04.03 WRONGFUL DEATH CLAIM — WITH OPTIONAL SURVIVAL CLAIM

The plaintiff claims that the defendant is legally responsible both for harm suffered by the deceased before [his][her] death and for loss caused to the deceased's [beneficiar(y)(ies)][estate] by [his][her] death. [These are two separate claims against the defendant and you must decide them separately.]

[(1) Plaintiff seeks compensation for the deceased's estate for harm suffered by the deceased before [he][she] died.]

[(2)] Plaintiff seeks compensation for the deceased's [beneficiar(y)(ies)] [estate] for the loss suffered because of the death of the deceased.

[For each of these claims] you must decide whether the defendant is legally responsible for the [injury or] death and, if so, the amount of compensation. [If you find for the plaintiff on both claims, you must compute a separate sum of money for each claim.]

I will explain to you in a moment how to decide each of these issues.

# **Use Note**

This instruction is used to introduce a wrongful death claim under AS 09.55.580 and, if appropriate, a survival claim under AS 09.55.570 arising out of the injury which resulted in death. Where a survival action is asserted for harm to the deceased before his or her death, include the bracketed language.

This instruction can be used to introduce the wrongful death claim, regardless of whether there are surviving statutory beneficiaries (spouse, children, or other dependents). If there are beneficiaries, replace the parenthesized references to beneficiaries with the beneficiaries’ names or descriptions, e.g., “spouse,” “child,” “dependent.”. If there are no statutory beneficiaries, insert the parenthesized references to the deceased’s estate.

This instruction must be followed by the appropriate instruction(s) setting forth the substantive tort theory asserted by plaintiff, e.g., Instruction 03.01 for negligence and 07.01 for strict liability, substituting the deceased’s name for "plaintiff." With respect to damages for the decedent’s pain and suffering, see Instruction 04.04.

## **Comment**

### The Statutes

AS 09.55.580 provides a cause of action when the death of a person is caused by the "wrongful act or omission" of another person. The cause of action is substantively derived from the cause of action which would have been available to the deceased had he or she lived. The action is filed by the personal representative of the deceased's estate. The damages and beneficiaries of the cause of action are defined in the statute.

AS 09.55.570 provides that all causes of action except defamation survive the death of the injured party and may be brought by the deceased's personal representative.

AS 09.15.010 provides that a parent or guardian may maintain an action for the injury or death of a minor child or ward. In *Gillispie v. Beta Construction Co.*, 842 P.2d 1272 (Alaska 1992), the supreme court held that the statute creates a separate, independent parental cause of action by which parents may recover for damages, such as loss of society, which are not recoverable under the wrongful death statute, AS 09.55.580. Such damages are limited, however, to the period of time before the child would have reached the age of majority. *See Sowinski v. Walker*, 198 P.3d 1134, 1163 (Alaska 2008). The supreme court in *Sowinski* declined to apply AS 09.15.010 to the siblings of a wrongful death victim.

The supreme court has confirmed that a person who is a statutory beneficiary under AS 09.55.580 and entitled to recover wrongful death damages under that statute may also be the personal representative of the decedent's estate and recover in the same action for the decedent's pre-death pain and suffering under the survival statute, AS 09.55.570. *North Slope Borough v. Brower*, 215 P.3d 308, 312 (Alaska 2009).

### Wrongful Death: Statutory v. Common Law Action

In 1977, the Alaska Supreme Court expressly recognized that wrongful death actions arise by "legislative fiat" and therefore must be strictly construed. On that basis, the court declined to expand the class of "other dependents" to include a parent who might have become dependent in the future upon her deceased child but who was not dependent as of the child's date of death. *In re Estate of Pushruk*, 562 P.2d 329, 332 (Alaska 1977). Similarly, two United States District Courts construed AS 09.55.580 narrowly on the ground that it created a new action not recognized at common law. *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840, 842 (D. Alaska 1977) ("statute creates an entirely new cause of action for wrongful death"); *Bowen v. Pan Am. World Airways, Inc*., 474 F. Supp. 563, 565 (S.D.N.Y. 1979) ("clear that Alaska has recognized no common law claim for wrongful death . . . the statutory remedy in that state has been the exclusive one").

In 1979, however, the supreme court construed the statute broadly with respect to the period of limitations. The court held that the time limit for filing a wrongful death action is tolled by the minority of the statutory beneficiaries although the statute expressly sets forth a two‑year period of limitations with no provision for tolling. *Haakanson v. Wakefield Seafoods, Inc.,* 600 P.2d 1087 (Alaska 1979). The court expressly stated that AS 09.55.580 is not in derogation of the common law of Alaska because, if the statute did not exist, the court would in all probability recognize a common law right of action for wrongful death as some other jurisdictions have done. *Id.* at 1092 n. ll. While recognizing that an action for wrongful death is statutory, the court "found no legislative intent to treat it differently than the common law tort actions." *Id.* at 1092. The court again construed the statute broadly in *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1048 (Alaska 1986), to permit recovery of punitive damages although punitive damages are not among the categories of recoverable damages enumerated in the statute.

Recovery for Beneficiaries

If there are statutory beneficiaries, AS 09.55.580 provides that any recovery shall be "exclusively for their benefit." This exclusivity is supported by *Engebreth v. Moore*, 567 P.2d 305, 306 (Alaska 1977). On grounds of res judicata, the court affirmed dismissal of an action challenging the personal representative's allocation of a wrongful death settlement. The court cited with apparent approval the superior court's non-appealed judgment in the earlier case to the effect that no persons other than the wife and children of the deceased were entitled to receive any portion of the award. Because there is no indication of any "other dependents" in *Engebreth*, it is consistent with the court's implicit recognition in *Greer Tank & Welding, Inc. v. Boettger*, 609 P.2d 548 (Alaska 1980), that "other dependents" can recover in addition to a surviving spouse or child.

The wrongful death statute contemplates that a wrongful death action includes the claims of all statutory beneficiaries. Therefore, a judgment of dismissal of the entire lawsuit extinguishes the claims of all beneficiaries. *Mitchell v. Mitchell*, 655 P.2d 748, 752‑53 (Alaska 1982).

However, statutory beneficiaries who are not parties to the wrongful death suit in their personal capacities are not parties for purposes of liability for an award of costs and attorney’s fees to the opposing party. *Zaverl v. Hanley*, 64 P.3d 809, 822 (Alaska 2003).

### Recovery of Damages

The fact finder has broad discretion in awarding damages under Alaska's wrongful death statute. *State v. Phillips*, 470 P.2d 266, 271 (Alaska 1970).

Under AS 09.17.010(b), a single damages cap applies to all claims for non-economic damages arising out of one death, regardless of the number of claimants or beneficiaries. *L.D.G., Inc. v Brown*, 211 P.3d 1110, 1133-35 (Alaska 2009). A wrongful death is not a “severe physical impairment” for purposes of applying a higher damages cap. *Id.* at 1135-36.

An award of damages for future economic loss must be reduced to present value absent the parties' agreement to do otherwise. *See* AS 09.17.040; *Beck v. State, Department of Transportation & Public Facilities*, 837 P.2d 105 (Alaska 1992)*.*

*See also* Comments to Instructions 04.05 and 04.12.