The Value of a Parent-Child Relationship: Should Adult Children in Wisconsin be Permitted to Recover for Loss of Companionship of a Parent Who has Died at the Hands of a Nursing Home?

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THE VALUE OF A PARENT-CHILD RELATIONSHIP: SHOULD ADULT CHILDREN IN WISCONSIN BE PERMITTED TO RECOVER FOR LOSS OF COMPANIONSHIP OF A PARENT WHO HAS DIED AT THE HANDS OF A NURSING HOME?

I. INTRODUCTION

Until recently, litigation involving nursing homes has been sparse, especially in Wisconsin.1 However, more than 1.5 million Americans are admitted to nursing homes each year, and studies indicate that as the "baby boom" generation reaches the age of sixty-five, the elderly population will increase resulting in a growing demand for extended-care facilities.2 With the increased maturation of the United States population and the resulting increased dependence on nursing home care, there will undoubtedly be an "increase[d] need for quality nursing care."3

Today, many extended-care facilities overwork their employees and fail to adequately supervise their staff, resulting in patients often being left without basic care.4 Thus, it will not be uncommon for much of the

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1. Although no source has explicitly stated that litigation involving nursing homes in Wisconsin is increasing, statistics coupled with an apparent lack of case law involving nursing homes in Wisconsin suggest that such will be a new and developing area of law.


   The percentage of admissions to nursing homes increases dramatically with age, ranging from 1 percent for persons 65 to 74 years to 6 percent for persons 75 to 84 years and 24 percent for persons 85 plus. In 1933, there were only about 25,000 nursing home beds in the United States. According to the National Center for Health Statistics, there were 1,478,217 nursing home residents in 1991.

   Id. (footnote omitted). Further, "[i]n 1994 there were 33.2 million persons in the United States 65 years or older. By the year 2050, the elderly population is expected to swell to 80 million as the baby boomers and their children mature." Id.

3. Id. at 508.

4. Id. at 508–09. Cardone further states that according to a Consumer Reports Investigation, the quality of nursing home care in America is lacking. Id. (citing Nursing Homes: When a Loved One Needs Care, CONSUMER REP., Aug. 1995, Vol. 60 No. 8). "About 40 percent of all facilities certified by the Health Care Financing Association have repeatedly violated federal standards . . . ." Id.
increased litigation stemming from the growing elderly population to be commenced against nursing homes by descendants of patients who die as a result of nursing home negligence. Among the issues certain to arise during this influx of litigation is that of recoverable damages. One issue that deserves attention is whether an adult child whose parent has died as a result of nursing home negligence may recover for the loss of companionship of that parent.

Loss of companionship is the legal concept under which family members may recover for the harm inflicted upon a family relationship when a family member has been injured or killed by the negligence of a third party.\(^5\) Damages for loss of companionship are non-economic and are not easily defined.\(^6\) One commentator attempted to define loss of companionship:

A claim for loss of companionship and society is closely analogous to a claim for loss of consortium. The two claims are virtually identical except that a claim for loss of consortium compensates for the harm done to the marital relationship between spouses, while a loss of companionship and society compensates for the harm done to the familial relationship between parent and child.\(^7\)

The Wisconsin Supreme Court defined loss of companionship damages as being "predicated upon the emotional ties [a plaintiff] shares with the injured party. Consequently, the possible universe of claimants is limited only by the number of persons with whom the injured person has established personal relationships."\(^8\)

Before beginning an analysis of an adult child's ability to recover for loss of parental companionship in a nursing home negligence case, it is important to recognize that loss of companionship is a legal concept that differs drastically from state to state. For instance, some state statutes, especially wrongful death statutes, provide claimants with a right to recover for loss of companionship,\(^9\) whereas other states recognize loss of companionship as a wholly separate cause of action.\(^10\) In addition, in

\(^5\) See 22A AM. JUR. 2D Death § 252 (1962).
\(^6\) Id.
\(^8\) Estate of Wells v. Mount Sinai Med. Ctr., 515 N.W.2d 705, 708 (Wis. 1994).
some states, including Wisconsin, the legislature has explicitly provided for the recovery of such damages in certain situations such as wrongful death; however, in non-death situations, the judiciary is responsible for shaping and creating law pertaining to loss of companionship. Finally, while some states' statutes provide recovery only for pecuniary injury, state courts have at times interpreted pecuniary injury to include damages for loss of companionship.

This Comment explores an adult child's ability, in Wisconsin as well as other jurisdictions, to recover for the loss of companionship of a parent who died as a result of nursing home negligence. However, neither the Wisconsin Legislature nor the Wisconsin courts has addressed whether an adult child can recover for loss of companionship of a parent whose death resulted specifically from nursing home negligence. Wisconsin law is also silent as to whether an adult child can recover for the loss of companionship of a parent in a wrongful death suit.

On the other hand, Wisconsin law clearly indicates that an adult child cannot recover for loss of companionship of a parent whose death resulted from medical malpractice.

Part II of this Comment focuses on the ability of an adult child to recover for loss of companionship of a parent in a medical malpractice action. Case law clearly dictates that under Chapter 655 of the Wisconsin Statutes, which governs medical malpractice claims, an adult child may not recover for loss of companionship. The question then arises whether nursing home services are included in Chapter 655. If nursing home negligence qualifies as medical malpractice under Chapter 655 pursuant to Wisconsin case law, an adult child would not be able to recover for the loss of companionship of a parent who died as a result of nursing home negligence. However, it is likely that nursing home services fall outside of the medical malpractice area; as such, the remaining course of recovery for an adult child whose parent died due the negligent care of a nursing home would be under a wrongful death cause of action.

Accordingly, Part III focuses on an adult child's ability to recover for the wrongful death of a parent in a non-medical malpractice, wrongful death suit.

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11. Estate of Wells, 515 N.W.2d at 708.
13. See infra Part II.
14. See infra Part III.
15. See infra Part II.
death context in Wisconsin. Section 895.04 of the Wisconsin Statutes governs wrongful death claims. Although the statute mentions that "children" can recover for loss of companionship of the deceased, it provides no definition of the word "children."\textsuperscript{17} Therefore, it is unclear whether an adult child may recover. However, an exploration of the history of the wrongful death statutes in Wisconsin, as well as examination of Wisconsin case law addressing loss of companionship, reveal that it is likely an adult child in Wisconsin may recover for the loss of companionship of a parent in a wrongful death suit.

Part IV of this Comment focuses on other jurisdictions' approaches to this issue. While many jurisdictions do not specifically address recovery by an adult child for loss of companionship of a parent in a nursing home negligence context, this part focuses on the adult child's ability to recover for loss of companionship in various other causes of action in an attempt to predict how state courts would rule in a case involving nursing home negligence.

Upon showing that many other jurisdictions allow adult children to recover for loss of companionship of a parent, as well as having determined that Wisconsin will likely allow adult children to recover for loss of companionship in a nursing home context, Part V briefly discusses the repercussions of allowing an adult child to recover for loss of parental companionship.

Part VI advocates a bar to such recovery. Given the reasoning behind prior Wisconsin case law, coupled with various policy arguments, there is a strong argument that Wisconsin courts should bar claims on behalf of adult children seeking to recover for loss of companionship.

II. LOSS OF COMPANIONSHIP IN WISCONSIN MEDICAL MALPRACTICE SUITS

A. State of Wisconsin Law: Loss of Companionship in Medical Malpractice Actions

Wisconsin law regarding the ability of an adult child to recover for the loss of companionship of a parent who has died as a result of medical malpractice is clear. An examination of Chapter 655 of the Wisconsin Statutes\textsuperscript{18} coupled with an analysis of recent case law dictate that adult children may not recover for loss of companionship of a

\textsuperscript{17} WIS. STAT. § 895.04 (1999–2000).
\textsuperscript{18} Chapter 655 governs medical malpractice claims.
parent in medical malpractice wrongful death suits.

In the 1993 case of Dziadosz v. Zirneski, the Wisconsin Court of Appeals explicitly held that adult children are not entitled to recover for the loss of companionship of a parent who has died as a result of medical malpractice. In Dziadosz, adult children sought to recover for the loss of companionship of their mother who died of a ruptured abdominal aortic aneurism after a physician prescribed only antibiotics and then discharged the decedent. The adult children claimed that, in a Chapter 655 medical malpractice action, they could recover for loss of companionship under section 895.04, which allows children to bring suit for wrongful death in non-medical malpractice wrongful death contexts and to recover for loss of companionship. The court rejected this argument stating, "Because sec. 895.04 has not been included in ch. 655 by specific reference, we conclude that it is not applicable in medical malpractice actions."

The court did not end its analysis with the statutory construction. Based on prior Wisconsin case law, the court further reasoned that adult children should not be able to recover for the wrongful death of a parent in a medical malpractice context. Prior Wisconsin case law expressed the court's sentiment that loss of companionship in a medical malpractice context should be found only in the case of a relationship between a parent and minor. The court noted a pattern emerging from the Wisconsin courts: "The [Wisconsin] [S]upreme [C]ourt now allows various claims for loss of society and companionship where the individual claiming recovery is alleging that either the victim or the one being affected by the injury is a minor child." The court concluded its analysis by refusing to extend recovery to adult children because neither

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20. Id. at 831.
21. Id. at 829.
22. Id. at 829–30. Section 895.04 allows children of the deceased to bring a wrongful death suit when the deceased has no surviving spouse. Wis. Stat. § 895.04 (1999–2000). Specifically, the adult children in Dziadosz argued that subsection four of the statute, which uses the broad term "child," allows adult children to recover for loss of companionship and has been incorporated into the medical malpractice chapter. See Dziadosz, 501 N.W.2d at 830.
23. Dziadosz, 501 N.W.2d at 830.
24. Id. at 830–31.
25. Id. (citing Rineck v. Johnson, 456 N.W.2d 336 (Wis. 1990); Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975)).
26. Id.
the parent nor the children were minors.  

