**04.11 WRONGFUL DEATH DAMAGES — RECOVERY BY ESTATE**

If you decide the defendant is legally responsible for the death of [decedent], you must decide what amount of money will fairly and justly compensate [his][her] estate. This compensation is measured by the financial loss, if any, to the estate caused by [decedent]’s premature death. To compute this amount, you must complete the following steps:

(1) Determine the amount that [decedent] would have earned during the period between the date of death, [insert date], and the date of trial, [insert date]. From this amount, you must subtract the money that [decedent] would have spent during the same time period for all purposes, including income taxes. This is Amount 1.

(2) Determine the amount that [name of decedent] would have earned during the period between the date of trial, [insert date], and the end of [his][her] ordinary life expectancy. From this amount, you must subtract the money that [decedent] would have spent during the same time period for all purposes, except income taxes. This is Amount 2.

(3) The sum of Amount 1 and Amount 2 is the amount [decedent] would have accumulated in [his][her] estate if [he][she] had lived to the end of [his][her] ordinary life expectancy.

In determining Amount 1 and Amount 2 you may consider, along with other evidence, [decedent]’s age, ability, and willingness to earn money and [his][her] living and spending habits.

# **Use Note**

This instruction should be used where the action is prosecuted on behalf of the deceased's estate because there are no statutory beneficiaries. This instruction should be used in lieu of Instructions 04.05 — 04.10C. This instruction and Instructions 04.05 — 04.10C apply to mutually exclusive circumstances. The only time Instruction 04.11 would be used in combination with Instructions 04.05 — 04.10C is if there is a fact question for the jury as to whether there are any qualifying statutory beneficiaries. The only exception is Instruction 04.08, which should be used when medical and/or funeral expenses are claimed on behalf of the estate.

## **Comment**

AS 09.55.580 provides: "When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the decedent but shall be limited to pecuniary loss." The Alaska Supreme Court has interpreted this provision to mean that, in the absence of statutory beneficiaries, wrongful death damages are limited to the loss to the decedent's estate. *Sowinski v. Walker*, 198 P.3d 1134, 1161 (Alaska 2008); *In re Estate of Pushruk*, 562 P.2d 329, 331 (Alaska 1977); *Osborne v. Russell*, 669 P.2d 550, 560 (Alaska 1983). As a result, certain items of non‑pecuniary damage which would be available to statutory beneficiaries are not recoverable in a wrongful death action where there are no statutory beneficiaries. For example, non‑dependent parents cannot recover damages for emotional distress in a wrongful death action, even though such damages would be recoverable by a statutory beneficiary. *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1045 (Alaska 1986). The Alaska Supreme Court has approved an instruction stating that "[g]rief, sorrow, and loss of companionship, comfort or society" are not to be awarded in a wrongful death action where there were no statutory beneficiaries. *Osborne*, 669 P.2d at 559.

However, an estate’s claim for wrongful death may seek punitive damages, since the “pecuniary loss” limitation of the statute applies only to the compensatory damage award. *Portwood v. Copper Valley Electric Ass’n*, 785 P.2d 541, 542 (Alaska 1990).

Computation of Pecuniary Loss to Estate

The Alaska Supreme Court has approved computation of pecuniary loss to the estate based upon the "net earnings theory." Under this theory, the loss to the estate equals the decedent's projected earnings diminished by the decedent's projected living expenses. *Osborne v. Russell*, 669 P.2d at 560. The supreme court in *Osborne* expressly approved the following instruction:

Pecuniary loss to the estate is the amount of decedent's probable future earnings diminished by the amount he would have spent for his own living expenses had he lived.

Grief, sorrow, and loss of companionship, comfort or society are not to be regarded as items of pecuniary loss for the purposes of any award.

*Id*. at 559.

The supreme court held in *Kulawik v. Era Jet Alaska*, 820 P.2d 627, 630 (Alaska 1991), that income tax liability is disregarded in calculating post-trial earnings and consumption.

*See also* Comment to Instruction 04.03