

“WRONGFUL DEATH” OF CHILDREN IN FOSTER CARE

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Award upheld in wrongful-death suit: Jurors award \$20 million in the case of a baby whose death was linked to negligent foster care.¹

Woman sues in child’s foster home death.²

Deal seen in death of boy, 4, in foster care.³

Biological mother sues over death of girl, 3, in foster care.⁴

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1. Bill Braun, *Award Upheld in Wrongful-Death Suit: Jurors Awarded \$20 Million in the Case of a Baby Whose Death Was Linked to Negligent Foster Care*, TULSA WORLD, Aug. 23, 2007, at A8.

2. Colleen Jenkins, *Woman Sues in Child’s Foster Home Death*, ST. PETERSBURG TIMES, July 2, 2008, <http://www.tampabay.com/news/courts/civil/article655039.ece>.

3. Patricia Wen, *Deal Seen in Death of Boy, 4, in Foster Care*, THE BOSTON GLOBE, Oct. 7, 2006, http://www.boston.com/news/local/massachusetts/articles/2006/10/07/deal_seen_in_death_of_boy_4_in_foster_care/.

4. Jeff Mosier, *Biological Mother Sues over Death of Girl, 3, in Foster Care*, THE DALLAS MORNING NEWS, July 19, 2007, http://www.dallasnews.com/sharedcontent/dws/news/city/arlington/stories/DN-odmlawsuit_19met.ART0.West.Edition1.4276c5f.html.

Mother sues DCF over boy's death.⁵

INTRODUCTION

The U.S. Department of Health and Human Services reports that during federal fiscal year 2005:

[A]n estimated 1,460 children . . . died from abuse or neglect—at a rate of 1.96 deaths per 100,000 children Three-quarters (76.6%) of child fatalities were caused by one or more parents More than one-quarter (28.5%) of fatalities were perpetrated by the mother acting alone. Nonparental perpetrators (e.g., other relative, foster parent, residential facility staff, 'other,' and legal guardian) were responsible for 13.0 percent of fatalities.⁶

This Article surveys wrongful death cases filed in various states involving the death of children in foster care. Part I discusses wrongful death claims in general, and Part II discusses foster care. Part III discusses specific cases involving claims of wrongful death filed in various states which arose from the death of a child in foster care. Lastly, Part IV briefly reviews the key aspects of foster care wrongful death cases.

5. Carol Marbin Miller, *Mother Sues DCF over Boy's Death*, THE MIAMI HERALD, May 28, 2008, http://www.miamiherald.com/news/miami_dade/story/548852.html.

6. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2005 61-62 (2005), <http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf>. The study also notes that more than:

[T]hree-quarters (76.6%) of children who were killed were younger than 4 years of age, 13.4 percent were 4-7 years of age, 4.0 percent were 8-11 years of age, and 6.1 percent were 12-17 years of age The youngest children experienced the highest rates of fatalities. Infant boys (younger than 1 year) had a fatality rate of 17.3 deaths per 100,000 boys of the same age. Infant girls (younger than 1 year) had a fatality rate of 14.5 deaths per 100,000 girls of the same age. In general, fatality rates for both boys and girls decreased as the children get older.

Id. In terms of race and ethnicity, "nearly one-half (44.3 percent) of all fatalities were White children. One-quarter (26.0%) were African-American children, and nearly one-fifth (19.3 percent) were Hispanic children. Children of American Indian or Alaska Native, Asian, Pacific Islander, 'other,' and multiple race categories collectively accounted for 4.5 percent of fatalities." *Id.*

I. WRONGFUL DEATH CLAIMS IN GENERAL

While this Article is aimed at discussing wrongful death claims in the context of deaths of children while in foster care, Schweitzer and Larsen caution the following:

[T]here is no such thing as a comprehensive explanation of liability because the outcome of each case depends on the facts of the incident at issue and the laws and regulations of the jurisdiction where it occurred. In other words, liability is often state-law specific and even more often fact sensitive. Moreover, liability is often affected by prior state and federal court decisions and new decisions are issued with some frequency.⁷

That being so, this Article discusses wrongful death claims in general and illustrates how such claims have been asserted following circumstances involving the death of a child while in foster care.

Historically, under common law, actions for the recovery of wrongful death could not be maintained.⁸ Instead, the cause of action died concurrently with the death of the injured party, and there was a bar to recovery after the injured person’s death.⁹ Some commentators have wryly noted that, “[t]he result was that it was cheaper for the defendant to kill the plaintiff than to injure him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy.”¹⁰

In the mid-nineteenth century, England’s Parliament removed the common law bar to recovery when it enacted the Fatal Accident’s Act of 1846, otherwise known as Lord Campbell’s Act.¹¹ Today in the United States, the wrongful death claim is statute driven.¹²

7. HARVEY SCHWEITZER & JUDITH LARSEN, *FOSTER CARE LAW: A PRIMER* 116 (Carolina Academic Press 2004).

8. See PROSSER AND KEETON ON THE LAW OF TORTS, §127 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., West Publishing Co. 5th ed.1984).