Although the Dziadosz court relied on the reasoning of prior Wisconsin cases and the intent of the legislature when making its determination, the court could have avoided such a lengthy analysis by determining that adult children are barred from ever bringing medical malpractice actions (much less recover for loss of companionship).  

Specifically, section 655.007 of the Wisconsin Statutes prescribes who has standing to bring a medical malpractice action. The plain language of the statute suggests that only a minor child can bring a claim for medical malpractice under the statute. Further, the Wisconsin Supreme Court in Czapinski v. St. Francis Hospital, Inc. confirmed that adult children cannot bring medical malpractice suits. In Czapinski, adult children seeking damages for loss of parental companionship filed a wrongful death suit for medical malpractice upon the death of their mother, which resulted from alleged negligence during a routine hip replacement surgery. The lower court dismissed their case, holding that the adult children were not entitled to bring a medical malpractice suit because they were not one of the parties listed in section 655.007. On appeal to the Wisconsin Supreme Court, the adult children argued that, although they were not one of the parties specified in section 655.007, they were entitled to bring suit because of a complex statutory scheme involving sections 893.55 and 894.04.  

Section 893.55(4)(f) applies to medical malpractice actions and places monetary limits on amounts recoverable for loss of companionship. That statute explicitly states that reasonable damages

27. Id.
30. Id. Section 655.007 states, "On and after July 24, 1975, any patient or the patient's representative having a claim or any spouse, parent, minor sibling or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter." Id. This section, therefore, suggests that only minor children can bring a medical malpractice wrongful death claim.
31. 613 N.W.2d 120 (Wis. 2000).
32. Id. at 131.
33. Id. at 123–24.
34. Id. at 124.
35. Id. at 124–25.
36. Wis. Stat. § 893.55(4)(f) (1999–2000). Section 893.55(4)(f) states in pertinent part, "[D]amages recoverable against health care providers and an employee of a health care provider, acting within the scope of his or her employment and providing health care services,
for wrongful death in a medical malpractice context are subject to the monetary limits under section 895.04(4), Wisconsin's wrongful death statute. In addition to imposing monetary limits, section 895.04(4) includes a list of people who may recover for loss of companionship in a non-medical malpractice wrongful death suit. In this list, the legislature states that children may recover, although it does not specify whether the term "children" is limited to minor children.

The plaintiffs in *Czapinski* argued that because section 893.55(4)(f) applies to medical malpractice cases, and because it incorporates the damage limits of section 895.04(4), the list of possible plaintiffs in section 895.04(4) is also incorporated to apply to medical malpractice actions. The court, however, rejected this argument, holding that the application of section 893.55 was not meant to "broaden the classification of claimants entitled to recover for the loss of society and companionship." The *Czapinski* court also noted that, in the case of *Ziulkowski v. Nierengarten*, the Wisconsin Court of Appeals held that "only minor children may make derivative claims stemming from injuries their parents sustain due to medical malpractice.

Thus, given Chapter 655 and the accompanying Wisconsin case law, it is evident that adult children cannot commence a medical malpractice action to recover loss of companionship of a deceased parent, much less recover for loss of companionship. Having concluded that adult children are barred from recovery in the case of medical malpractice, it is then necessary to determine whether negligent services provided by nursing homes qualify as medical malpractice.

**B. Coverage of Nursing Home Services Under Chapter 655**

In order for an adult child to be barred from recovering for loss of companionship of a deceased parent whose death resulted from nursing home negligence, the negligence action must qualify as medical malpractice under Chapter 655.

While section 655.007 specifies who has standing to bring a medical

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37. *Id.*
38. *Wis. Stat.* § 895.05(4) (1999–2000). Section 895.04(4) states in part, "Additional damages... for loss of society and companionship may be awarded to the spouse, children or parents of the deceased..." *Id.*
40. *Id.* at 129.
41. 565 N.W.2d 164 (Wis. Ct. App. 1997).
42. *Id.* at 167.
malpractice claim, section 655.002 discusses the applicability of Chapter 655 to negligent tortfeasors, individuals, and organizations. Accordingly, section 655.002 applies to physicians and nurse anesthetists, and partnerships or corporations comprised of physicians or nurse anesthetists if the partnership or corporation is "organized and operated in this state for the primary purpose of providing the medical services of physicians or nurse anesthetists." In addition, a hospital or "[a]n entity ... that is an affiliate of a hospital and that provides diagnosis or treatment of, or care for, patients of the hospital" are also covered under Chapter 655.

Finally, and perhaps most relevant to this Comment, subsection "j" states that nursing homes are included under Chapter 655 only if their "operations are combined as a single entity with a hospital ... whether or not the nursing home operations are physically separate from the hospital operations." Therefore, section 655.002 suggests that any negligence that occurs at a nursing home that runs independently of a hospital is not actionable on a medical malpractice theory. Furthermore, because such negligence is not considered medical malpractice, Chapter 655 will not apply, and as later sections of this Comment discuss, adult children may have a greater likelihood of recovering for loss of companionship of a deceased parent under Wisconsin's wrongful death statute. This conclusion will likely be troubling to nursing homes that are not affiliated with hospitals, as they will not be granted the protection of Chapter 655 and additionally may be exposed to claims for loss of companionship by adult children under Wisconsin's wrongful death statute.

C. Independent Nursing Homes' Arguments for Inclusion Under the Medical Malpractice Statute

Nursing homes which are not affiliated with a hospital (independent nursing homes) are not protected under Wisconsin's medical malpractice statute from loss of parental companionship claims by adult children in a medical malpractice context. As such, independent nursing

44. § 655.002.
45. § 655.002(a)-(c).
46. § 655.002(d)-(e).
47. § 655.002(h)-(i).
48. § 655.002(j).
49. See infra Part III.
homes may be compelled to defend against negligence suits in which adult children are attempting to recover for loss of companionship of deceased parents. In such a case, an independent nursing home may attempt to argue that, although independent nursing homes are not covered under section 655.002, for the purposes of recovery of loss of companionship, its negligence should be considered as medical malpractice, thereby barring adult children from bringing claims for loss of companionship.50

In some instances, Wisconsin courts have found that, although the defendant did not meet the requirements of section 655.002, the claim should nevertheless be covered under section 893.55,51 the medical malpractice statute of limitations.52 For example, in Ritt v. Dental Care Associates, S.C.,53 the Wisconsin Court of Appeals held that a claim against a dentist for alleged negligence should be governed by the medical malpractice statute of limitations.54 Although the plaintiff claimed that a dentist is not covered under Chapter 655, the court concluded that dentists are "health care providers" as provided by section 893.55 because they provide healthcare by diagnosing and treating others, and dentists are licensed to provide healthcare by the state medical examining board.55

Similarly, an independent nursing home may be able to challenge an adult child's claim of loss of parental companionship by arguing that a

50. See Clark v. Erdman, 468 N.W.2d 18 (Wis. 1991) (holding that although podiatrists are not included in section 655.001(8), which defines "health care provider" as someone to whom section 655.02 applies, the medical malpractice statute of limitations applies to such cases). It may, therefore, be possible for nursing homes to argue that although nursing home services do not fit under section 655.002, for the purposes of recovering for loss of companionship, the medical malpractice statute should apply.

51. WIS. STAT. § 893.55(1)(a)(b) (1999-2000). Section 893.55 is the statute of limitations for medical malpractice and applies to "healthcare providers":

[A]n action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of:

(a) Three years from the date of the injury, or

(b) One year from the date the injury was discovered . . .

Id.


53. Id. at 858.

54. Id.

55. Id. at 856–57; see also Arenz v. Bronston, 542 N.W.2d 295 (Wis. Ct. App. 1999) (following the reasoning of the Ritt court in applying section 893.55 to chiropractors); Doe v. Am. Nat'l Red Cross, 500 N.W.2d 264 (Wis. 1993) (applying section 893.55 to a blood bank).
nursing home renders care and provides health related services to its patients. Although independent nursing homes do not technically fit under section 655.002, when adult children claim loss of companionship in wrongful death actions the claim should be treated as a medical malpractice case and, as such, be prohibited. If the courts are willing to extend the medical malpractice statute of limitations to entities not covered under the medical malpractice chapter of the Wisconsin statutes, the courts may also be willing to extend the protections of medical malpractice to independent nursing homes faced with claims of loss of companionship of adult children, notwithstanding the fact that such nursing homes are not covered by Chapter 655.

Because such an argument has not yet been made and is perhaps more complex than stated above, it is unlikely to be successful. It is probable that independent nursing homes are not covered by Chapter 655, thus relegating any claims for loss of companionship of a parent who died as a result of nursing home negligence to the non-medical malpractice statute, section 895.04. Thus, the next logical step is to look to section 895.04 to determine whether, in a non-medical malpractice case, adult children can recover for loss of companionship of a parent.

