationships.

In 1975, Professor Stuart Speiser proposed a model wrongful death act designed to promote uniformity and to resolve questions left unanswered by current wrongful death legislation. In their model act, the interchangeable terms “survivor” and “beneficiary” included spouses, children, and parents of the decedent; when dependent on the decedent for support, blood relatives, stepchildren, stepparents, and in-laws; and persons standing in loco parentis to the decedent and to whom the decedent stood in loco parentis. A wrongful death action would be brought for the benefit of the survivors and the decedent’s estate. Professor Speiser was rather prescient in formulating a model act that would provide benefits for twenty-first century families, and his proposal acknowledged the bonds formed between unrelated members of the same household.

After criticizing the Speiser proposal as too cumbersome and complex and the Model Code as inconsistent, Professor T.A. Smedley proposed a wrongful death model that would follow an intestacy statute

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81 Speiser & Rooks at Appendix C, noting “the gross disparities in the states’ many different death and survival systems have resulted in some chaotic results, particularly with choice-of-law questions where legitimate interests of more than one jurisdiction and of its residents have been involved”
82 Id., section 4(i) and(j)
84 Id. at 288.
with flexibility to compensate those who would be unfairly deprived in such a scheme. Professor Smedley proposed giving the probate judge the authority to change distributive shares to allow a greater share of damages to those requiring greater support, including those who might recover nothing under intestate succession “such as an unadopted minor child or a handicapped adult who lived as a member of the decedent’s household, or a grandchild not being supported by his parents.”

Although the proposal would not distinguish between pecuniary and nonpecuniary losses because of its reliance on the losses to the estate for calculation of damages, it would bridge the gap between biological and kinship care relationships. The reliance on intestacy also has the advantage of avoiding the risk of excessive noneconomic damages being awarded by a sympathetic jury; although states may be reluctant to make a wholesale change, such an advantage may appease tort reform proponents opposed to the addition of new categories of beneficiaries.

“Tort reform” in a political context is typically intended to benefit corporate and insurance interests who are stereotypically considered the victims of frivolous tort suits. Expansion the class of potential plaintiffs in wrongful death lawsuits would therefore not necessarily be a popular idea of “tort reform” legislation. Limiting an expansion of beneficiaries to grandparents and grandchildren, however, may not be as difficult as implementing other plaintiff-oriented legislation. For instance, the American Tort Reform Association opposes all noneconomic damages because of the lack of objectivity and the possibility of excessive awards based on emotional rather than rational decisionmaking processes of jurors.

ATRA does seem to acknowledge that grandparents and grandchildren can sometimes be appropriate beneficiaries under a wrongful death statute and that recovery of damages is confined to those with “appropriately close blood relationships” in light of the limited assets of wrongful death defendants.

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85 Id. at 295.
86 85 B.U. L. Rev at 51: “convincing legislators to expand tort damages is a challenging prospect at best;” noting that defects in the system exist on both plaintiff and defense sides
88 The general policy behind such laws is an appreciation that a defendant has only a finite amount of assets from which to compensate family members when a death occurs.
A concern arises in determining whether a grandparent or other kinship-care provider has in fact provided parental-type emotional benefits that disappear after the death of one of the parties to the relationship. As society grows more diverse, the law has expanded to recognize the legitimacy of different types of familial bonds. For instance, family law judges have been provided with a guideline in the form of the Uniform Parentage Act, under which fatherhood is presumed if the man lived with the child for the first two years of the child’s life and treated the child as his own. In addition, functional parentage is recognized by many scholars as prevailing over mere biology in surrogacy cases. Further, intent rather than biology is required in adoption. As one commentator has noted, “Parentage can be predicated on choices. Such choices may be made known through a declaration of intentions or in written agreements, or they may become clear through one's actually raising a child in one's home and treating that child as one's own before a larger community.”

Standards similar to those created by the Ohio court in Lawson could provide guidance for fact-finders in determining the existence and extent of kinship care relationships. One author has proposed a list of factors for determining whether a parent-child type of relationship existed between the decedent and a survivor for purposes of remedying inequities in intestacy laws:

1) whether the relationship began during the child’s minority;
2) whether the relationship was long enough in duration to allow parental-type bonds to form;
3) whether the decedent was married to or in a committed relationship with a parent of the child;
4) whether the decedent held the child out as his or her child,

Thus, claims should be limited to those who have had a relationship recognized by the state in other contexts as an appropriately close blood relationship or other legal relationship. Id. at 10.