9. See *Howlett v. Doglio*, 83 N.E.2d 108 (Ill. 1949).

10. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 381-86 (1970); see also *Liff v. Schildkrout*, 404 N.E.2d 1288, 1290 (N.Y. 1980); PROSSER, *supra* note 8, at §127.

11. 1 STUART M. SPEISER & JAMES E. ROOKS, *RECOVERY FOR WRONGFUL DEATH AND INJURY* § 1:9 (4th ed. Thomson West 2005) (1966).

12. *Id.* The Arkansas law provides that a wrongful death cause of action arises when a person’s death is “caused by a wrongful act, neglect, or default and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover

Generally, an action brought under a wrongful death statute is an original and distinct claim for damages sustained by the statutory beneficiaries and is not derivative of or a continuation of a claim existing in the decedent.¹³ Often the purpose of the wrongful death statute is to provide a procedure for compensating survivors or “statutory beneficiaries” of the decedent for their loss of the decedent.¹⁴ For instance, in Arizona, a wrongful death claim may be brought by a surviving spouse, child, parent or guardian on behalf of the surviving spouse, children or parents or, if none of these survive, on behalf of the decedent’s estate.¹⁵ Other states may require that the claim be brought

damages in respect thereof *if death had not ensued.*” ARK. CODE ANN. § 16-62-102 (West 1987) (emphasis added). For example, New Jersey’s wrongful death statute reads:

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

N.J. STAT. ANN. 2A:31-1 (West 2000). Arizona’s wrongful death statute is similarly written. ARIZ. REV. STAT. ANN. §12-611(1) (LexisNexis 1977). In Connecticut, the statute provides that:

[i]n any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses

CONN. GEN. STAT. ANN. § 52-555 (2000). In New York, the:

personal representative . . . of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent’s death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued

N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 2003).

13. See generally SPEISER & ROOKS, *supra* note 11 at § 1:9. While the wrongful death claim is often defined as that claim that the decedent would have had had death not ensued, such a claim is to be distinguished from a survival action, which is a claim brought by a representative of the decedent’s estate and which originally belonged to the decedent. Such claims are also statute driven and, in some states, are permitted to avoid abatement of the decedent’s claim. See, e.g., ARIZ. REV. STAT. ANN. § 14-3110 (LexisNexis 2005); SPEISER & ROOKS, *supra* note 11, § 1:13.

14. Aranda v. Cardenas, 159 P.3d 76, 80 (Ariz. Ct. App. 2007).

15. See, e.g., ARIZ. REV. ST. ANN. § 12-612(a) (2003)

by a personal representative of the decedent’s estate.¹⁶ Interestingly, in at least one of the states that permit a parent to bring a wrongful death claim, a “parent” may include an adoptive parent, but does not include a foster parent.¹⁷

In addition to defining who may bring the wrongful death claim, wrongful death statutes define the damages that can be recovered and often provide that a jury or fact finder determine an amount of damages that is “fair and just.”¹⁸ For example, “fair and just” compensation in New York has been limited to the pecuniary loss resulting from the death.¹⁹ Arizona, however, permits plaintiffs to claim and juries to consider the survivors’ loss of love, loss of affection, loss of companionship, loss of consortium, and personal anguish and suffering resulting from the death.²⁰ In such cases, damages are always a question for the jury or fact finder.²¹

However, in states where damages are limited to a pecuniary loss, wrongful death claims may be disposed of prior to trial if there is no evidence of such a loss. In either case, the measure of damages available to survivors generally varies significantly and depends significantly on the age, and future status of the decedent.²² It should be noted that in addition to the compensatory damages generally available to the survivors of the decedent, a decedent’s survivors in some states and under some circumstances may be permitted to seek punitive damages.²³ Awards for punitive damages are to serve as punishment to the wrongdoer and a warning to others not to engage in such conduct.²⁴

Wrongful death statutes “provide the authority to sue, but generally [] do not provide a theory of liability for the suit itself.”²⁵ Where such claims sound in negligence the claim is often established by proving the four following necessary elements:

16. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 2003).

17. Solomon v. Harman, 489 P.2d 236, 241 (Ariz. 1971).

18. See, e.g., ARIZ. REV. STAT. ANN. § 12-613 (2003); CONN. GEN. STAT. ANN. § 52-555 (West 2000); N.Y. EST., POWERS & TRUSTS LAW § 5-4.3 (McKinney 1999).

19. N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 1999); Moyer v. State, 572 N.Y.S.2d 262, 263 (App. Div. 1991) (holding that the factors to be considered in making an award for pecuniary damages in a death action involving a child are age, life expectancy, decedent’s earning potential, probability of means to support parents, if they are in need, the relationship between decedent and those persons claiming to suffer pecuniary loss, and the circumstances of those persons).

20. Vasquez v. State, 206 P.3d 753, 759 (Ariz. Ct. App. 2008).

21. ARIZ. REV. STAT. ANN. § 12-613 (2003).

22. See generally SPEISER *supra* note 11, at §§ 6:7-6:8.

23. See *id.* at §§ 8:8-8:10.

24. See *id.* at § 8:1.

25. *Id.* at § 2:1.