III. LOSS OF COMPANIONSHIP IN WISCONSIN: NON-MEDICAL MALPRACTICE CONTEXT

A. Wisconsin's Non-Medical Malpractice Wrongful Death Statute

Section 895.04 governs wrongful death in contexts other than medical malpractice. Subsections two and four of the statute are most relevant to suits in which an adult child is claiming loss of parental companionship against an independent nursing home. These subsections dictate who can bring the suit and who can recover for loss of companionship in a wrongful death suit involving negligence. The pertinent part of section 895.04(2) specifies that children, in the absence of a surviving spouse, may bring an action for the wrongful death of a parent. The Dziadosz case further states that a "wrongful death action

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56. See supra notes 51-55 and accompanying text.
58. Id.
59. §§ 895.04(2), 895.04(4).
60. § 895.04(2). Subsection two states in pertinent part: "If there are no [ ] surviving minor children, the amount recovered shall belong and be paid to the spouse of the deceased;
may be brought by the children of the deceased regardless of the age if the deceased has no surviving minor children or spouse. It is clear that children of any age, in the absence of a surviving spouse of the decedent, can commence a wrongful death suit on behalf of the decedent. What is not so clear, however, is whether an adult child who brings a wrongful death action can then claim loss of companionship of the deceased parent.

Section 895.04(4) attempts to answer that question. Subsection four places limits on the amount that can be recovered and further states that only the spouse of the decedent, the child or parents of the decedent, or the siblings (in some cases) may recover for loss of companionship. However, the statute does not define the word "child," leaving it questionable as to whether an adult child, minor child, or both can recover for loss of companionship of the deceased.

**B. "Child" and Recovery for Loss of Companionship Under Section 895.04(4)**

In the absence of a statutory definition, it is necessary to look to Wisconsin case law for guidance as to whether the word "child" includes adult children. Unfortunately, there are no Wisconsin cases that explicitly address this question. The lack of case law can perhaps be attributed to the fact that section 895.04(4) has only existed in its current form since 1986. Prior to 1986, the statute definitively prohibited adult children from recovering for loss of companionship. Thus, in order to accurately predict the validity of an adult child's loss of companionship claim, it is necessary to explore the history of the wrongful death statute and its application through case law.

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62. WIS. STAT. § 895.04(4). Subsection four reads in part:

Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death.


69. See Harris v. Kelley, 234 N.W.2d 628, 631 (Wis. 1975); Herro v. Steidl, 37 N.W.2d 874, 876 (Wis. 1949).
C. History of an Adult Child's Claim for Loss of Parental Companionship in a Wrongful Death Action

A prior version of the Wisconsin wrongful death statute, section 331.04, applicable in the late 1940s and 1950s, allowed only the parents, or spouse of the deceased to recover for loss of companionship. In a discussion of section 331.04, the Wisconsin Supreme Court stated, "[Loss of society and companionship] is an element of damages available only to certain specifically-named beneficiaries." Pursuant to section 331.04(2), because children were not "specifically-named beneficiar[ies]," they could not recover, regardless of age.

Section 331.04(2) was subsequently changed to section 895.04. The 1971 version of section 895.04 allowed unemancipated or dependent children, among others, to recover for loss of society and companionship. However, as of 1975, no version of section 895.04 had ever entitled adult children to recover damages for loss of society and companionship resulting from the death of a parent.

In 1985 the statute was amended and the words "unemancipated or dependent" were removed from subsection four leaving only the word "child." Although no cases have attempted to define "child," it can be inferred that when the legislature eliminated the phrase "unemancipated or dependent" it intended to allow adult children to recover for loss of companionship. The legislative history of the 1986 amendment states that the proposed amendment makes "all children of the deceased eligible" to recover for loss of companionship. Furthermore, the State Bar of Wisconsin states that under the language of the current section 895.04(4) an adult child can recover for the loss of

65. Herro, 37 N.W.2d at 876.
66. Id.
67. Id. Section 331.04(2) stated, "In addition to the benefits provided for in subsection (1), a sum not exceeding $2,500 for loss of society and companionship shall accrue to the parent or parents or husband or wife of the deceased." Id.
68. Harris, 234 N.W.2d at 631 n.3 (stating that a bill which amended section 895.04(4) clearly expressed the legislature's intent to limit recovery for loss of companionship to parents, spouse, or unemancipated or dependant children of the decedent).
69. Id. at 631. The Wisconsin Supreme Court in Harris addressed the issue of whether independent adult children can recover pecuniary damages under section 895.04(4). Id. at 629. However, in the court's discussion of whether an adult child can recover such pecuniary damages, the court not only quotes the 1971 version of the statute but cites to cases which hold that section 895.04 never allowed emancipated children to recover for loss of companionship. Id. at 629–30.
71. 1985 Wis. Act 130 § 1.
companionship resulting from the wrongful death of the parent.\textsuperscript{72} Given the legislative history of section 895.04(4) and the Wisconsin Bar's statement, even in the absence of case law, it is likely that adult children can recover for loss of parental companionship resulting from wrongful death.

IV. OTHER JURISDICTIONAL APPROACHES TO AN ADULT CHILD'S ABILITY TO RECOVER FOR LOSS OF COMPANIONSHIP

Before making the final determination as to whether an adult child should be able to recover for loss of companionship of a parent whose death has resulted from nursing home negligence, it is helpful to examine other jurisdictional approaches to this discrete issue. Each state has a wrongful death statute that defines who can commence a wrongful death suit and what type of damages can be recovered. As of 1997, twenty states expressly allowed recovery for loss of companionship in their wrongful death statutes and seventeen states broadly interpreted their statutes to allow for such recovery.\textsuperscript{73} A minority of jurisdictions prohibited recovery for loss of companionship altogether.\textsuperscript{74} Thus, the trend is to allow recovery for loss of companionship for adult children of the decedent.\textsuperscript{75} Because jurisdictions vary so much in their approaches to loss of companionship and because many states have not even addressed the issue of whether an adult child can recover for loss of companionship of a parent, much less in the nursing home context, this Comment will focus on only a selection of states.\textsuperscript{76}

A. States Likely to Allow Adult Children to Recover for Loss of Parental Companionship

Many courts have yet to explicitly address the issue of whether an adult child can recover for loss of companionship of a parent in a nursing home negligence context. As a result, in order to predict

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} 22A AM. JUR. 2D Death § 252 (1962). Note, however, that this source does not state that the trend is to allow adult children to recover for loss of companionship. Id. It merely states that the trend is to allow recovery for loss of companionship and that some states even allow the adult child to recover. Id.
whether an adult child could recover for such non-pecuniary damages, it may be necessary to determine whether those states allow a parent to recover for the loss of companionship of an adult child. If a state allows a parent to recover for loss of companionship when the decedent or injured person is an adult child, then it can be inferred that the courts will also allow adult children to recover for loss of companionship of a deceased or severely injured parent, as the relationship for which compensation is granted is the same in both situations. Furthermore, where states have not addressed this issue on point, it may be necessary to examine recovery for loss of companionship under an individual state’s wrongful death act as well as recovery for loss of companionship in a medical malpractice context because in some states nursing homes may be subject to governance by medical malpractice statutes and precedents. In addition to enacting medical malpractice and wrongful death statutes, some states have special nursing home or elder laws which further complicate the analysis. In sum, in order to understand other jurisdictional approaches to whether an adult child can recover for loss of companionship of a parent who has died as a result of nursing home negligence, it will be necessary to piece together various parts of a complex puzzle.

1. Arizona

In *Frank v. Superior Court,* the Supreme Court of Arizona allowed parents to recover for the loss of companionship of their adult daughter who was severely brain damaged after a doctor’s negligence during surgery. The court stated that under the Arizona wrongful death statute, recovery for loss of companionship is allowed. Further, the court noted that the Arizona wrongful death statute does not distinguish between adult and minor children, inferring that both adult children and parents of adult children may recover for loss of companionship in the appropriate situations. The court also found that there was no substantial difference between wrongful death and severe injury, and therefore the court deemed it proper to allow the parents of the brain-damaged adult child to recover for loss of companionship of their

78. Id. at 955.
79. Id. at 957.
80. Id. at 960. The Arizona Supreme Court even went as far as to say that the parents of adult children “may suffer equal or greater harm” than a parent of a minor child. Id. at 961.
Based on this opinion, it is likely that in Arizona adult children can recover for loss of parental companionship in a wrongful death context and when the parent has been severely, but not fatally, injured. No Arizona court has yet addressed this issue in a nursing home situation. However, in situations in which a nursing home resident was seriously or fatally injured, given the aforementioned case law, it is likely that an adult child would be able to recover for loss of parental consortium.

2. Oklahoma

While Arizona did not expressly address the loss of companionship issue in a nursing home context, in *Nelson v. Four Seasons Nursing Center*, the Oklahoma Court of Appeals explicitly held that an adult child could recover for loss of companionship of a parent in a nursing home negligence context. The plaintiff in *Nelson* was an adult child who sought damages from the Four Seasons Nursing Center after his father disappeared while under the supervision of the nursing home. The court noted that the Oklahoma wrongful death statute "expressly allow[ed] recovery for the loss of companionship [on behalf] of the children and the parents of the decedent." Consistent with Oklahoma's wrongful death statute and based on the reasoning of prior Oklahoma case law, the *Nelson* court stated that there was "simply no good reason to afford the personal right of companionship and the parent-child relationship less protection in cases involving adult children who seek to recover for injury to the parent-child relationship." The court, therefore, extended recovery for loss of companionship to the adult child.

3. Ohio

Ohio has taken a view similar to that of Arizona and Oklahoma. Although Ohio has one of the largest elderly populations, neither the

81. Id. at 960–61.
83. Id. at 1104.
84. Id.
86. *Nelson*, 934 P.2d at 1105 (quoting § 1053(a)).
87. Id.
88. Id.
courts nor the legislature has specifically addressed whether an adult child can recover for loss of parental companionship in a nursing home negligence case. However, currently an adult child in Ohio can recover for loss of parental companionship in both a wrongful death suit as well as when a parent has been seriously injured as a result of negligence.

