

## **ABOUT THE AUTHOR**

Kevin Garrison is an experienced personal injury attorney with deep roots in Arizona. He has a proven record of aggressively pursuing compensation for his clients from insurance companies and other responsible parties. Kevin Garrison began practicing personal injury law in Phoenix in 1988. He established the Garrison Law Firm in 1994.

A past president of the Phoenix chapter of the Arizona Trial Lawyers, he is a graduate of the University of Arizona College of Law and the Arizona Trial College.

Kevin has taught legal courses at Phoenix Community College, Rio Salado Community College and the Academy of Business College. Kevin has presented as a speaker at seminars for other attorneys and published articles on topics relating to personal injury and trial law. In addition, Kevin is a member of the American Association of Justice.

## **INTRODUCTION**

If you are reading this book it may be because you have lost a love one. If that is your situation, then I am truly sorry for your loss. Nothing can be as devastating as the loss of a loved one and no amount of money can ever replace the loss of a human life. The purpose of writing this book is to provide the reader with information about the legal rights and remedies when death has been caused by the negligence or wrongful act of someone else.

## **WHAT IS A WRONGFUL DEATH CLAIM**

In Arizona a claim for wrongful death is controlled by statute. Arizona has had a wrongful death statute since 1887, even before Arizona became a State in 1912. The purpose of the statute is to allow close relatives of the decedent to assert a claim for financial compensation for their losses resulting from the death of a loved one.

A wrongful death claim is an action or demand by relatives or the estate of a person killed by negligence or a wrongful act of another person, business or public entity. The purpose of the claim is compensation for economic losses, out-of-pocket expenses, personal suffering and emotional grief of survivors.

Arizona Revised Statutes Section 12-612, Section 12-613 control wrongful death claims in Arizona. Court decision have interpreted and given meaning to the statutes over the years as the loss a wrongful death has evolved. This book will highlight some of the interesting Arizona court decisions. As you will see below a wrongful death claim is an action brought by the relatives of the estate of a person who has been killed by the negligence or wrongful act of another person, business or public entity. The statute provides:

When death of a person is caused by wrongful act, negligence or default, and the act, neglect or default is such as would, if death had not been ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to murder in the first or second degree or manslaughter.

Many times the issues surrounding a wrongful death claim can be complex. Therefore, it is the suggestion of this author to consult a lawyer experienced in wrongful death matters before making a claim or giving any statements or information to anyone. Most attorney's offer free consultation. Use the consultation as a starting point and take advantage of the experience a trusted attorney can provide.

In Summerfield v. Superior Court, the court faced the question of whether a claim for wrongful death could be asserted for a stillborn viable fetus. The court held that the word "person" in the wrongful death statute did encompass a stillborn viable fetus. Indeed, the author has successfully asserted a claim for the father of an eight month old fetus who was killed along with her mother in a car accident.

### **WHO IS ENTITLED TO MAKE A CLAIM**

Under Arizona law, all of the following may bring a claim:

1. The Spouse of the deceased;
2. The Children of the deceased; and
3. The Parents of the deceased.

If neither a spouse, child, or parent survives the decedent then a claim can be made by the Estate of the decedent. If a claim is made on behalf of the Estate, any recovery would be distributed according to the will of the decedent, or if no will exists, pursuant to the laws of interstate succession. Notice that the law does not allow brothers or sisters to assert a loss for a sibling even though the impact of the death may be just as significant.

### **WHEN MUST A CLAIM FOR WRONGFUL DEATH BE MADE**

The general statute of limitations is two years although there are exceptions such as worker's compensation where the claims must be made within one year or when death is caused by a governmental entity, or if the Plaintiff is a minor or mentally incompetent. Claims should be pursued as soon as possible to preserve key evidence. Witnesses should be interviewed before they disappear and memories fade. Bringing claims in a timely manner is important, as evidence can be lost.

### **WHAT DAMAGES CAN BE RECOVERED IN A WRONGFUL DEATH CLAIM**

Once again, this is controlled by statute ARS Section 12-613 provides:

In an action for wrongful death, the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover, and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default. The amount recovered in such action shall not be subject to the debts or liabilities of the deceased, unless the action is brought on behalf of the decedent's estate.