- (1) The defendant owed a duty to the decedent;
- (2) The defendant failed to perform that duty;
- (3) The decedent's death was caused by the defendant's failure to perform in accordance with the duty owed; and
- (4) The decedent's death caused damages to the survivors.²⁶

The claim is usually initiated by an attorney (who represents the claimant) conducting an investigation surrounding the death, and obtaining all records, witness statements and associated evidence to support the wrongful death claim. In addition to evidence concerning circumstances surrounding the death, the relationship of the survivors with the decedent must also be effectively communicated in order for a jury or court to assess a fair damage award.²⁷ In cases where the decedent was in foster care at the time of death, the circumstances surrounding the relationship with the survivors of the decedent and the circumstances leading to the placement in foster care may have an impact on the survivors' damages claim.²⁸

Therefore, issues that should be considered in bringing a claim for wrongful death against a foster care agency are:

- (1) Does the jurisdiction compensate for loss of love or for pecuniary loss only;
- (2) Does the jurisdiction allow for punitive damages in wrongful death actions
- (3) What kind of relationship is there between the claimant and the decedent (i.e. is the claimant representing the decedent's estate, etc. . .)
- (4) Can the cause of death be ascertained apart from the cause of soliciting foster care.

26. *Id.*

27. *See Id.* at §14:4 (stating “[w]herever the right to maintain an action depends upon the existence of a certain relationship between the decedent and the plaintiff, the burden of proving that relationship exists upon the plaintiff.”).

28. *See generally* SPEISER *supra* note 11, at §7:32 (stating that “[t]he deceased minor's relationship with a parent who sues for damages will be a significant factor in determining the proper amount of an award.”).

II. FOSTER CARE GENERALLY

Foster care has been defined as “a child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible.”²⁹ It is full-time substitute care for children who have been removed from their parents or guardians and for whom the state has taken legal custody.³⁰ The goal of foster care is often not to create a new “family unit” or encourage permanent emotional ties between the child and foster parents.³¹ Instead, “foster care is designed to provide a stable, nurturing, non-institutionalized environment for the child while the [biological] parent or caretaker attempts to remedy the problems which precipitated the child’s removal or, if parental rights have been terminated, until suitable adoptive parents are found.”³²

Sixty percent of youths in foster care enter the system as a result of abuse, neglect or some other trauma.³³ Under the Adoption and Safe Families Act of 1997 (ASFA) and other federal statutes, child safety while in the child welfare system is the primary goal.³⁴ The Washington Supreme Court explains in *Braam ex rel. Braam v. State* that “at its core, foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety.”³⁵

29. *Mitchell v. Davis*, 598 So. 2d 801, 804 (Ala. 1992) (citing *Smith v. Org. of Foster Families*, 431 U.S. 816, 823 (1977)).

30. The Administration on Children, Youth and Families, *Foster Care Maintenance Payments, Adoption Assistance, and Child and Family Services: Definitions*, 45 C.F.R. §1355.20 (2006).

31. *Mitchell*, 598 So. 2d at 804.

32. *Id.*

33. SUE BADEAU & SARAH GESIRIECH, THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *A CHILD’S JOURNEY THROUGH THE CHILD WELFARE SYSTEM* (2004), <http://pewfostercare.org/docs/index.php?DocID=24>.

34. Individuals with Disabilities Education Act (IDEA) of 1975, 20 U.S.C. § 1401 (2006); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2006); Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 620-679 (2006); Foster Care Independence Act of 1999, 42 U.S.C. § 677 (2006); Early and Periodic Screening, Diagnostic and Treatment Services, the Medicaid Act, 42 U.S.C. §§ 1396(a)(43); 1396(d)(a)(4)(B) (2006); American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996 (2006); Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213 (2006); *see also* Foster Care Independence Act of 1999, 42 U.S.C. § 1305 (2006).

35. *Braam v. State*, 81 P.3d 851, 857 (Wash. 2003).

Other courts have held similarly.³⁶ Despite the recognition by courts (and legislative bodies) of these rights, unknown numbers of the the more than half million children in foster care will die an alleged wrongful death while in such care.³⁷ When these deaths occur, the stoic, matter-of-fact headlines may mask brutal and excruciating details (as represented above). Nevertheless, each death of a child in foster care briefly captures the public's attention and forces us to look at what may have gone wrong and how the foster care system may be improved.

III. SURVEY OF RECENT WRONGFUL DEATH CLAIMS INVOLVING FOSTER CHILDREN

*A. Estate of Pesante ex rel. Pesante v. Mundell*³⁸

Evelyn Pesante, the biological mother of her four year-old daughter Angelica, commenced a wrongful death action seeking damages for pain and suffering caused as a result of her daughter's death while in foster care.³⁹ Angelica and her half brothers had been placed as foster children in the home of their foster parents, the Mundells, because Pesante had neglected the children.⁴⁰ Pesante admitted that her daughter had been removed from her home because the girl had sustained a broken leg, had been burned and had not been provided with adequate food and shelter.⁴¹

While in the foster care of the Mundells, Angelica "sustained severe injuries, including a lacerated and ruptured liver on an occasion when she . . . [was] in the care of the Mundell's thirteen year-old son Emmanuel."⁴² Evidence in the case suggested that Emmanuel (who reportedly weighed approximately 180 pounds) had tackled Angelica, causing her to go forward onto a bed, which broke.⁴³ Angelica received no medical care, and eventually became disoriented and fell down a flight of stairs the following morning.⁴⁴ An autopsy following her death revealed that Angelica sustained a closed head injury, had significant

36. *Nicini v. Morra*, 212 F.3d 798, 807 (3d Cir. 2000); *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 891-93 (10th Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990).