Ohio's wrongful death statute\(^9\) allows compensatory damages to be awarded in wrongful death actions.\(^9\) Embedded in the definition of compensatory damages are damages stemming from the "[l]oss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, minor children, parents, or next of kin."\(^9\) At first glance, the statute appears to prohibit adult children from recovering for loss of companionship; however, in the event that adult children can be considered "next of kin," they will be permitted to recover. In *Ellenwood v. Flower Memorial Hospital*,\(^9\) the Court of Common Pleas liberalized the wrongful death statute to include adult children in the "next of kin" designation and allowed them to recover for loss of parental companionship.\(^9\)

In addition to this statutory provision, the Supreme Court of Ohio in *Rolf v. Tri State Motor Transit Co.*\(^9\) extended such recovery to an emancipated adult child whose parent was severely, but not fatally, injured.\(^9\) In *Rolf*, the father of two emancipated, adult children was seriously injured as a result of a car accident.\(^9\) The Supreme Court of Ohio followed the reasoning of the Oklahoma court in *Nelson*\(^9\) and rejected the defendant's argument that an adult child's relationship with his parent differs so drastically from that of a minor child's relationship with his parent so as to prohibit the adult child from recovering.\(^9\)

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90. OHIO REV. CODE ANN. § 2125.01 (Anderson 2002).
91. § 2125.02(B)(3).
92. *Id.* (emphasis added).
94. *Id.* at 1010. Other Ohio courts defined "next of kin" to include any person who would have taken under intestate succession. *Id.* (citing Karr v. Sixt, 67 N.E.2d 331 (Ohio 1946)). Because an adult child could take under intestate succession, they should be included in the next of kin designation. *Id.*
95. 745 N.E.2d 424 (Ohio 2001).
96. *Id.* at 425.
97. *Id.*
Instead, the court held that although minor children may be more dependent on their parents for basic needs, adult children may still have a close relationship with their parents and may look to them for support and guidance.100 The court went so far as to state that "many adults actually renew their reliance on their parents when they reach middle age."101 The court found it "irrational to deny recovery for loss of parental consortium simply because the child... reached the age of majority."102

4. Michigan

Michigan, like Ohio, has one of the largest elderly populations in the United States.103 Of the 9,938,444 people who comprise Michigan's population, 1,219,018 are elderly.104 Despite the likely increased dependence on extended-care facilities, Michigan has not addressed the issue of whether an adult child can recover for loss of companionship of a parent who has died as a result of nursing home negligence.

Michigan case law, however, indicates that actions for nursing home negligence that result in death should be brought under the state's wrongful death statute.105 For example, in *Estate of Neal v. Friendship Manor Nursing Home,*106 a mother commenced a wrongful death action against a nursing home to recover for the death of her cognitively disabled one-year-old child.107 The child died as a result of burns inflicted by an employee of the nursing home who placed a hot water bottle on the baby's bare stomach.108 Although this case neither involves an adult child recovering for loss of parental consortium nor discusses recovery for loss of companionship, the case suggests that suits against nursing homes for negligent causation of death should be brought under Michigan's wrongful death statute109 rather than a medical malpractice statute.110

100. *Id.* at 426–27.
101. *Id.* at 426.
102. *Id.*
104. *Id.*
106. *Id.*
107. *Id.* at 595.
108. *Id.*
109. MICH. COMP. LAWS ANN. § 600.2922 (West 2000).
110. *See generally id.*
The Court of Appeals of Michigan interpreted the Michigan's wrongful death statute in *Westfall v. Venton*, in which six adult children claimed loss of companionship for their parents who were killed in a car accident. Five of the six plaintiffs were adults, and four of the adults lived on their own and independent of any financial support from their parents. Furthermore, none of the plaintiffs had financially supported their parents, but the family was nonetheless closely knit, spending holidays together along with lending and receiving moral support from each other and their parents. At issue in *Westfall* was whether these independent, adult children could recover for loss of companionship of their parents under Michigan's wrongful death statute. The issue becomes more complex as that wrongful death statute allows only for the recovery of pecuniary damages and does not mention recovery for loss of companionship. The *Westfall* court, however, found that the phrase "pecuniary injury" included recovery for loss of companionship, provided that such loss could be adequately proven. Specifically, the court stated:

A family unit, including all of its members, whether living under the same roof or not, is still a family unit. As a rule parents as they grow older acquire more wisdom and appreciation for their children, grandchildren, and the family unit. This enables them to exert through their concern, love, and companionship valuable guidance to the other members of the family, and strengthen the effective service of the family as a unit. The unlawful taking of the life of one of the members of a well-knit and close family unit, where love, and concern, abounds, severs this unit, which results in pecuniary injury to the survivors. For such loss the survivors have an action under the death act.

Needless to say, the court allowed the adult children to recover. Given that claims against nursing homes for the death of a resident...

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112. Id. at 758.
113. Id.
114. Id. at 758–59.
115. Id. at 759.
117. *Westfalls*, 137 N.W.2d at 761.
118. Id.
119. Id.
can be brought in Michigan as wrongful death actions, whether an adult child can recover for loss of parental companionship when a parent died as a result of nursing home negligence turns on the construction of the Michigan wrongful death act. The Court of Appeals of Michigan made it very clear in Westfall that a child's majority status should not bar a claim for loss of parental companionship. Thus, it is likely that an adult child in Michigan could successfully pursue a claim for loss of companionship of a parent who died at the hands of a nursing home in a Michigan wrongful death suit.

5. Texas

Texas also has a large elderly population, with 2,072,532 people over the age of sixty-five.\(^{120}\) Like Ohio and Michigan, Texas still has not addressed the specific issue of whether an adult child can recover for loss of parental companionship when a parent dies as a result of nursing home negligence.

The Texas Legislature, however, has responded to the presence of a large elderly population by providing coverage to nursing homes under the Texas Medical Liability and Insurance Improvement Act (Act).\(^{121}\) Nursing homes are considered "health care provider[s]" under the Act and are subject to the Act's restrictions.\(^{122}\) The Act was passed in part because the frequency of health care liability claims has increased drastically since 1972. As a result, insurers began paying out inordinate amounts of money in judgments and settlements creating a "medical malpractice insurance crisis in the State of Texas."\(^{123}\) In order to remedy the so called "crisis," the Act was passed to create restrictions that would protect insurers and health care professionals.\(^{124}\) Specifically, Texas legislators envisioned the Act reducing the "excessive frequency and severity of health care liability claims" as well as "decreas[ing] the cost of those claims and assur[ing] that awards are rationally related to actual damages."\(^{125}\) Fortunately for nursing homes, the extended-care industry was included under this protection.

The Act does not address recovery for loss of companionship

\(^{121}\) TEX. REV. CIV. STAT. ANN. art. 4590i § 1.02(a)-(b) (Vernon 2001).
\(^{122}\) Id. § 1.03(a)(3).
\(^{123}\) Id. §§ 1.02(a)(1)-(5).
\(^{124}\) Id. § 1.02(b).
\(^{125}\) Id. §§ 1.02(b)(1)-(2).
damages, although it places certain monetary restrictions on damages.\footnote{126} Despite the existence of the Act, a claim against a nursing home is more appropriately brought as a medical malpractice case than under the Act; "[t]he liability of nursing homes and related institutions for injuries sustained by patients is evaluated in accordance with traditional 'malpractice' cases."\footnote{127} Claims against nursing homes are treated as malpractice cases, and because there is an absence of cases involving nursing home negligence, it is necessary to examine Texas medical malpractice cases to determine whether loss of parental companionship damages may be awarded to an adult child.

In Texas, medical malpractice cases involving death are commenced under Texas's wrongful death statute. For example, in \textit{Parrot v. Caskey},\footnote{128} the surviving spouse and adult children of the decedent parent sued the defendant physician for medical malpractice under the Texas wrongful death statute.\footnote{129} Although the court ultimately ruled that the Texas wrongful death statute did not apply to the specific facts of the case,\footnote{130} the court implied that, had the negligence been a proximate cause of the death, the wrongful death cause of action would have been appropriate.\footnote{131}

The Supreme Court of Texas explicitly answers the question of whether an adult child can recover for loss of parental companionship under the Texas wrongful death statute in \textit{Cavnar v. Quality Control Parking, Inc.}\footnote{132} In \textit{Cavnar}, adult children of the decedent parent commenced a wrongful death action. The trial court rendered judgment on the verdict for the children but denied recovery for loss of companionship damages.\footnote{133} The court of appeals reversed on the damages portion of the judgment and awarded each child damages for loss of companionship.\footnote{134} The Texas Supreme Court affirmed the recovery for loss of companionship of the deceased parent on behalf of

\begin{itemize}
\item \footnote{126} \textit{Id.} §11.02(a) (stating that civil liability of a healthcare provider should not exceed $500,000).
\item \footnote{127} \textit{1 TEXAS TORTS & REMEDIES, HEALTH CARE PROVIDERS} § 11.03[1][d] (MB) (2001).
\item \footnote{128} \textit{873 S.W.2d 142} (Tex. Ct. App. 1994).
\item \footnote{129} \textit{Id.} at 143, 149.
\item \footnote{130} The court found that the defendant's negligence did not "bring about" the decedent's death and therefore, was not the proximate cause of the decedent's death. \textit{Id.} at 149. As a result, the Texas wrongful death statute was inapplicable. \textit{Id.}
\item \footnote{131} \textit{Id.}
\item \footnote{132} \textit{696 S.W.2d 549} (Tex. 1985).
\item \footnote{133} \textit{Id.} at 551.
\item \footnote{134} \textit{Id.}
\end{itemize}
Although the Texas courts have yet to decide a case involving an adult child claiming loss of companionship of a parent who died as a result of nursing home negligence, it is possible that such a claim may be permitted. In Texas, nursing homes are considered health-care providers and are therefore subject to the laws governing traditional malpractice cases. There is a strong argument, however, that because nursing homes are covered under the Texas Medical Liability and Insurance Improvement Act, and because the Act functions primarily to protect nursing homes and similar healthcare industries from excessive damages and astronomical claims, courts may prohibit loss of companionship in a nursing home negligence context. Until the Texas courts or legislature speaks to this issue, whether an adult child can recover for loss of parental companionship in a nursing home negligence death case in Texas will remain uncertain.

