

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

Joseph J. Short, in his own right and as Executor of the Estate of Elsie Short, Deceased	:	January Term 1993
	:	No. 516
	:	consolidated with
v.	:	November Term 1993
	:	No. 2724
Constantinos Pavlides, M.D. et al.	:	
	:	

Opinion

Introduction

The issue raised in the present case is whether the two adult children of the decedent, Elsie Short, were properly excluded as beneficiaries from the recovery of her wrongful death action. In explaining the allocation of this recovery, the settlement petition characterized these two adult children as "pecuniarily independent" of their mother at the time of her death in contrast to her "pecuniarily dependent" "mentally incapacitated" adult son.¹ This characterization, however, obscures the proper criteria for determining a wrongful death beneficiary which hinges instead on establishing "pecuniary loss."

This court understands and deeply sympathizes with the plaintiff father's desire to provide financial security for his mentally incapacitated adult son by allocating a major share of the wrongful death benefits to him and by eliminating an allocation for his other two adult children. The statutory scheme, however, is not

¹ Plaintiff's Petition to Settle Wrongful Death Action, ¶4.

designed to compensate for such needs--or to draw such distinctions--once the threshold requirements of "pecuniary loss" have been established. A strict construction of the Wrongful Death Statute, which incorporates the rules of intestate succession, and the relevant precedent requires that adult children who can establish "pecuniary loss" due to the death of a parent should all share equally in any wrongful death benefits.

Factual Background

On November 19, 1991, Elsie Short died at the age of 53 from complications after undergoing surgery on May 13, 1991. At the time of her death, Mrs. Short was survived by her husband and their three adult children. A wrongful death and survival action was subsequently brought by Joseph Short, the decedent's widower, in his own right and as Executor of his wife's estate.²

Shortly before this case went to trial, the parties agreed on a settlement. Joseph Short thereafter filed a Petition for the Approval of the Wrongful Death and Survival Action Settlement pursuant to Pa.R.C.P. 2206. This settlement agreement designated only two beneficiaries for the Wrongful Death Action: the surviving spouse, Joseph Short, and just one of Elsie Short's three adult children, John F. Short.³ In explaining this allocation, plaintiff stated that his son John Short was

² In this action, the plaintiff alleged that the decedent's death was caused by the negligence of her two physicians in failing to properly insert Hickman catheters that she needed for outpatient chemotherapy to treat leukemia. As a consequence of this negligence, plaintiff alleges, Mrs. Short's vena cava was lacerated, causing massive hemorrhage. For the last 6 months of her life, she languished in the intensive care unit suffering from blindness, dependency on a ventilator, and massive edema throughout her upper body. Plaintiff's Petition to Settle Wrongful Death Action, ¶¶ 1-6, 17.

³ Plaintiff's Petition to Settle Wrongful Death Action, Proposed Order. Plaintiff allocated \$915,947.05 as Wrongful Death Benefits, designating \$366,378.82 to Joseph Short, as surviving

"mentally incapacitated and pecuniarily dependent adult son" who had resided in New Jersey with his mother prior to her death. The other two adult children -- Elizabeth Ann Mulder and Joseph Short, Jr.-- were characterized as "pecuniarily independent of their mother at the time of decedent's death."⁴

On July 17, 1998, this court entered an order approving the settlement and its allocation since it appeared to be unopposed. Shortly thereafter, however, Mrs. Short's other two adult children filed a motion for reconsideration objecting to the allocation of the wrongful death benefits because it excluded them. On August 3, 1998, this court granted the motion for reconsideration so that the objections of Elizabeth Mulder and Joseph Short, Jr. (hereinafter "objectors" or "objecting children") might be considered. An oral argument was subsequently held at which time counsel stipulated to facts presented in the objecting children's affidavits. Upon consideration of the petitions, the documents submitted, and the oral argument, this court is constrained to conclude that Elizabeth Mulder and Joseph Short Jr. together with their brother John Short qualify as wrongful death beneficiaries for the reasons set forth below.

spouse, and \$549,568.23 payable "to the Guardian of the Estate of John F. Short, the surviving child of Elsie Short, Deceased, to be appointed by the Surrogate's Court of Gloucester County, New Jersey." Id. A total of \$101,771.89 was allocated as Survival Act Damages.