37. See Appendix A, *infra* (demonstrating foster care trends).

38. *Pesante v. Mundell*, 829 N.Y.S.2d 390 (App. Div. 2007).

39. *Id.* at 391.

40. *Id.* at 392.

41. *Id.*

42. *Id.* at 391.

43. *Id.*

44. *Mundell*, 829 N.Y.S.2d at 391.

bruising, and a lacerated liver, which caused one third of her blood to drain into her abdominal cavity.⁴⁵

As the administrator of Angelica’s estate, Pesante sued the Mundells and their son Emmanuel.⁴⁶ In addition, Pesante, in two unreported companion cases, sued: 1) a medical group for an alleged failure to report abuse,⁴⁷ and 2) Seneca County where the Mundells provided foster care for negligence.⁴⁸

In the case against the Mundells, the jury rendered a verdict in favor of Pesante and a judgment was entered in her favor for pain and suffering and future pecuniary loss.⁴⁹ On appeal, the appellate court held as a matter of law that the award for pain and suffering “deviated materially from what would be reasonable compensation” and reduced Pesante’s award accordingly.⁵⁰ As for Pesante’s award for future pecuniary loss, the appellate court recognized that in order to have a cognizable claim for future pecuniary loss, it is relevant to consider whether the decedent would have been legally obligated to support the beneficiary and, if not, whether there is any evidence that the decedent would have volunteered to support the beneficiary.⁵¹ In addition, the appellate court considered the nature of Pesante’s relationship with Angelica and the circumstances under which Angelica was removed from Pesante’s home.⁵²

The appellate court found that Pesante had failed to establish the existence of “circumstances to indicate that [she] had a reasonable expectation of future assistance from [Angelica]” and denied her recovery for future pecuniary loss.⁵³

*B. Prince v. United National Insurance Company*⁵⁴

The biological parents of Dakota Denzel Prince-Smith and Nehemaiha Nate Prince-Smith filed a lawsuit against the insurers of foster mother Leslie Smoot, who left the two children in a vehicle for

45. *Id.*

46. *Id.*

47. *Pesante v. Geneva Med. Group, LLP*, No. 30779, 2002 WL 398517 (N.Y. Sup. Ct. Mar. 11, 2002).

48. *Pesante v. County of Seneca*, No. 30071, 2002 WL 31818827 (N.Y. Sup. Ct. July 19, 2002).

49. *Mundell*, 829 N.Y.S.2d at 391-92.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Prince v. United Nat’l Ins. Co.*, 47 Cal. Rptr. 3d 727 (Ct. App. 2006).

more than six hours outside a preschool that Smoot co-owned with her husband.⁵⁵ The children died while in the car.⁵⁶

Recovery turned on whether the loss was of a type covered under the parents' insurance policy.⁵⁷ The policy contained an exclusion of coverage barring recovery for bodily injuries arising from the "use" of the vehicle.⁵⁸ The court found that the Prince children's death occurred while Smoot was using the vehicle and, as such, the policy excluded coverage for claims arising from the death of the children.⁵⁹ Thus, the biological parents of the Prince children were denied recovery against the Smoot's insurance carrier.⁶⁰

*C. Ward v. Greene*⁶¹

Patrice Ward, individually and as the representative of the estate of her two year-old daughter, Raegan McBride, brought a wrongful death claim against the day care provider Kathy Greene, and against Village for Families and Children, Inc., a foster care placing agency.⁶² Village for Families and Children Inc. referred families to Greene for foster care and day care services.⁶³ In 1995 Village for Families and Children ended its contract for day care services with Greene, but continued to contract with Greene for foster care services.⁶⁴ In 1996, Ward solicited the services of Greene to care for her child Raegan McBride.⁶⁵ Ward learned of Greene's services through a friend, not through Village for Families and Children Inc.⁶⁶ In 1997, Raegan McBride suffered a blunt

55. *Id.* at 728.

56. *Id.*

57. *Id.* at 729-30.

58. *Id.* at 729.

59. *Id.* at 735-36.

60. Prince, 47 Cal.Rptr.3d at 736.

61. Ward v. Greene, 839 A.2d 1259 (Conn. 2004); Ward v. Greene, No. X04CV990120118S, 2002 WL 377922 (Conn. Super. Ct. Feb. 21, 2002).

62. Ward, 839 A.2d at 1262.

63. *Id.* at 1263.

64. *Id.* Specifically, the court noted that after 1995 Village for Families and Children:

(1) had no ownership interest in Greene's day care facility; (2) did not refer or direct children to Greene's day care operation; (3) did not pay Greene for the operation of her day care program; (4) did not supervise Greene in the operation of her day care program; and (5) did not investigate to determine Greene's qualifications to be licensed as a day care provider, or to determine whether her license should be renewed.