6. Illinois

Illinois is another state whose population is comprised of a large number of elderly persons. Illinois has a total population of 12,419,293, of which 1,500,025 residents are over the age of sixty-five. Despite the presence of a significant number of elderly residents, Illinois courts have also yet to decide a case explicitly stating that, in a nursing home context, an adult child can recover for loss of parental companionship. However, careful analysis of applicable statutes and Illinois case law suggest that such recovery is probably allowed.

Illinois case law indicates that negligence in the nursing home context is actionable under Illinois's wrongful death statute. In Morris v. William L. Dawson Nursing Center, Inc., a suit was brought against the William L. Dawson Nursing Center for the wrongful death of Georgia Holland who died at the hands of the nursing home. Although the Morris court did not discuss an adult child's ability to recover for loss of parental companionship, the court considered whether siblings of a decedent could recover under the Illinois wrongful death statute.

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135. Id. at 550.
137. Id.
138. See infra notes 146–47 and accompanying text.
140. Id. at 346.
death statute when the decedent was also survived by grandchildren. \footnote{141} This case implies that claims involving nursing home negligence that results in death are appropriately brought under the Illinois wrongful death statute, rather than a medical malpractice statute.

Having established that a negligence suit against a nursing home in Illinois is properly brought as a wrongful death action, the question arises whether the Illinois wrongful death action allows adult children to recover for loss of parental companionship. In \textit{Cooper v. Chicago Transit Authority}, \footnote{142} the plaintiff, an adult daughter, commenced a wrongful death action against Chicago Transit Authority for loss of parental companionship after her mother died after being hit by a bus. \footnote{143} The defendant argued that an adult child should not be able to recover damages for loss of companionship of a deceased parent as part of pecuniary damage \footnote{144} and that the Illinois wrongful death act limits recovery to pecuniary damages. \footnote{145} The Appellate Court of Illinois, however, rejected the defendant's contention by first discussing \textit{Bullard v. Barnes}, \footnote{146} a case in which the Supreme Court of Illinois expanded the phrase "pecuniary injury to [encompass] non-monetary losses," such as the loss of companionship "suffered by parents after the death of their minor child." \footnote{147}

Thereafter, having noted that the Illinois wrongful death statute does not preclude the recovery of loss of companionship damages, the \textit{Cooper} court looked to \textit{Ballweg v. City of Springfield} \footnote{148} for further guidance. In \textit{Ballweg}, the Supreme Court of Illinois held that under the Illinois wrongful death statute, "the parents of a deceased adult child were entitled to [a] loss-of-society presumption." \footnote{149} In \textit{Cooper}, the appellate court found that the \textit{Ballweg} "presumption" could be applied to the reverse situation where an adult child is the one trying to recover for loss of companionship. \footnote{150} Thus, the \textit{Cooper} court found that not only can adult children recover for loss of parental companionship under the Illinois wrongful death statute's designation of "pecuniary damages,"

\footnotesize{\begin{itemize}
\item \footnote{141} \textit{Id.} at 347.
\item \footnote{142} 505 N.E.2d 1239 (Ill. App. Ct. 1987).
\item \footnote{143} \textit{Id.} at 1240–41.
\item \footnote{144} \textit{Id.} at 1241.
\item \footnote{145} \textit{See id.} at 1243 (citing ILL. COMP. STAT. ANN. 180/2-2 (West 1993)).
\item \footnote{146} 468 N.E.2d 1228 (Ill. 1984).
\item \footnote{147} \textit{Cooper}, 505 N.E.2d at 1243.
\item \footnote{148} 499 N.E.2d 1373 (Ill. 1986).
\item \footnote{149} \textit{Cooper}, 505 N.E.2d at 1244 (citing \textit{Ballweg}, 499 N.E.2d at 1373).
\item \footnote{150} \textit{Id.}.
\end{itemize}}
but there is a rebuttable presumption that such damages should be awarded to the adult child. The court was careful to note that the presumption could be overcome by shifting the burden to the defendant to prove that the adult child was estranged or that the parent and child had virtually no relationship at all.\textsuperscript{151}

The \textit{Cooper} court ultimately sustained the award of loss of parental companionship to the adult child who lost her mother after a tragic bus accident.\textsuperscript{152} The court found that although the married twenty-seven-year-old plaintiff and the mother did not reside in the same household, the plaintiff and decedent mother had a close relationship in which they visited each other regularly and offered each other mutual support, advice, and companionship.\textsuperscript{153} Further, the defendant failed to rebut the presumption of loss of companionship, and the adult child was able to recover.\textsuperscript{154}

In sum, in Illinois, a claim against a nursing home for the negligent death of a resident is appropriately brought as a wrongful death action. The Illinois wrongful death statute not only allows an adult child to recover for loss of companionship, but the courts have concluded that in such cases of wrongful death, a presumption is created that the plaintiff has suffered a loss of companionship.

7. Florida

According to the 2000 Census, Florida has the second largest elderly population in America, with 2,807,597 residents over the age of sixty-five.\textsuperscript{155} Notwithstanding the large elderly population, Florida courts have not addressed the issue at hand. However, an examination of the various causes of action available to an adult child reveals that an adult child can likely recover for loss of companionship of a parent whose death was caused by nursing home negligence.

In Florida, there are three different statutory enactments that must be considered before commencing a suit against a nursing home for negligently causing the death of a resident.\textsuperscript{156} First, Florida has a

\begin{footnotes}
\item[151] Id.
\item[152] Id. at 1244-45.
\item[153] Id.
\item[154] Id.
\item[156] Florida law provides a complex network of recovery options to descendants and people who have been affected by the negligent death of an elderly person at the hands of a nursing home. This Comment will not attempt a thorough explanation of those options; but
\end{footnotes}
wrongful death statute under which an adult child could commence a lawsuit against a nursing home. In fact, many plaintiffs in Florida attempting to recover for damages stemming from the death of nursing home residents sue under the wrongful death statute. Under that statute, when the negligence of a third party results in death, the personal representative of the decedent may commence an action against the negligent tortfeasor. The issue is then whether an adult child can recover for loss of parental companionship under the statute. No Florida case explicitly answers this question, perhaps because the statute clearly states that an adult child can recover such damages as long as there is no surviving spouse of the decedent. Specifically, the statute states, "Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance." Thus, the plain language of the statute clearly indicates that an adult child, in the absence of a surviving spouse, can recover for loss of parental companionship under the wrongful death statute. However, the statute allows such recovery only when the negligence is not caused by medical malpractice; section 768.21(8) states that loss of companionship damages are not recoverable by adult children when the claim for wrongful death stems from medical malpractice. The next question that arises is whether nursing home negligence is considered medical malpractice in Florida.

Chapter 766 of the Florida Statutes governs medical malpractice or medical negligence actions. The Comprehensive Medical Malpractice Reform Act (Act) was enacted in 1985 and seeks to reduce medical

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157. FLA. STAT. ANN. § 768 (West 2001).
158. See generally Estate of Blanchard v. Central Park Lodges, 805 So. 2d 6 (Fla. Dist. Ct. App. 2001) (stating that, among other causes of action, the decedent's estate sued the defendant nursing home for wrongful death).
159. § 768.
160. § 768.21(6).
161. Id. § 768.21(3).
162. Id.
163. § 768.21(8). Specifically, subsection eight states, "The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by s. 766.106(1)." Id. Subsection three allows minor children and adult children, in the absence of a surviving spouse, to recover for lost companionship. See supra text accompanying note 161.
malpractice litigation and ensure that the public received quality healthcare. The Act imposes various requirements on health care providers and requires that plaintiffs comply with strict investigatory measures and notice requirements before commencing legal action based on medical malpractice. The Act defines the entities considered to be "health care providers," but does not include nursing homes in its list. Florida courts have held that the Chapter 766 notice requirements apply to claims against nursing homes in cases when "the professional medical negligence standard of care described in section 766.102, Florida Statutes ... applies to the active tortfeasor." In other words, when a claim for wrongful death is brought against a nursing home and the professional medical negligence standard of care applies to the nursing home employee, the plaintiff must comply with the notice requirements as outlined in the medical malpractice statute. Just because the notice requirement may apply in certain suits against nursing homes does not necessarily mean that all wrongful death suits commenced against nursing homes are medical malpractice suits. Therefore, it is not necessarily true that adult children are excluded from recovering for loss of parental companionship. Unless the claim against the nursing home is brought specifically under Chapter 766, and the plaintiff alleges that the nursing home employees are "healthcare providers," adult children suing nursing homes for the wrongful death of a parent under Florida's wrongful death act may be allowed to pursue damages for loss of parental companionship.