89 UPA  
92 FMLA
referring to the child as his or her child or treating the child as his or her child;

5) whether the decedent and survivor provided economic and/or emotional support for each other;

6) whether the treatment of the child by the parent-figure was comparable to the parent-figure’s treatment of his or her legal children;

7) the decedent had named the survivor as a beneficiary to receive property upon the death of the decedent.93

V. PROPOSED STATUTORY LANGUAGE

The wrongful death statutes of most states could be easily transformed to include a broader definition of survivor. California, for instance, already allows stepchildren and domestic partners to recover a full range of benefits.94 Simply adding the words “grandchildren” and “grandparents” to the existing statute would result in a more equitable system of damage awards:

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, grandchildren, or parents, grandparents, or other blood or adoptive relatives.

As used in this subdivision, “putative spouse” means the

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94 Cal Code Civ P 377.60
surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.\(^95\)

In a similar manner, Florida’s statute could be broadened to include kinship care relationships by simply altering two phrases:

"Survivors" means the decedent's spouse, children, parents, and, when anyone partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. …

Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. Each survivor may also recover for loss of the decedent's companionship and for mental pain and suffering. In evaluating the amount of damages, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of

\(^{95}\) Cal. Code. Civ. P. § 377.60. While subsection (c) seems to allow for recovery by some in kinship-care relationships, the language would eliminate several other categories such as non-minors with close relationships with their grandparents and minors who reside on college campuses but are still dependent on the kinship-caregivers for economic and emotional support.
future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered. Compensation shall be limited to actual losses suffered, and no duplicate recovery may be awarded.96

A special verdict form should also be required to confirm that damages are apportioned properly by the jury. For instance, in a case involving the death of a grandparent raising a grandchild where the grandchild’s parent provides financial support but no emotional support and is otherwise absent from the child’s life, the damages portion of the verdict form would appear as follows:

What is the amount of any loss by [surviving grandchild] of the decedent’s support and services?

$______________

What is the amount of any damages sustained by [surviving grandchild] in the loss of companionship, instruction and guidance, and in the survivor’s pain and suffering as a result of the decedent’s injury and death?

$______________

A jury under these circumstances would award zero (or minimal) damages for the first category, since the parent and not the decedent provided support, but could give a full award for the second category.

For those states using intestate succession as a basis for determining the beneficiaries in a wrongful death action, Professor Smedley’s proposal would equalize the discrepancy occurring when an absent parent could recover a windfall under intestate succession leaving a caregiving grandparent uncompensated for her losses. Counsel for the estate-plaintiff would be required to notify the judge of the need to vary from the intestate succession scheme, and would provide the court with the information regarding the survivors outside that scheme. Even if a jury determines the total amount of damages, a judge would modify the distribution so that the

96 See also Jonah M. Levine, suggesting a revision of this statute to award damages to
appropriate survivors would receive amounts commensurate with their losses even though they would not receive anything through intestacy.  

CONCLUSION

Although it has been described as insensitive, barbaric, and monstrous,  Dean Prosser’s infamous quote “it is cheaper to kill a man than to maim him” unfortunately remains true in the case of kinship-care relationships. A defendant who negligently kills a parent of a minor child will be subject to hundreds of thousands of dollars in nonpecuniary damages, while in the same state a defendant who negligently kills a caregiving grandparent of a minor child will escape with relatively minimal damages. States should remedy this inequity by including kinship-care relationships on an equal level with other beneficiaries in their wrongful death statues. Just as wrongful death law evolved to provide protections to new classes of beneficiaries as their legal rights evolved, so too should statutes evolve to recognize expanded definitions of families.

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97 Smedley, 37 Vand. L. Rev. at 295.
98 29 Seattle L. Rev. 663
99 Id.
100Note 12, supra; Malone, Genesis of Wrongful Death, 17 Stan. L. Rev. 1043 (1965)