Id.

65. *Id.* at 1263.

66. Ward, 839 A.2d at 1263.

force trauma to the head while in the care of Greene, and subsequently died.⁶⁷ The Plaintiff alleged that Greene shook Raegan, causing the child to strike her head.⁶⁸ Plaintiff alleged under Connecticut statute section 17a-101,⁶⁹ that Village for Families and Children Inc. had a duty to report any suspected child abuse by Greene.⁷⁰ Greene was alleged to have previously abused several foster children who had been placed in her care by the defendant placing agency.⁷¹ Ward’s claim against the foster care placing agency was dismissed because the court determined that the agency did not owe a duty to Ward. Because the claim was one of negligence per se, the plaintiff had to show that the Connecticut statute applied to the Village for Families and Children and whether the victim was in the class of persons to be protected by the statute.⁷² In this particular case, the Court found that because the plaintiff did not use the placing agency to engage the services of the daycare, the Connecticut statute did not apply to establish the duty against Village for Families and Children, Inc.⁷³

*D. Texas Department of Family and Protective Services v. Atwood*⁷⁴

Three year-old Jonathan Atwood, Jr.’s biological mother brought a wrongful death claim against Texas’ Department of Family and Protective Services after Jonathan drowned in a swimming pool located at the home of Jonathan’s foster parents, Dolan and Linda Roe.⁷⁵ Jonathan and his two younger brothers, Chance and Christopher, were placed with the Roes after their mother was determined to have physically and medically neglected the boys and after their mother was found to have two sexual predators in the family.⁷⁶

Linda Jayne, an employee of the Department of Family and Protective Services, visited the Roe home and expressed concerns to Linda Roe about an above-ground pool in the Roes’ backyard.⁷⁷ Jayne urged the Roes to construct a locking-gate around the pool.⁷⁸ Linda Roe assured Jayne that a locking-gate would be constructed around the pool

67. *Id.* at 1263.

68. *Ward*, 2002 WL 377922 at *1.

69. Conn. Gen. Stat. Ann. § 17a-101 (2008).

70. *Ward*, 839 A. 2d at 1262.

71. *Ward*, 2002 WL 377922 at *3, *5.

72. *Ward*, 839 A.2d at 1272-73.

73. *Id.* at 1263.

74. *Texas Dep’t of Family Servs. v. Atwood*, 176 S.W.3d 522 (Tex. App. 2004).

75. *Id.* at 525.

76. *Id.*

77. *Id.*

78. *Id.*

and that she would contact Jayne upon its completion.⁷⁹ Eleven days later, Jonathan was found lying at the bottom of the pool, dead.⁸⁰

The Department of Family and Protective Services challenged the court's jurisdiction, claiming it was immune under the state's Tort Claims Act.⁸¹ The trial court denied the Department's challenge, which the Department appealed.⁸² The appellate court reversed the trial court's decision and held that the Department of Family and Protective Services did have immunity under the state's Tort Claims Act.⁸³ The court further held that Atwood's wrongful death claim against the Department did not fall within any of the categories under the Tort Claims Act where the immunity afforded to the Department would have been waived.⁸⁴

*E. Risk Management Division, General Services Department of
State ex. rel. Apodaca v. Farmers Insurance Company of
Arizona*⁸⁵

Two year-old Emeterio was placed in the licensed foster care home of James and Kathy Apodaca by New Mexico's Children, Youth and Families Department ("CYFD") (which had legal custody of Emeterio) for long term care with the plan of returning home to his biological parents in the future.⁸⁶ Emeterio drowned in a hot tub owned by the Apodacas.⁸⁷ JoAnn Martinez, Emeterio's grandmother, brought a wrongful death case against the Apodacas and CYFD.⁸⁸ CYFD's Risk Management Division filed a declaratory action against the Apodacas' homeowner's liability carrier, Farmers Insurance Company, to have a court determine that the Apodacas' policy was primary to CYFD's liability insurance.⁸⁹ The Apodacas' Farmers policy excluded coverage for any bodily injury to any resident of the home but did not define the term "resident."⁹⁰ Farmers moved for summary judgment arguing that Emeterio, although a foster child, was a "resident" and, as such,

79. *Id.*

80. *Atwood*, 176 S.W.3d at 525.

81. *Id.* at 526-27.

82. *Id.*

83. *Id.* at 527-35.

84. *Id.*

85. Risk Mgmt. Div. *ex rel. Apodaca v. Farmers Ins. Co. of Arizona*, 75 P.3d 404 (N.M. Ct. App. 2003).

86. *Id.* at 405.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 405-06.

coverage for the claim arising from his death was excluded under the policy.⁹¹ CYFD’s Risk Management Division opposed the motion arguing that questions of fact existed as to whether Emeterio was a “resident” of the Apodaca home.⁹² The trial court granted Farmer’s motion and CYFD’s Risk Management Division appealed.⁹³