In addition to the Florida wrongful death statute and the Comprehensive Medical Malpractice Reform Act, Florida law is further complicated by the addition of special statutory provisions relating to nursing home care. In 1980, in response to a Dade County grand jury investigation that revealed that sixty percent of Florida nursing homes provided "unacceptable or consistently ... poor care," the Florida Legislature amended Chapter 400 of the Florida Statutes to provide nursing home residents with improved care and to protect them against abuses. Specifically, section 400.022 "mandates that all nursing home

166. Id.
167. Id.
169. Troy J. Crotts & Daniel A. Martinez, The Nursing Home Resident Rights Act—A
facilities adopt a statement of the rights and responsibilities of the residents as well as treatment of the residents in accordance with the provisions of that statement." In addition, section 400.023 provides a private right of action for the nursing home residents and the personal representative of the decedent's estate in the case of a patient's death. Section 400.023 clearly states that if the nursing home's negligence resulted in death, then the claimant is entitled to recover damages under either Florida's survival statute or Florida's wrongful death statute. Therefore, under Chapter 400, an adult child who sues for the death of a parent that died as a result of nursing home negligence, is entitled to recover damages for loss of parental companionship pursuant to the wrongful death statute as previously discussed.

Florida's elder laws are extremely complex and require careful examination. However, it appears likely that adult children will be able to pursue a claim for loss of companionship under both Chapter 768 (wrongful death) and under Chapter 400. It is only when the suit brought against the nursing home explicitly alleges medical malpractice, and medical malpractice is indeed found by the court, that an adult child will be barred from recovering for loss of parental companionship.

B. States Likely to Prohibit Adult Children from Recovering for Loss of Parental Companionship

The issue of whether an adult child can recover for loss of companionship of a parent whose death has been caused by nursing home negligence has not been explicitly addressed in many states. Although the aforementioned states appear to support recovery of loss of parental companionship by adult children, there are few states which clearly do not allow such recovery.

1. New York

Although New York has the third largest elderly population in America, with 2,448,352 residents being over the age of sixty-five, it

\begin{itemize}
  \item Good Idea Gone Bad!, 26 STETSON L. REV. 599, 605 (1996).
  \item Id. at 606.
  \item F.L.A. STAT. ANN. § 400.023(1) (West 2002).
  \item Id.
  \item Note that in the event the nursing home is sued under Chapter 766 for medical malpractice, loss of companionship damages may not be recovered by an adult child. See supra note 168 and accompanying text.
\end{itemize}
has not explicitly addressed the issue of whether an adult child can recover for loss of companionship of a parent who has died as the result of nursing home negligence. Unlike Ohio, Florida, Michigan, and Texas, states that have large elderly populations and appear to allow an adult child to recover for loss of parental consortium, New York not only bars recovery of the traditional loss of companionship damages, but even expresses a repudiation of the idea of allowing recovery for loss of parental consortium.\textsuperscript{175}

The first indication of New York courts' reluctance to allow children in general to recover for loss of parental companionship was in \textit{DeAngelis v. Lutheran Medical Center}.\textsuperscript{176} In \textit{DeAngelis}, the plaintiffs, who were minor children, urged the Supreme Court of New York, Appellate Division, to extend the common law concept of loss of companionship to allow children to recover for the loss of companionship of a parent who was injured by a negligent third party.\textsuperscript{177} Although the court recognized that severe injury to a parent by a negligent tortfeasor may have a serious impact on the parent's minor children, the court declined to recognize a child's right to recover for parental companionship.\textsuperscript{178}

The \textit{DeAngelis} court, in refusing to allow children to recover for loss of parental companionship under common law, reasoned that its decision was strongly supported by public policy.\textsuperscript{179} The court utilized a "slippery slope" argument,\textsuperscript{180} saying that once children were permitted to recover, the courts would be forced to confront the issues of whether siblings, grandparents, and friends could also recover for loss of companionship.\textsuperscript{181} The court simply did not know where it would draw the line to limit liability. The court, was also concerned that allowing such recovery would cause insurance premiums to increase, and as a result, more people would elect to live without insurance.\textsuperscript{182}

Finally, the court supported its decision by comparing New York's approach to other jurisdictional approaches.\textsuperscript{183} The plaintiffs in

\textsuperscript{175} The discussion of New York law in this section will make evident New York's reluctance to allow for recovery of parental consortium.
\textsuperscript{177} \textit{Id.} at 190.
\textsuperscript{178} \textit{Id.} at 191.
\textsuperscript{179} \textit{Id.} at 191–94.
\textsuperscript{180} \textit{Id.} at 192.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} at 193.
\textsuperscript{183} \textit{Id.} at 195.
DeAngelis argued that a majority of jurisdictions allow claims for loss of parental consortium when a parent has been injured by a negligent tortfeasor.\footnote{Id.} In the jurisdictions relied on by the plaintiffs, however, the state courts reasoned that when the state's wrongful death statute authorizes recovery for loss of parental companionship, the common law should as well.\footnote{Id. (citing Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981)).} In contrast, New York's wrongful death statute allows recovery for only pecuniary injury, which excludes recovery for loss of companionship.\footnote{Id.} Thus, the argument that New York common law and statutory law should be consistent failed.

Notwithstanding the DeAngelis decision, in order to predict whether an adult child can recover for loss of parental companionship resulting from the negligent death of a parent in a nursing home in New York it is necessary to examine New York's wrongful death cause of action.

"Under New York law, wrongful death damages are limited to 'fair compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought.'\footnote{McKee v. Colt Elect. Co., 849 F.2d 46, 50 (2d Cir. 1988) (quoting N.Y. EST. POWERS & TRUST LAW § 5-4.3(a) (McKinney 1981)).} New York's wrongful death statute clearly limits the damages recoverable to pecuniary injury, and as the Supreme Court of New York, Appellate Division stated in Bell v. Cox,\footnote{388 N.Y.S.2d 118, 119 (N.Y. App. Div. 1976).} until the legislature makes a change, no damages may be recovered for loss of society or loss of companionship.\footnote{Id. at 119.}

The United States Court of Appeals for the Second Circuit, in McKee v. Colt Electronics Co.,\footnote{849 F.2d 46.} explicitly addressed the issue of whether an adult child could recover for loss of companionship of a parent in a wrongful death suit.\footnote{Id.} The plaintiffs, who commenced the wrongful death action pursuant to New York's wrongful death statute, were the children of a decedent who died in the crash of a corporate jet.\footnote{Id. at 47.} The children ranged in ages from fourteen to twenty-two, and all had a close relationship with their deceased father and viewed him as a
role model. The lower court awarded the children damages for the loss of "nurture, care, and guidance" of their father in the wrongful death suit, and the defendants contested such award.

The Second Circuit first explained that under the New York wrongful death statute, the plaintiffs are allowed only to recover for pecuniary injuries stemming from the decedent's death. Such pecuniary injuries explicitly exclude recovery for loss of companionship on behalf of anyone, whether minor child or adult child. The court, however, did conclude that although children cannot recover for loss of a parent's companionship, pecuniary injury included the harm that they suffered as a result of losing their father's "nurture, care, and guidance." The question then arose whether recovery of nurture, care, and guidance would be limited to minor children only.

The court adhered to the doctrine of stare decisis, followed the lead of New York case law, and stated that adult children were not barred from recovering pecuniary loss under the New York wrongful death statute. Furthermore, the court held that dependency is not an absolute requirement in determining whether to award adult children damages for loss of parental "nurture, care, and guidance"; rather, each case is to be decided on an individual basis.

Thus, children, spouses, and others are barred from recovering for loss of parental companionship under New York's wrongful death statute but are allowed to recover pecuniary damages for loss of "nurture, care, and guidance." Unfortunately the answer of whether claims against nursing homes for the death of a resident fall under the wrongful death cause of action or some other distinct cause of action is elusive. An overview of New York law reveals no distinct statutory cause of action for infringement upon nursing home residents' rights, as in Florida, although New York's case law suggests that claims against

193. Id. The close familial relationship in this case is exemplified by the fact that two of the children pursued the same career as their father through their undergraduate studies. Id.
194. Id. at 50.
195. Id.
196. Id.
197. Id. At first glance this may be confusing; however, New York considers loss of companionship as an element of damages distinct from loss of nurture, care, and guidance. Id.
198. Id.
199. Id.
200. Id. at 50–51.
201. See supra Part IV.A.7.
nursing homes may be considered medical malpractice in appropriate cases.  

The Supreme Court of New York, Appellate Division, in Rey v. Park View Nursing Home, Inc., suggested that claims against nursing homes and nursing home employees may be considered medical malpractice. The decedent was a seventy-six-year-old woman who managed to get out of her wheelchair several times despite efforts to restrain her. Notwithstanding the nursing home's awareness of this problem, the woman slipped out of the chair one final time and fractured her hip, which ultimately led to her death days later. The plaintiff sued both the nursing home and the decedent's physician, who was affiliated with the nursing home, based on a medical malpractice theory. The court then engaged in an analysis to determine whether the claim against the nursing home doctor was one of ordinary negligence or medical malpractice:

[A] claim sounds in medical malpractice when the challenged conduct 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'... By contrast, when 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the... failure in fulfilling a different duty', the claim sounds in negligence.

The court then determined that the nursing home doctor's failure to review the patient's medical records and prior medical conditions, as well as his inattention to the decedent's problem of falling out of her wheelchair, bore a "substantial relationship" to the rendition of medical treatment by a licensed physician; therefore, the claim was one of medical malpractice, and as such, the medical malpractice statute of limitations was applicable.

204. Id. at 687–89.
205. Id. at 688.
206. Id.
207. Id.
208. Id.
209. Id. at 688–89 (alteration in original) (quoting Weiner v. Lenox Hill Hosp., 673 N.E.2d 914, 917 (N.Y. 1996)).
210. Id. at 689.
Based on the Rey case, it is evident that a claim brought in New York against a nursing home may be classified as either negligence or medical malpractice. In certain situations, it may be necessary to sue a nursing home under the New York wrongful death statute, while in others it may be necessary to proceed against the nursing facility under medical malpractice, an entirely different body of New York law. While it is certain that children, especially adult children, are barred from recovering for loss of parental companionship under the wrongful death statute, neither the New York State Legislature, nor the New York common law has indicated whether such damages are recoverable under a claim for medical malpractice. Given New York's overall hesitancy to recognize a claim for loss of companionship by anyone, it is probable that proceeding under a medical malpractice cause of action would produce the same results as proceeding under common law or the wrongful death statute.