### **WHAT DOES A JURY CONSIDER WHEN DETERMINING THE PROPER AMOUNT TO AWARD IN A WRONGFUL DEATH CLAIM**

If a wrongful death claim goes to trial the jury is instructed to consider the following elements in determining damages.

1. The loss of love, affection, companionship, care, protection, and guidance since the death of the decedent and in the future.
2. The pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced and reasonably probable to be experienced in the future.
3. The income and services that have already been lost as a result of the death, and that are reasonably probable to be lost in the future.
4. The reasonable expenses of funeral and burial.
5. The reasonable expenses of necessary medical care and services for the injuries that resulted in the death.

An important element in determining the damages suffered by the survivors is the relationship that was lost. Evidence of a decedent's behavior or a survivor's behavior can be admitted to disprove loss of consortium damages. Thus, for example a husband's abuse of his wife was shown to rebut his claim that he had suffered a loss of consortium as a result of her wrongful death. The husband was awarded nothing when the evidence determined that he was abusive to his wife. The survivors may not recover for the decedent's pain and suffering prior to his death. ARS Section 14-3110; Harrington v. Flanders 2 Ariz. App. 265, 407 P.2d 946 (1965). The only exception to this is found in claims for abuse of a vulnerable adult. Arizona Revised Statutes Section 46-451 et. seq. The survivors of the decedent, however, are entitled to damages for personal anguish, sorrow, mental suffering and pain and shock that they experience as a result of the death of the decedent. Southern Pacific Transportation Company v. Lueck 111 Ariz. 560 535 P2d 599. It is important to understand, however that the grief that is compensable is that attached to no longer having the decedent. For example in Mollen v. Posada Del Sol Health Care Center 169 Ariz. 399, 819 P.2d 985 (App. 1991). The court held that the decedent's mother could not recover damages for her feelings of guilt over not having transferred her son from a nursing home after she learned that her son was receiving unsafe, improper and negligent care at the home prior to his death. The reason for this decision is that her emotional trauma was not from the loss of her son but rather from her own guilt in not

transferring him from the nursing home prior to his death. It is interesting to note that Arizona Law does not allow evidence of the remarriage of a surviving spouse. Taylor v. Southern Pacific Transportation Company 130 Ariz. 516, 637 P.2d 726 (1981). The justification for this is that the law does not wish to penalize a spouse whose a partner has died by prohibiting that spouse from recovery if they later remarried.

### **WHAT HAPPENS TO THE MONEY**

The recovery obtained by a Plaintiff is held for the benefit of the statutory beneficiaries. Sentry Insurance v. Superior Court 156 Ariz. 557, 753 P.2d 1213 (App. 1988). There can be only one Plaintiff in a wrongful death case. Thus, if there is a surviving spouse, children or parents and they don't all agree on a single attorney, each can have their own attorney. However, only one of them may be the Plaintiff in a lawsuit. The wrongful death action must be brought in the names of the person's within the categories listed in the wrongful statute. This means that claims by all statutory beneficiaries should be consolidated in a single action. The statutory Plaintiff represents all other beneficiaries and owes them the duties of a fiduciary in conducting and settling the action and in distributing any proceeds.

### **WHAT IF A PERSON IS KILLED WHILE WORKING**

Arizona law provides benefits for survivors of persons who are killed in an accident arising out of and in the course of their employment unless the injury was purposely self-inflicted. Arizona Revised Statute Section 23-1021. Under the workers compensation statutes, however, death benefits are paid regardless of who was at fault for the accident. The survivors do not need to prove a claim for negligence. Rather, the survivors need to merely prove that the decedent employee was killed while in the course and scope of his employment.

### **ARE THERE ANY CAPS OR LIMITS ON THE AMOUNT OF DAMAGES THAT MAY BE RECOVERED IN A WRONGFUL DEATH CASE**

No. There is no dollar limit on the amount that can be recovered. Arizona Constitution, article 18, section 6 provides as follows:

The right of action to recover damages for injuries shall never be abrogated and the amount recovered shall not be subject to any statutory limitation.