The appellate court found the Farmers policy use of the word “resident” to be ambiguous and held additional facts had to be developed before the court could determine whether Emeterio was a “resident” under the circumstances.⁹⁴ The case was remanded to the trial court with suggestions by the appellate court as to the facts that should be developed to determine whether Emeterio was a “resident” of the Apodaca home.⁹⁵ The appellate court emphasized that while actual or intended duration of the relationship between the foster child and the foster parents is a factor to be considered when determining whether the foster child is a “resident” of the foster parents’ home, it alone is not determinative of residency.⁹⁶ In addition, the appellate court suggested that the nature of the relationship (e.g., whether the relationship was informal, or close and intimate) between the foster child and the foster parents is a factor that should be considered when determining residency.⁹⁷ The appellate court noted that public policy favored a finding of residency.⁹⁸

*F. Department of Human Resources v. Johnson*⁹⁹

Parthenia Johnson brought a wrongful death claim following the death of her son, Bryan Jones (age fifteen), who was electrocuted by “faulty wiring” when sweeping behind a freezer at a juvenile facility where he was housed.¹⁰⁰ A jury rendered a verdict in favor of Johnson and an appeal followed.¹⁰¹ One of the issues on appeal was the amount of the jury’s verdict in favor of Johnson, which the defendants argued was excessive.¹⁰² The appellate court recognized that it lacked the discretion to set aside a jury verdict absent a clear showing from the

91. *Apodaca*, 75 P.3d at 405-06.

92. *Id.*

93. *Id.* at 406.

94. *Id.* at 408.

95. *Id.* at 408-10.

96. *Id.* at 409.

97. *Apodaca*, 75 P.3d at 405-06.

98. *Id.*

99. *Dep’t of Human Res. v. Johnson*, 592 S.E.2d 124 (Ga. Ct. App. 2003).

100. *Id.* at 126.

101. *Id.*

102. *Id.* at 130.

record that the jury's verdict was prejudiced, biased, or procured by corrupt means.¹⁰³ In addition, the appellate court stated that in order to set aside a verdict, the amount must appear to be exorbitant, flagrantly outrageous, and extensive.¹⁰⁴

The appellate court, in finding that the verdict rendered in Johnson's favor was not exorbitant, nor outrageous nor extensive, found that the proper measure of damages in a wrongful death case is the "full value of the life of the decedent, as shown by the evidence."¹⁰⁵ This value, the appellate court explained, consists of both "the economic value of the deceased's normal life expectancy as determined by his expected lifetime earnings, plus the intangible element incapable of exact proof."¹⁰⁶

The appellate court stated that the value of a child's life "must be established by the enlightened conscience of an impartial jury as applied to the evidence . . . including testimony as to the child's age, life expectancy, precocity, health, mental and physical development, family circumstances, and from experience and knowledge of human affairs on the part of the jury."¹⁰⁷ The appellate court found that the juvenile facility presented no evidence of prejudice, bias or impropriety in the conduct of the trial that would compel a finding that the jury's verdict was excessive.¹⁰⁸ Moreover, the appellate court was unmoved by the argument asserted on appeal that the jury's verdict was not representative of the worth of Bryan's life because Bryan would have "invariably" ended up in prison, and affirmed the amount of the verdict, finding that the verdict did not "shock the conscience."¹⁰⁹

*G. Commerce Bank v. Youth Services of Mid-Illinois, Inc.*¹¹⁰

Three year-old Louise Osborne died while enclosed in a closet in the home of her foster parents, Sarah and Matthew Augsburgers.¹¹¹ Louise's estate brought a negligence claim against the Augsburgers and Youth Services of Mid-Illinois, Inc. ("Youth Services), a licensed

103. *Id.* at 130-31.

104. *Id.* at 131.

105. *Johnson*, 592 S.E.2d at 131 (quoting GA. CODE ANN. § 51-4-2(a) (2003)).

106. *Id.*; *Miller v. Jenkins*, 412 S.E.2d 555, 556 (Ga. Ct. App. 1991).

107. *Johnson*, 592 S.E.2d at 131 (citing *Williams v. Worsley*, 510 S.E.2d 46, 49 (Ga. Ct. App. 1998)).

108. *Id.*

109. *Id.*

110. *Commerce Bank v. Youth Servs. of Mid-Illinois, Inc.*, 775 N.E.2d 297 (Ill. App. Ct. 2002).

111. *Id.* at 298.

contractor of the state’s Department of Children and Family Services (“DCFS”).¹¹² The court determined that the Augsburgers had parental immunity for any negligence in supervising Louise and were dismissed from the suit.¹¹³ Subsequently, a jury found that Sarah Augsburger was negligent in her supervision of Louise, proximately causing Louise’s death, and that an agency relationship existing between Sarah Augsburger and Youth Services made Youth Services vicariously liable for Louise’s death under the doctrine of *respondeat superior*.¹¹⁴ Youth Services appealed, arguing (among other things) that there was insufficient evidence to allow for a finding of an agency relationship between Sarah Augsburger and Youth Services.¹¹⁵ In examining whether there was sufficient evidence to support a finding of agency between Sarah Augsburger and Youth Services, the appellate court recognized that the controlling issue was whether Youth Services had control over the Augsburger’s day-to-day supervision of Louise.¹¹⁶ In reviewing the record and the evidence submitted to the jury, the appellate court found that Youth Services, in dealing with the Augsburgers, were merely standing in the shoes of DCFS, carrying out DCFS’ regulations, and not under its control.¹¹⁷ As such, the appellate court concluded, the finding of an agency relationship could not stand.¹¹⁸

*H. Patterson v. Lycoming County*¹¹⁹

A mother sued John and Robin Robinson, the foster parents of her three month-old son Elijah, who died while in the Robinsons’ care.¹²⁰ The Robinsons, in turn, argued that they were employees of the county children and youth services and filed a separate action seeking indemnity from the county Children and Youth Services.¹²¹ The county argued that the Robinsons were not employees of the county and, therefore, were not owed indemnity.¹²² The trial court agreed that the Robinsons were not employees of the county and dismissed the

112. *Id.*

113. *Id.* at 299.