⁴ Plaintiff's Petition to Settle Wrongful Death Action, ¶ 4. The petition stated that John Short had submitted to a psychiatric evaluation by Wolfram Rieger, M.D. to establish that he would be incapable of managing his designated settlement funds. Consequently, plaintiff stated that a petition for the appointment of a Guardian for John Short would be filed in the Surrogate Court of Gloucester County, New Jersey, after court approval of this settlement agreement and its allocation of benefits. Plaintiff's Petition to Settle Wrongful Death Action, ¶7.

Legal Analysis

I. Court Approval of the Proffered Settlement Agreement

A preliminary issue that has not been raised in the petitions is the scope of this court's review of the wrongful death action settlement. It is well established that court approval is required for settlements involving a survival action to protect the estate, its creditors and its beneficiaries. Schuster v. Reeves, 403 Pa. Super. 518, 589 A. 2d 731, 734, app. denied, 528 Pa. 645, 600 A.2d 196 (1991). Wrongful death actions, in contrast, do not require court approval where the only beneficiaries are competent adults. Moore v. Gates, 398 Pa. Super. 211, 580 A.2d 1138, 1141 (1990), app. denied, 527 Pa. 617, 590 A.2d 758 (1991).

In seeking approval of their settlement, the plaintiff invoked Pa.R.C.P. 2206.

This rule provides, inter alia, as follows:

When as the result of a verdict, judgment, compromise or settlement or otherwise it has been determined that a sum of money is due the plaintiff in an action for wrongful death, the court upon petition of any party in interest, shall make an order designating the persons entitled to share in the damages recovered and the proportionate share of the net proceeds to which each is entitled. If the share shall be payable to a minor or incapacitated person, the court shall designate as the person to receive such a share a guardian of the estate of the minor or incapacitated person, qualified to receive the fund, if there is one or one is to be appointed. Pa.R.C.P. 2206(b)(1)(emphasis added).

This rule thus is the basis for this court's consideration of the propriety of the allocations among the wrongful death beneficiaries. In addition, the requirement in this rule for the appointment of a guardian when necessary must also be invoked since both the plaintiff father and the objecting children agree that one of the named beneficiaries--John Short--has a degree of mental incapacity that requires the appointment of a guardian to help him handle the funds he will receive as a result of this settlement. Indeed, plaintiff's proposed settlement order specifically provides

for the appointment of a guardian by the Surrogate Court in Gloucester, New Jersey after approval of the settlement. In the instant case, moreover, the plaintiff father has more than adequately represented the interest of his son, John, since in his initial petition John Short was allocated 60% of the total proceeds of the wrongful death proceeds which exceeded his statutory share.⁵

II. Threshold Legal Criteria for a Wrongful Death Beneficiary: Family Relation and Pecuniary Loss

A. The Wrongful Death Act and Intestate Succession

Prior to the enactment of the Pennsylvania Wrongful Death Statute, there was no common law cause of action for the wrongful death of another person. Seymour v. Rossman, 449 Pa. 515, 297 A.2d 804, 808 (1972). The Pennsylvania Wrongful Death Act, 42 Pa.C.S.A. § 8301, provides for a cause of action "to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another" for certain "beneficiaries" which it defines as follows:

⁵ Petition to Settle Wrongful Death Action, Proposed Order, ¶ 11(b). In the initial petition there were only 2 wrongful death beneficiaries: Joseph Short who was allocated \$366,378.82 (or 40% of the wrongful death proceeds) and John Short who was allocated \$549,568.23. After this proposed allocation was challenged by the objecting children, Joseph Short agreed to an amended order under which he would take his statutory share of \$30,000 plus fifty percent of the remaining balance of the wrongful death proceeds or \$442,973.52 for a total of \$472,973.52. Plaintiff's Proposed Order (filed 8\31\98) at ¶11(a). John, under this order, would receive the remaining 50 per cent or \$442,973.52. This accords with 20 Pa.C.S.A §2102(3) which provides that the intestate share of a decedent's surviving spouse is "[i]f there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the first \$30,000 plus one-half of the balance of the intestate estate.

Beneficiaries.- Except as provided in subsection (d), the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere. The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the statutes of this Commonwealth. 42 Pa.C.S.A. §8301(b) (emphasis added).