2. Kentucky

Like New York, Kentucky does not expressly address the issue of whether, in a nursing home negligence context, an adult child can recover for loss of companionship of a deceased parent. However, the Court of Appeals of Kentucky, in Smith v. Vilvarajah,\(^{211}\) addressed the issue of whether there should be a cause of action whereby adult, emancipated children can claim loss of parental consortium.\(^{212}\)

In Smith, the emancipated, adult children of the decedent brought a claim to recover damages for the loss of parental consortium.\(^{213}\) The trial court dismissed the plaintiffs' cause of action, holding that Kentucky does not recognize such a claim.\(^{214}\) The plaintiffs relied on Giuliani v. Guiler\(^{215}\) to support their assertion that the Kentucky courts should recognize a new cause of action for adult children.\(^{216}\) In Giuliani, the Supreme Court of Kentucky recognized a cause of action on behalf of minor children for the recovery for loss of parental consortium.\(^{217}\) The Smith court found that, because Giuliani neither mentioned nor considered claims of adult children, it was not precluded from

\(^{211}\) 57 S.W.3d 839 (Ky. Ct. App. 2000).
\(^{212}\) Id. at 840.
\(^{213}\) Id. at 841. The decedent died after ingesting fenphen prescribed by the defendant.
\(^{214}\) Id. at 840.
\(^{215}\) 951 S.W.2d 318 (Ky. 1997).
\(^{216}\) Smith, 57 S.W.3d at 841.
\(^{217}\) Id.
considering whether Kentucky allows recovery by adult children for such a loss.\textsuperscript{218}

The \textit{Smith} court noted that the \textit{Giuliani} court was guided by Kentucky statute section 411.135, which provided parents with a cause of action for recovery for loss of companionship of a minor child.\textsuperscript{219} The \textit{Giuliani} court reasoned that if the legislature created a separate cause of action for a parent to recover for the loss of companionship of a minor child, then there is no logical reason why a minor child should be barred from recovering for the loss of companionship of a parent.\textsuperscript{220} The same reasoning, however, could not be applied to the \textit{Smith} case; Kentucky statutes do not allow parents to claim loss of consortium of adult children.\textsuperscript{221}

In addition, the \textit{Smith} court discussed the public policy reasons against allowing an adult child to recover:

\begin{quote}
[W]hile an adult is capable of seeking out new relationships in an attempt to fill in the void of his or her loss, a child may be virtually helpless in seeking out a new adult companion. Therefore, compensation through the courts may be the child's only method of reducing his or her deprivation of the parent's society and companionship.\textsuperscript{222}
\end{quote}

Finally, the \textit{Smith} court noted that some other jurisdictions that allow an adult child to recover for loss of parental companionship do so based on an interpretation of some statutory authority.\textsuperscript{223} In contrast to these other jurisdictions, Kentucky's wrongful death action limits recovery to economic damages, as allowing recovery for loss of companionship on behalf of an adult child is a "wholly separate cause of

\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.} at 842 (citing \textit{Giuliani}, 951 S.W.2d at 319). Section 411.135 states:

\begin{quote}
In a wrongful death action in which the decedent was a minor child, the surviving parent, or parents, may recover for loss of affection and companionship that would have been derived from such a child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action.
\end{quote}

KY. REV. STAT. ANN. § 411.135 (Michie 2001).

\textsuperscript{220} \textit{Giuliani}, 951 S.W.2d at 319.
\textsuperscript{221} \textit{Smith}, 57 S.W.3d at 842–43.
\textsuperscript{222} \textit{Smith}, 57 S.W.3d at 843 (quoting \textit{Theama v. City of Kenosha}, 344 N.W.2d 513, 516 (Wis. 1984)).
\textsuperscript{223} \textit{Id.} at 842.
Recognizing this new cause of action is a step that the Kentucky courts were not yet ready to take. In sum, it is clear that an adult child, in Kentucky, will not be able to recover for loss of parental companionship in any context.

C. Summary of Other Jurisdictional Approaches

Based on the analysis above, it appears as though many jurisdictions would permit an adult child to recover for loss of parental companionship in a nursing home death situation. Nevertheless, because few states have explicitly addressed this issue, it is difficult to predict exactly how each state court would respond to such a claim. Further, notwithstanding the trend in the courts to allow for general loss of companionship, no trend has yet been established with regard to an adult child's ability to recover for loss of parental companionship in a nursing home context. While the research in this Comment displays a trend favoring the allowance of such recovery, this Comment does not serve as a complete fifty-state survey. Rather the states discussed were primarily selected due to their proximity to Wisconsin or their large elderly populations.

V. SIGNIFICANCE OF AN ADULT CHILD'S ABILITY TO RECOVER FOR LOSS OF PARENTAL COMPANIONSHIP

Given the likelihood in Wisconsin that an adult child will be able to recover for loss of parental companionship under the wrongful death statute, coupled with the myriad of jurisdictions that will likely allow such recovery by adult children, it is important to understand the effect that such recovery will have on plaintiffs and defendant nursing homes.

Simply because a state allows an adult child to recover for loss of parental companionship does not mean that such recovery will be astronomical or excessive. Adult children plaintiffs will likely not be able to recover unlimited amounts of money. In fact, states have put limits on the total amount of damages recoverable in wrongful death and other actions. Further, just because a court allows an adult child

224. Id. at 841.
225. Id. at 844.
226. This apparent trend relates to the generic ability to recover for loss of companionship, not specifically to an adult child's ability to recover for loss of companionship of a parent.
227. See, e.g., WIS. STAT. § 895.04(4) (1999–2000). Subsection four states:
to claim loss of companionship does not mean that the court will award the plaintiff damages. The court, in determining whether a sufficient relationship exists between the adult child plaintiff and the parent to award damages, will often look to factors such as "the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium giving relationships are available to the child."\(^{228}\) In addition, courts will consider the marital status, as well as the life expectancy of the persons bringing the claim in order to ensure that the award for the loss of companionship is not excessive.\(^{229}\) Finally, some courts will prohibit recovery altogether if the adult child or the parent is estranged.\(^{230}\)

VI. ADULT CHILDREN IN WISCONSIN SHOULD NOT BE ABLE TO RECOVER FOR LOSS OF COMPANIONSHIP

In Wisconsin, adult children are barred from recovering for loss of companionship in medical malpractice actions, whereas in non-medical malpractice wrongful death actions, adult children will likely be able to recover for such damages. The question thus arises: Why would such recovery be allowed in one context and not the other? Unfortunately, there is no clear answer to this question. In examining case law, however, there are plenty of justifications for limiting this type of recovery to minor children. Thus, independent nursing homes that are trying to challenge an adult child's claim of loss of companionship should rely on the reasoning of Wisconsin case law and other jurisdictions' laws as to why adult children should not be allowed to recover.

A. Wisconsin Nursing Homes' Challenge to Allowance of Recovery for Loss of Parental Companionship on Behalf of an Adult Child

Because loss of companionship is a common law concept, it is the

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\(^{228}\) Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990).

\(^{229}\) See generally James L. Isham, Excessiveness or Adequacy of Damages Awarded for Non-Economic Loss Caused by Personal Injury or Death of a Parent, 61 A.L.R. 4th 251 (1988).

duty of the court to continuously define and limit this area of law.\footnote{231} "Generally, the question of who may recover for the loss of society and companionship of a person injured or killed by the negligent act of another has been left to the courts."\footnote{232} Relying on prior courts' discussions about the limitation of recovery for loss of companionship, it may be possible for Wisconsin's independent nursing homes to argue that Wisconsin case law clearly shows a reluctance to extend recovery for loss of companionship beyond a relationship in which there is a minor child. Therefore, adult children should not be able to recover for loss of companionship in non-medical malpractice contexts, or in any context for that matter.

This is so, for the same reasons that the court has been hesitant to extend the recovery to adults in other cases. For example, in Theama v. City of Kenosha,\footnote{233} the Wisconsin Supreme Court limited recovery for loss of companionship to the period of the child's minority "because the minor is the one whose relationship is most likely to be severely affected by a negligent injury to the parent."\footnote{234} The Theama court found that when a child has lost a parent, "the loss to the child is indeed a real and serious one and that the effects of this loss may be far-reaching."\footnote{235} Such a loss will deprive the child of his parent's guidance, love, and protection, which are essential to a healthy development.\footnote{236} The court also pointed out that studies have shown that minor children may even have a tendency to become delinquent in the absence of parental guidance.\footnote{237}