114. *Id.*

115. *Id.*

116. *Commerce Bank*, 775 N.E.2d at 301.

117. *Id.*, at 302.

118. *Id.*

119. *Patterson v. Lycoming County*, 815 A.2d 659 (Pa. Commw. Ct. 2002).

120. *Id.* at 660.

121. *Id.*

122. *Id.*

Robinsons' separate action.¹²³ The Robinsons appealed.¹²⁴ The appellate court found that the Robinsons were employees of the county because the county was responsible for supervising the placement of the child and had the legal authority to exercise control over foster parents, including the Robinsons.¹²⁵ The Robinsons' separate action was reinstated and the matter was remanded to the trial court for further proceedings.¹²⁶

*I. Mosher-Simons v. County of Allegany*¹²⁷

Two year-old Jarret Eck died while in the foster care of his maternal aunt and temporary custodian, Deborah Mosher, where he was placed by the county.¹²⁸ Melissa Mosher-Simons, Jarret's mother, brought a wrongful death claim against the county, alleging that the county failed to conduct an adequate pre-placement home study evaluation before placing Jarret with Mosher.¹²⁹

Jarret was removed from his mother's care at seven months of age after the county received a report that Mosher-Simons had abused and neglected Jarret.¹³⁰ During neglect proceedings before the Family Court, which were aimed at terminating the parental rights of Mosher-Simons and that of Jarret's father, Mosher and Jarret's paternal grandmother filed petitions for custody.¹³¹ The Family Court ordered home studies, which "evaluated the residential conditions, household composition, financial situations and ability of both [parties] to provide a safe and stable environment" and contained no recommendation as to placement.¹³² After submission of the home studies to the Family Court, the parties stipulated that Jarret was to be placed with Mosher.¹³³ The Family Court entered an order granting custody to Mosher and assigned a caseworker to monitor Jarret's placement.¹³⁴ Jarret was fatally beaten while in Mosher's care.¹³⁵

123. *Id.* at 661.

124. *Id.*

125. *Patterson*, 815 A.2d at 661-62.

126. *Id.* at 662.

127. *Mosher-Simons v. County of Allegany*, 783 N.E.2d 509 (N.Y. 2002).

128. *Id.* at 510.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Mosher-Simons*, 783 N.E.2d at 510.

134. *Id.* at 511.

135. *Id.* at 510.

In response to Mosher-Simons’ complaint for wrongful death, the county filed a motion for summary judgment, claiming immunity.¹³⁶ The county’s motion was granted and Mosher-Simons appealed.¹³⁷ The appellate court recognized that the home studies performed by the county was done at the direction of the Family Court and did not -court noted that the placement with Mosher was court-ordered and occurred after a stipulation among the parties regarding the placement.¹³⁸ The appellate court recognized that Jarret’s placement with Mosher was “undeniably the execution of a judicial function” and, therefore, should be cloaked with judicial immunity.¹³⁹ Thus, the appellate court held, because the county’s function in completing the home studies were only an extension of the Family Court and done in an effort to provide the court with information to make a decision as to placement, the county (under the circumstances) was entitled to judicial immunity.¹⁴⁰

IV. AN OVERVIEW

In some cases, as illustrated above, the biological parents or family members of the decedent, whose child(ren) has been removed from their care, are recovering large sums of money as a result of litigation following such deaths.¹⁴¹ This is because, not only are the foster parents named as defendants, but the governmental agencies and entities responsible for licensing and monitoring the foster parents and for managing the foster care system are also named as defendants. These governmental agency and licensing entity defendants are often insured by multi-million dollar insurance policies or are similarly self-insured. Furthermore, governmental and licensing defendants are often the source of documentary evidence that will allow for the magnification of any deficiency in the system, including the licensing process and the subsequent monitoring, supervision and reporting.

CONCLUSION

Circumstances which lead to the death of a child do not escape the foster care setting. However, deaths occurring in the foster care setting are typically subject to additional scrutiny due, in part, to the statutory duty owed by governmental agencies and licensing entities licensing

136. *Id.* at 511.

137. *Id.*

138. *Mosher-Simons*, 783 N.E.2d at 512.

139. *Id.* at 513.

140. *Id.*

141. *See supra*, Part III.