As the Pennsylvania Supreme Court observed, the "Legislature's enactment of the Wrongful Death Act conferred a new cause of action upon the statutorily enumerated heirs of the decedent." Seymour v. Rossman, supra, 297 A.2d at 808. The Wrongful Death Act thus incorporates the intestate act to determine the allocation of any recovery. The rules of intestate succession are set forth at 20 Pa.C.S.A. §2101 et seq. and provide for the following distribution where the deceased is survived by a spouse and children:

The intestate share of a decedent's surviving spouse is:

(3) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the the first \$30,000 plus one half of the balance of the intestate estate. 20 Pa.C.S.A. § 2102 (3)

The rules of intestate succession also provide for inheritance by the "issue" or children of the decedent, 20 Pa.C.S.A. §2103(1) who would take equal shares:

(2) Taking in same degree - When the persons entitled to take under this chapter other than as surviving spouse are all in the same degree of consanguinity to the decedent, they shall take in equal shares. 20 Pa.C.S. A. § 2104(2).

B. Relevant Precedent

A body of precedent has also evolved concerning the definition of a wrongful death beneficiary--a disputed issue in the present case. All of the petitioners agree, however, that a key case in defining a wrongful death beneficiary is Gaydos v.

Domaby 301 Pa. 523, 152 A. 549 (1930). The Supreme Court in Gaydos analyzed a jury charge concerning the rights of minor and adult children to recover wrongful death benefits for the death of their mother. In concluding that the trial court erred in its jury instruction, the Supreme Court provided broad definitions of such key factors in determining a wrongful death beneficiary as "family relation" and "pecuniary loss." There are, however, elements in its analysis that are potentially contradictory when attempting to apply it to the particular facts raised in a family dispute over allocation of a recovery.

In Gaydos, a widow who was negligently killed was survived by seven children ranging in age from 32 through 14 years old. In describing the scope of recovery under the wrongful death statute, the Gaydos court noted that a "family relation" was "the foundation of the right of action, without regard to age." Gaydos, supra, 152 A.at 551 (emphasis added). It defined this "family relation" in terms of the wrongful death act:

The term 'family relation' as thus used does not embrace its comprehensive definition, but is confined to certain phases of family relation between the persons named in the act. As the term 'family relation' is understood under the act, those affected by such death need not reside at the same home or under the same roof as the deceased. They may reside elsewhere and still be within the family relation. Gaydos, supra, 152 A. at 551-52 (emphasis added).

In addition to "family relation," the Gaydos court emphasized that a wrongful death beneficiary must demonstrate "pecuniary loss," which it defined as follows:

Pecuniary loss has been defined to be a destruction of a reasonable expectation of pecuniary advantage from the deceased. It is not a matter of guess or conjecture, but must be grounded on reasonably continuous or past acts or conduct of the deceased. The reasonable expectation of pecuniary advantage to one standing in the family relation may be shown in many ways, but more frequently through services, food, clothing, education, entertainment, and gifts bestowed; to be reasonable, the services and gifts

must have been rendered with a frequency that begets an anticipation of their continuance; occasional gifts and services are not sufficient on which to ground pecuniary loss. Gaydos, supra, 152 A. at 552 (emphasis added)(citations omitted).

Pecuniary loss, the Gaydos court explained, encompassed a parent's probable earnings insofar as they would enure to the benefit of the child as well as "the value of the parent's services in the superintendence, attention to, and care of his family, and the education of his children which have been deprived by his death." Gaydos, supra, 152 A. at 552.

Significantly, however, pecuniary loss did not include either claims for "mental suffering, grief or distress of mind" or "for the loss of the society or companionship, as such, of children and parents." Id., 152 A. at 552. An adult, as well as a child, may be a wrongful death beneficiary,⁶ but while the family relation and pecuniary loss are assumed for a minor child, "adults must affirmatively show direct pecuniary loss." Id., 152 A. at 553. The age of twenty one years is thus not a dividing line for recovery "because family relation is the basis for recovery of damages" and "this may continue beyond that period; damages are measured by the pecuniary loss, based on past conduct and acts of the deceased in that relation." Id., 152 A. at 554.

Despite its repeated emphasis on the affirmative requirement that adult children establish pecuniary loss based on the past acts of the decedent,⁷ the

⁶ In Pongratz v. Boyer, 180 Pa. Super. 260, 119 A.2d 813, 815 (1956), two adult sons who lived with their mother prior to her accidental death were the wrongful death beneficiaries. In concluding that the jury's award to them was too low, the court emphasized that the proper focus is on the acts of the decedent towards her children and their consequent loss.