In Estate of Wells v. Mount Sinai Medical Center,\footnote{238} the Wisconsin Supreme Court addressed the issue of whether a parent can recover for the loss of society and companionship of an adult child who was injured as a result of medical malpractice.\footnote{239} Finding that Chapter 655, governing medical malpractice, did not address this issue, the court

\begin{footnotes}
\footnote{231}{See Estate of Wells v. Mount Sinai Med. Ctr., 515 N.W.2d 705, 708 (Wis. 1994). The Wisconsin Supreme Court stated, "[T]he rules against recovery for loss of society and companionship were created by the courts, and it is our responsibility as much as it is the legislature's, to continue to shape this area of the law." \textit{Id.} at 708.}
\footnote{233}{344 N.W.2d 513 (Wis. 1984).}
\footnote{234}{\textit{Id.} at 522.}
\footnote{235}{\textit{Id.} at 516.}
\footnote{236}{\textit{Id.}}
\footnote{237}{\textit{Id.}}
\footnote{238}{515 N.W.2d 705 (Wis. 1994).}
\footnote{239}{\textit{Id.} at 706.}
\end{footnotes}
believed it had the duty to decide the limits of such type of recovery.\textsuperscript{240} The court relied on several factors in concluding that recovery for loss of companionship should not be extended to parents of adult children.\textsuperscript{241} First, the court looked to prior case law and noted that the \textit{Theama} court "refused to extend recovery for the lost society and companionship of an injured parent beyond the confines of the 'nuclear family.'"\textsuperscript{242} The \textit{Wells} court then noted that "nuclear family" was defined as only parents and their minor children.\textsuperscript{243} The \textit{Wells} court also relied on the Wisconsin Supreme Court's decision in \textit{Rineck v. Johnson},\textsuperscript{244} allowing only a minor child to recover from loss of companionship of a parent whose death resulted from medical malpractice.\textsuperscript{245} Overall, the \textit{Wells} court found that although the aforementioned cases did not explicitly address the issue of whether an adult child could recover for the loss of companionship of a parent, the cases indicated a strong reluctance on the part of the Wisconsin Supreme Court to extend such recovery to adult children.\textsuperscript{246}

In addition to examining prior case law addressing similar issues, the \textit{Wells} court concluded that there are strong public policy reasons for prohibiting a parent from recovering for loss of companionship of an adult child.\textsuperscript{247} \textit{Wells} stated, "[S]ound public policy dictates that some limit be placed on the liability faced by negligent tortfeasors . . . . To hold [the] . . . tortfeasors potentially liable to parents for the loss of an adult victim's society and companionship, is, we believe, excessive and contrary to public policy."\textsuperscript{248} Specifically, the \textit{Wells} court concluded that allowing a parent to recover for the loss of companionship of an adult child was excessive due to the general increased life expectancy of the American population and, therefore, contrary to public policy.\textsuperscript{249} Because people are living beyond sixty or even seventy years, the potential period of a parent's recovery may be extended forty or fifty years.\textsuperscript{250} It is possible that a person in her sixties could have living

\textsuperscript{240} \textit{Id.} at 708.
\textsuperscript{241} See \textit{id.}
\textsuperscript{242} \textit{Id.} at 709 (citing \textit{Theama}, 344 N.W.2d at 513).
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} 456 N.W.2d 336 (Wis. 1990).
\textsuperscript{245} \textit{Wells}, 515 N.W.2d at 709 (discussing \textit{Rineck}, 456 N.W.2d at 336).
\textsuperscript{246} \textit{Id.} at 709.
\textsuperscript{247} \textit{Id.} at 709–10.
\textsuperscript{248} \textit{Id.} at 707.
\textsuperscript{249} \textit{Id.} at 710.
\textsuperscript{250} \textit{Id.}
parents who could recover for the sixty-year-old child's death. The court implied that such a situation would be excessive.251

It then follows that due to the increased life expectancy of Americans, there is an increased need for extended-care facilities because as people live longer, more people will depend on nursing homes. As people live longer, their children will be older when they die, thus making it probable that their children will be adults upon their death. Given the reasoning of the Wells court, allowing the increased number of adult children to recover would be excessive. Therefore, recovery for loss of companionship of a parent should be limited to minor children.

Based on the analysis above, Wisconsin courts have exhibited a strong reluctance to extend the right to recover for loss of companionship to a situation involving either an adult child or a parent with an adult child. Therefore, an independent nursing home in Wisconsin that is not protected by the loss of companionship provisions of Chapter 655, the Wisconsin medical malpractice statute, may have a strong argument that despite the legislative history of the Wisconsin wrongful death statute indicating that adult children may be able to recover for loss of parental companionship, the reasoning of Wisconsin courts in deciding not to extend recovery for loss of companionship to adult children in all other contexts is not only persuasive but binding authority. Such authority dictates that recovery for loss of companionship in Wisconsin should be limited to situations in which either the plaintiff or decedent is a minor child.

Moreover, the Wisconsin medical malpractice statute clearly bars adult children from recovering for loss of parental companionship. If the Wisconsin Legislature barred such recovery in the medical malpractice context, why would it not do so in the wrongful death context? Is there a significant difference between medical malpractice wrongful death and death resulting from ordinary negligence so as to justify barring an adult child from recovering under medical malpractice but allowing an adult child to recover under the ordinary wrongful death statute? There is no compelling justification. Thus, given the judiciary's silence as to whether an adult child can recover for loss of parental companionship under Wisconsin's wrongful death statute, if given the chance, perhaps the judiciary would interpret the law to bar an adult child from recovering so as to maintain uniformity among Wisconsin statutes.

251. Id.
B. Other Reasons to Limit Recovery for Loss of Parental Companionship to Minors

Not only does Wisconsin case law create authority as to why adult children generally should not be able to recover for loss of parental companionship against Wisconsin nursing homes, but other jurisdictions have also asserted persuasive arguments against permitting such recovery.

First, insurance is a valid concern. When adult children are allowed to recover for loss of companionship, nursing home insurers and insurance companies in general will be compelled to award more money in damages and during settlements. Thus, it is probable that insurance premiums will rise, and as a result, there is an increased risk that some will go without insurance. In addition, the cost of operating nursing homes will rise and as such they may become less affordable to the people who depend on their services the most.

Second, during a child's minority, parents have greater influence over their children. During this time, parents help teach their children morals and values, and in the process, parents assist in the development of the child's personality. The effect of a parent's death on his children, albeit devastating, will not be as severe or as detrimental to children in their majority as if it happened during their minority. Adult children do not need the guidance and care from their parents to the same extent as do minor children in their crucial stage of development. Moreover, upon the death of a parent, adult children are better able to find companionship with another adult in order to fill the void of their loss, whereas minor children will be deprived of the experiences and care of their mother or father that they were entitled to upon birth.

VII. CONCLUSION

As the current United States population grows older, there will be an increased need for extended-care facilities. Further, as the population becomes more dependent on nursing homes, the opportunity for accidents stemming from inadequate care and supervision on behalf of the nursing home facilities will increase. When a loved one dies as a result of an accident in a nursing home, or under anyone else's care, it is inevitable that the decedent's surviving friends and family will feel a tremendous sense of loss, not only for the person, but for the loss of the special relationship with that person. When the loved one is a parent,

no matter how old the children are, the effects are devastating and often we look to the American judicial system as a last resort to compensate us for the wrongful deprivation of that relationship. Thus, loss of companionship damages are an important element of any cause of action, and as nursing homes become more abundant, reliance on such damages by adult children will grow.

Wisconsin has clearly stated that when the death of a parent occurs as a result of medical malpractice, adult children are unable to recover for loss of parental companionship. Although Wisconsin medical malpractice law provides important protection to health care providers, independent nursing homes cannot benefit from such protection. Instead, independent nursing homes in Wisconsin will be compelled to defend against wrongful death actions.

The Wisconsin wrongful death statute states that children are allowed to recover for loss of companionship, however, neither the statute nor case law explicitly defines the word children, therefore it is uncertain whether "children" includes adult and minor children or solely minor children. Given the legislative history of the statute and statements made by the state bar, it is likely that adult children will be permitted to recover for loss of companionship under the Wisconsin wrongful death act.

An independent nursing home in Wisconsin has two compelling arguments against the recovery of loss of parental companionship damages by adult children. The first stems from the inconsistency between Wisconsin medical malpractice law and wrongful death law, and the second originates in the reasoning from prior Wisconsin court cases that demonstrate a reluctance to extend recovery to parent child relationships in which at least one person is not a minor.

Not only does it appear likely that in Wisconsin an adult child can recover for loss of parental companionship of a parent who has died as a result of nursing home negligence, many other jurisdictions also allow adult children to recover for loss of parental companionship. Few courts, however, have ruled definitively on this issue in cases involving nursing home negligence.

On a final note, this Comment advocates that an adult child should not be able to recover for loss of parental companionship when the parent has died as a result of nursing home negligence. The current, inconsistent state of Wisconsin law is troubling—if the legislature prohibits recovery for loss of parental companionship in a medical malpractice negligence case, there is no compelling reason why it should allow such damages in a wrongful death context. What justification is
there for allowing a court to place a value on human life when it has been taken by ordinary negligence as opposed to when it was taken by an error of a medical professional? Further, Wisconsin courts have traditionally expressed a reluctance to extend recovery of this sort to adult children, so why allow it now? Finally, it is difficult to put a value on human life and relationships. Allowing the courts to place a value on the relationship between an adult child and her decedent parent will increase the dollar amount of claims against nursing homes, and given the increased dependence of our society on nursing homes, nursing homes should be protected to some degree. Perhaps such protection may not have to be in the form of denying the adult child the ability to recover, instead this protection may be in the form of a cap or a limit on total damages recoverable. That would, in effect, prevent liability from becoming excessive. Nursing homes should be protected so that they are still a viable option for today's youth as they grow older.

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253. It is important to note that nursing homes require protection in order to survive, and their continued existence is crucial as the baby boomers mature. See supra note 2 and accompanying text. However, as more people depend on nursing home care, they want to be assured that the care they receive is of the highest quality. It is a well known fact that current nursing home care is often plagued with resident abuse and mistreatment. As a result, some may argue that if being forced to pay out damages to compensate an adult child for loss of companionship encourages nursing homes to improve standards of care, such recovery should be permitted. Under this scenario, loss of companionship damages would act as a punishment or mode of deterring the nursing home from negligent provision of care. However, it is important to remember, it is the objective of punitive damages to punish and deter, whereas loss of companionship damages are to compensate for the deprivation of a familial relationship.

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