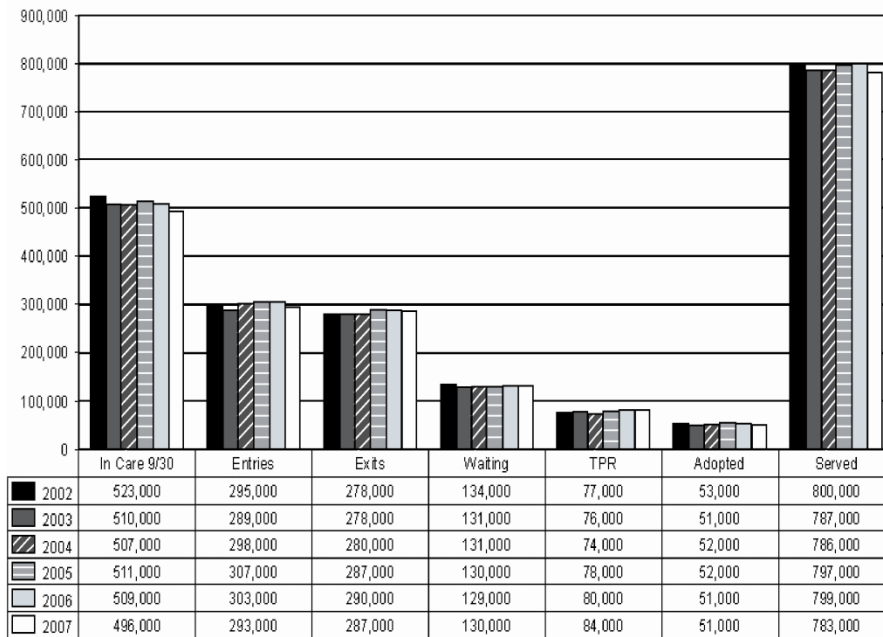
foster care parents to protect the child. In addition, in recent years, the foster care system has been cast into the public spotlight and, at times, ridiculed for the seeming failure by the system to protect the children it serves.

The cases summarized above do not begin to illustrate the magnitude of the number of deaths that result from such deficiencies in the system, as many claims are often settled prior to litigation or during the litigation process and never result in a reported court opinion. Meanwhile, governmental agencies and licensing entities try to improve with limited resources and try to employ vigilant standards to ensure that each child is being protected and kept safe. However, with each death of a child in the foster care system, the questions, among others, are raised as to whether the standards set are sufficiently high, whether the standards set are being met, whether qualified people are being selected for foster care, and whether children are being appropriately placed. Despite the efforts of the governmental agencies and licensing entities to ensure protection and safety of children in the foster care system, numerous deaths continue to occur, some of which result from negligent and preventable acts.

APPENDIX A: TRENDS IN FOSTER CARE AND ADOPTION—FY 2002-FY 2007

(BASED ON DATA SUBMITTED BY STATES AS OF JANUARY 16, 2008)

SOURCE: AFCARS DATA, U.S. CHILDREN’S BUREAU, ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES



DISCUSSION OF “TRENDS” CHART

The data in the chart were submitted to the Adoption and Foster Care Analysis and Reporting System (AFCARS) by States, the District of Columbia and Puerto Rico by September 1, 2008.

Sub-population Definitions

1. In foster care on the last day of the federal fiscal year (September 30):
This is an estimated count of all the children in foster care on the last day

- of the year. An individual child is included in the count for each year for which he or she is in foster care on the last day.
2. Entering care during the federal fiscal year: This is an estimated count of all children who enter foster care during the year. An individual child is counted only once for each year, even if the child entered, exited and re-entered care during the year. If an individual child entered in one year and then exits and re-enters in a subsequent year, he or she is included in the count of entries for both years.
 3. Exiting care during the federal fiscal year: This is an estimated count of all children who exited foster care during the fiscal year at the end of their most recent foster care episode. An individual child is counted only once for each year, even if the child exited, re-entered and exited again during the year. If an individual child exits care in one year and then re-enters and exits again in a subsequent year, he or she is included in the count of exits for both years.
 4. Whose parental rights have been terminated (TPR): This is an estimated count of the children in care on the last day of the year who are both waiting for adoption and whose parental rights have been terminated. An individual child is counted only once for each year. An individual child is included in the count for each year that he or she has these characteristics on the last day of the year.
 5. Waiting to be adopted: This is an estimated count of all children who are waiting to be adopted on the last day of the year. An individual child is included in the count for each year in which he or she is waiting to be adopted on the last day. There is no federal definition for children waiting to be adopted. For the purposes of this analysis, children waiting to be adopted include children with a goal of adoption and/or whose parental rights have been terminated. Children whose parental rights have been terminated, who are 16 years old and older, and who have a goal of emancipation are excluded from the “waiting” population. An individual child is included in the count for each year that he or she has these characteristics on the last day of the year.
 6. Adopted: This is an estimated count of all children adopted during the year with public child welfare agency involvement. An individual child is counted only once for each year. In rare cases when a child is adopted multiple times, the child will be counted in each year he or she is adopted.
 7. Served: This is an estimated count of all children who were in the public foster care system during the year. This number is the sum of two mutually exclusive groups of children: the children who are already in care on the first day of the fiscal year (as of October 1) and the children who enter foster care during the year. An individual child is counted only once for each year.