⁷ Gaydos, supra, 152 A. at 555. The Gaydos court emphasized that damages are not based on the value of the life "as property" but rather on "a reasonable expectation of pecuniary advantage

Gaydos court suggested that when it came to distributing the recovery all children--

as a class--might recover if only one demonstrated the requisite pecuniary loss:

All the children, under the act, should sue as parties-plaintiff, even though at trial a pecuniary loss to one child only can be shown. Where all sue and less than that number have been damaged, the verdict must be confined to the loss shown by those damaged even though the verdict and distribution of the amount, under the act, must be made among all the children. Id., 152 A. at 552-53 (citations omitted).

Based on this language, the objecting children in the instant case argue that "where one member of a class of children is entitled to participate in Wrongful Death proceeds" then "all children participate."⁸ The plaintiff father rejects this argument, and contends that to qualify as a wrongful death beneficiary each individual must establish his or her own "pecuniary loss."⁹ This court agrees with the plaintiff father that each wrongful death beneficiary must establish his or her own pecuniary loss. Significantly, this issue was addressed by the Superior Court in Manning v. Capelli, 270 Pa. Super. 207, 411 A.2d 252 (1979) which concluded that the Gaydos

based on past acts and should be confined to those who were entitled to that pecuniary advantage from those past acts." Id., 152 A. at 555.

⁸ Motion for Reconsideration by Mulder and Short at ¶ 16 and Memorandum at 4-5. The objecting children also rely on Seymour v. Rossman, 220 Pa. Super. 92, 283 A.2d 495 (1971), which they misleadingly characterize as presenting "factual circumstances nearly identical to the case at bar." Memorandum at 5. The facts of Seymour, however, are clearly distinguishable since that case focused on whether a widow and minor child of the deceased should take equally as wrongful death beneficiaries. In concluding that both the mother and child should take equally according to the legislatively mandated rules of intestate succession, the Pennsylvania Supreme Court was not asked to distinguish among the respective rights of adult children within the same class. See Seymour v. Rossman, 449 Pa. 515, 297 A.2d 804 (1972).

⁹ Response of Plaintiff Joseph Short to the Motion for Reconsideration, Memorandum at 8-9.

discussion as to allocation was dicta and that each beneficiary must establish his or her own pecuniary loss.

In Manning, the adult daughter ("appellant") of a father's first marriage challenged the allocation of wrongful death benefits recovered in a suit by her father's second wife. The appellant's parents separated when she was eight months old and then divorced when she was only two years old. From the time of her parents' separation, appellant neither lived with her father nor did he provide any support--financial or otherwise--to her. After her father's accidental death, his second wife brought a wrongful death and survival action which resulted in a settlement. The wrongful death benefits were distributed solely among the second wife, their two minor children, and an adult, "dependent" child. The appellant was completely excluded from any recovery and thus challenged this allocation. Manning, supra, 411 A.2d at 254.

The Superior Court, lamenting the absence of appellate authority on this issue, concluded that the appellant was properly excluded from recovery. In so doing, it rejected the suggestion in Gaydos that all children should recover equally from wrongful death benefits once one child had established the requisite pecuniary loss by characterizing it as "[w]andering afield from the issue before it." Manning, supra, 411 A.2d at 255. Instead, the Manning court concluded that the appellant should not recover from her father's wrongful death suit because "[u]nder the facts of the present case, the appellant suffered no pecuniary loss as a result of her father's death, and therefore should be excluded from distribution." Id. at 255.

The extreme, stark facts of Manning, in which the appellant's relationship with her father had been severed at the age of eight months, undoubtedly support the court's conclusion that she suffered no pecuniary loss due to her father's death.

Unfortunately, the Manning court's rationale is more complicated since it casts the issue before it as "whether Pennsylvania's Wrongful Death Statute, Act of April 15, 1851, P.L. 669, authorizes appellant to participate in the aforesaid distribution, notwithstanding her being an emancipated and financially independent adult," thereby interjecting the concept of "financial independence" into its analysis. Id., 411 A.2d at 254 (emphasis added). Moreover, in concluding that appellant should not recover, the Manning court noted that it was "faced with two clear alternatives:

Either the provisions of the Wrongful Death Act must be strictly followed and a distribution made under the Intestate Act, without regard to possible windfalls, or the Act must be interpreted so as to prevent an inequitable benefit to particular individuals. Manning, 411 A.2d at 255.

In opting for the second course, the court explained that it "is settled beyond dispute that only persons standing in a 'family relation' with the deceased, hereinbefore defined to require pecuniary loss, and statutorily authorized to maintain a wrongful death action as a result of the deceased's death" should recover. Id., 411 A.2d at 255 (emphasis added). Thus, it rejected the notion that all children should recover equally under the laws of intestacy where all had not satisfied the threshold requirements for bringing a wrongful death action. Rather, "we are of the opinion that it is incumbent for one seeking to procure a share of wrongful death proceeds to prove the family relationship and pecuniary loss before he may be included in the distributional schedule." Id., 411 A.2d at 256 (emphasis added).

Thus, despite the Manning court's allusions to the appellant's financial independence, its test for determining a wrongful death beneficiary was the same as set forth in Gaydos: family relation and pecuniary loss. The facts confronting the

Manning court were so extreme, however, that its guidance is somewhat limited in analyzing the more nuanced, complex family relationship that is presented in the instant case. While the appellant in **Manning** had no contact whatsoever with her father after the age of eight months, the children of Elsie Short, in their affidavits, testify to a long standing, warm relationship with their mother in which she repeatedly bestowed parental services and guidance at critical points in their lives.¹⁰

It is in such nuanced, complex cases where a child seeking an allocation has a long standing familial relationship and has alleged pecuniary loss due to the death of a parent that adhering strictly to the rules of intestacy is beneficial. As the Supreme Court observed in **Seymour v. Rossman**, 449 Pa. 515, 297 A.2d 804, 808 (1972):

Incorporation of the Intestate Act into the Wrongful Death Act reduces the potential for intrafamily conflict by obviating the necessity for a jury determination respecting the apportionment of the wrongful death recovery among the beneficiaries. The procedure eases and simplifies the administration of wrongful death actions. It is thus relevant to the purpose of enactment. **Seymour, supra**, 297 A.2d at 808.

For these reasons, this court concludes that an adult child who establishes that he or she suffered pecuniary loss as a result of the wrongful death of a parent should share equally in the wrongful death benefits. It is thus necessary to determine whether the Elizabeth Mulder and Joseph Short, Jr. have established this loss based on the stipulated affidavits they have submitted.

¹⁰ For a discussion of these affidavits, see Section III, B infra.

III. Analysis of the Pecuniary Loss asserted by Elizabeth Mulder and Joseph Short, Jr.

A. Threshold Procedural Issue: Reliance on Affidavits Submitted by Stipulation

Determining whether the adult children of Elsie Short experienced pecuniary loss as a result of her death necessarily raises inherently factual issues. In addressing the issue of pecuniary loss in Gaydos, supra, the Pennsylvania Supreme Court focused on the creation of proper jury instructions, thereby suggesting that these were issues of fact for a jury. The settlement in the instant case removes it from the scrutiny of a jury. The Superior Court in Berry v. Titus, 346 Pa. Super. 376, 499 A.2d 661 (1985) concluded that a judge in the Orphans' court division could make findings of fact during a hearing to consider objections to a proposed wrongful death settlement. It stated:

The findings of a judge in the orphans' court division, sitting without a jury, must be accorded the same weight and effect as the verdict of a jury, and will not be reversed by an appellate court in the absence of an abuse of discretion or a lack of evidentiary support.

This rule is particularly applicable "to findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe and upon the weight given to their testimony. Berry, supra, 499 A.2d at 663.

In the instant case, however, the objecting children, Elizabeth Mulder and Joseph Short, Jr., submitted affidavits concerning the pecuniary loss they experienced due to the death of their mother. At the oral argument that was held to consider the objections raised by these adult children, counsel for both the plaintiff and the objecting children made the following stipulations as to these affidavits. Thus, counsel for the objecting adult children engaged in the following colloquy

with the court:

THE COURT: It's my understanding that the affidavits that were submitted sometime ago from the objectors would be Elizabeth Ann Mulder and John F. Short, is that correct?

Mr. Jackson: It's Joseph J. Short, Jr., which is sufficient for purposes of providing a factual background to permit the argument.

THE COURT: What I am going to do here today is the argument based on an acceptance of those facts. Is that a fair statement?

Mr. Jackson: I believe it is, Your Honor. That's what counsel is indicating in the brief and what we said at the conference we had several weeks ago. N.T. (1\8\99) at 3.

Counsel for the plaintiff father, Joseph Short, interjected no objections to this representation as to the affidavits. During his presentation to the court, he stated: We have stipulated to the facts well pleaded in the affidavits for purposes of this argument. N.T. (1\8\99) at 11.

The analysis of the affidavits submitted is thus premised on the stipulation by counsel.

B. The Affidavits of the Objecting Adult Children as Establishing the Requisite Pecuniary Loss

The objecting children concede that their brother Joseph Short, Jr. suffered pecuniary loss because of the death of their mother. In his Petition to Settle the Wrongful Death Action, plaintiff Joseph Short stated that prior to her death Mrs. Short had performed household services for him, as her husband, and for their son, John, who shared their home. He emphasized that she had been John's primary caregiver. Although John was an adult, plaintiff characterized him as "mentally

handicapped" and "pecuniarily dependent" upon his mother up until the time of her death. John's mother provided his primary mode of transportation; she was his companion at movies and other social events; and she "assisted him with respect to the basic necessities and comforts of life." Although John was employed as a nursing home dietary aid, he lived in his mother's home up until her death.¹¹

The objecting children presented affidavits to establish that they should be designated as wrongful death beneficiaries. In analyzing the facts presented in these affidavits, the standards for determining pecuniary loss must be invoked. As the Supreme Court emphasized in Gaydos, supra, 152 A. at 552, pecuniary loss is "not a matter of guess or conjecture, but must be grounded on reasonably continuous past acts or conduct of the deceased." While occasional gifts and services do not suffice, a "reasonable expectation of pecuniary advantage to one standing in the family relation may be shown in many ways, but more frequently through services, food, clothing, education, entertainment and gifts bestowed." Gaydos, supra, 152 A. at 552. In determining pecuniary loss, the focus is therefore on the decedent and her relationship with those claiming pecuniary loss. The attainment of majority by a child does not necessarily end the requisite family relation.¹²

There are, moreover, many intangible factors that necessarily color this analysis since at least one court has emphasized that "the frugality, industry,

¹¹ Petition to Settle Wrongful Death Action, ¶¶ 12-13.

¹² Gaydos, supra, 152 A. at 553 ("an adult, if damaged, may recover"). See also Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104, 107 n.2 (1949). As the Superior Court observed: "Twenty one years of age is not a dividing beyond which children cannot recover for loss of services. The family relation is the basis of recovery for their pecuniary loss." Pongratz v. Boyer, 180 Pa. Super. 260, 119 A.2d 813, 815 (1955).

usefulness, attention and tender solicitude of a wife and mother of children, surely make her services greater than an ordinary servant and therefore worth more." Tulewicz v. SEPTA, 529 Pa. 584, 606 A.2d 425, 426 (1991). Since the focus is on the benefits the decedent bestowed on her beneficiaries, a court should not be distracted by any presumed negative characteristics of these beneficiaries such as greed or ingratitude. As the Superior Court observed in Pongratz v. Boyer, 180 Pa. Super. 260, 119 A.2d 813, 815 (1956), "[w]hile we might agree that the sons 'expected too much from their mother and selfishly gave too little,' the fact remains that the measure of their damage is the value of the mother's life to them."

Under these criteria both Elizabeth Mulder and her brother Joseph Short, Jr. demonstrate that they have been the beneficiaries of constant, longstanding and generous services and support from their deceased mother. Ms. Mulder, the eldest child of Elsie and Joseph Short, was born in 1959. In her affidavit, she stated that she returned to her parents' home for two extended periods after her two marriages faltered: from 1979 through 1981 and from 1983 through 1989. During the period between 1979-1981, Ms. Mulder's mother furnished her with room and board while babysitting her baby daughter fulltime so that Ms. Mulder could work fulltime in a factory. During this period, Ms. Mulder had no drivers' license, so her mother frequently drove her to work. When Ms. Mulder moved back into her parents' home in 1983, Mrs. Short quit her job at K-Mart so that she could take care of her daughter's two children. A porch was converted into a bedroom for Ms. Mulder. Her mother provided this small family with room and board, while offering guidance on childrearing and education. Not only did Ms. Mulder's parents provide financial support to her, but they counseled her to send her daughter to Parochial School and paid the tuition. Throughout this period, Mrs. Short babysat for her daughters'

children. Finally, after Ms. Mulder left her parents' home in 1989, her mother continued to provide daily babysitting for her two daughters up until the time of Mrs. Short's illness and death in 1991. Throughout this period, Ms. Mulder visited her mother on a nearly daily basis, sharing meals and exercise videos. Affidavit of Elizabeth Ann Mulder (7-7-98), Ex. "E" to Motion for Reconsideration.

Mrs. Short's son, Joseph, was her second child born in 1960. He stated in his affidavit that he left his parents' home in 1983 at the age of twenty-two. He moved back in with his parents in 1986, however, when he separated from his wife and he was unemployed. He remained with his parents from November 1986 until June 1987. His mother furnished him with room and board at no cost. His mother also cooked his meals and laundered his clothes. In 1990, he returned again to his mother's home during a period of marital problems. He stayed in his parents' home for approximately 6 months, during which time he commuted to Lancaster, Pennsylvania to work at a job that required him to work 4 days of ten hour shifts. His mother "was always understanding of my problems," furnishing him room and board without charge. Shortly before his mother became ill in 1991, he returned to Florida to be reunited with his wife. He nonetheless returned to New Jersey nearly every weekend during the last six months of her life "to be closer to my mother and our family." Affidavit of Joseph J. Short, Jr. (7/7/98), Ex. "F," Motion for Reconsideration.

Both of these affidavits testify to the extremely generous and loving services that Elsie Short performed for her two children throughout the course of their adulthood. These facts sharply contrast to those of Manning v. Cappelli, supra, where the appellant's relationship with her father was totally severed at the age of eight months. In the Short family, Elsie Short maintained her warm family relations

with all three of her children, consistently providing them with services throughout their adulthood. Although counsel for the plaintiff/father attempted to minimize these services--and their value--as "parental indulgences" or "normal grandparenting,"¹³ the duration of Mrs. Short's childcare services, for instance, were of inestimable value to a single mother--or married mother--attempting to work outside the home. The need to find steady, reliable, loving care for children is a pressing need for all parents which Mrs. Short unflinchingly fulfilled. Similarly, she welcomed her son Joseph home during periods of marital and employment crisis up until a few months before her illness and death. Although plaintiff seeks to distinguish the relationship of Joseph and Elizabeth to their mother from that of their brother John on the basis of actual residence in his mother's home at the time of her death, it is important to remember that the Supreme Court in Gaydos, supra, stated "as the term 'family relation' is understood under the act, those affected by such death need not reside at the same home or under the same roof as the deceased. They may reside elsewhere and still be within the family relation."¹⁴ See generally Berry v. Titus, 346 Pa. Super. 376, 499 A.2d 661 (1985)(divorced mother established pecuniary loss due to death of 15 year old son even though he had resided apart from her in the home of his father for nearly 2 years prior to his death).

During the oral argument, plaintiff's counsel argued that because the

¹³ N.T. (1\8\99) at 12-13

¹⁴ Gaydos, supra, 152 A. at 552 (citations omitted)(emphasis added). The facts of Gaydos, it must be noted, do not necessarily coincide with this broad definition of family relation. The Court noted, for instance, that two of Mrs. Gaydos's children, Stephen and Joseph, lived away from home--Stephen in the Mayfield Asylum. Id., 152 A. at 551. It noted that Joseph visited home only occasionally and he did not receive gifts or services with any regularity. The record before it, the court noted, did not support any pecuniary loss for these children. Id., 152 A. at 555.

wrongful death statute creates a cause of action that did not exist at common law, it should be strictly construed. He then suggested, however, that this strict construction should extend to the definition of "pecuniary loss"¹⁵ which, it must be remembered, evolved through case law. If the wrongful death statute is strictly construed, however, it provides without any further distinction for the right of a decedent's "children" to recover for his or her wrongful death: thus, the wrongful death cause of action "shall exist only for the benefit of the spouse, children or parents of the deceased." 42 Pa.C.S.A. § 8301 (b). Under this standard, all three Short children would fall within the definition of a wrongful death beneficiary. The relevant precedent in addition leads to the same result.

Conclusion

For the reasons stated above, this court concludes that the petition to approve a settlement agreement should be amended to provide for equal distribution among Elsie Short's three children and an is issued accordingly.

DATE: _____

BY THE COURT:

John W. Herron, J.

¹⁵ N.T. (1\8\99) at 17.