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Tort Law

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UNDERSTANDING WRONGFUL DEATH AND SURVIVAL ACTIONS

Though the terms are sometimes used interchangeably, wrongful death and survival actions are anything but identical, and failing to understand the differences can cost you and your client. Here's what to look for when you're suing after an injury victim dies.

THE TERMS "WRONGFUL DEATH" AND "SURVIVAL" ARE SOMETIMES USED interchangeably when you sue after an injury victim dies. Failing to understand that there are procedural and substantive differences between these two statutory actions, and how these differences impact the case, can cause big problems for both you and your client.

Lawsuits after death: The Probate Act's answer

Dead men tell no tales and win no lawsuits. At least that's how it was under the common law, where a cause of action generally died with the plaintiff. If a plaintiff suing for replevin, personal injury, slander, or anything else died while walking up the courthouse steps on the last day of trial, the suit was dismissed.¹

The Probate Act of 1975 alters the common law by allowing certain actions to survive a plaintiff's death (hence the name "survival"):

*31 Sec. 27-6. Actions which survive. In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 6-21 of 'An Act relating to alcoholic liquors'.²

The Survival Act applies to people who have pending litigation when they die, but more commonly to people who die before they sue. The executor of an estate, as appointed by the probate court, has the authority to bring a survival action to recover for the injury to the decedent as if he or she had survived the accident. This includes seeking recovery for medical bills, pain, suffering, lost wages, and all other damages the decedent would otherwise have the right to assert had he or she survived.³

You must go to probate court to bring this action. If the decedent had a last will and testament, you need to file it, have it admitted to probate, and take all of the formalities of a probate action.

Most trial lawyers consider it good practice to hire a firm with probate court experience to open and administer the estate. Deciding to open a probate estate and pursue a survival action should be based on whether it benefits the client. Sometimes it does not, especially when all of the proceeds will be exhausted by creditors or lien claimants.

Wrongful death: Recovery for next of kin

The **Wrongful Death** Act vindicates different injuries than the Survival Act.⁴ Unlike the Survival Act, the **Wrongful Death** Act compensates family member for the grief, sorrow, and mental anguish the death has caused them to endure.⁵ Those entitled to recover are the “next of kin” of a decedent. “Next of kin” are the decedents blood relatives who would have taken the decedent’s property had he or she died intestate.⁶

Unlike a survival action, a **wrongful death** suit does not require the opening of a probate estate.⁷ Probate action is not required because the cause of action belongs to the survivors, not the estate. Most local court rules have specific provisions on the subject, so be sure to consult them.⁸

While a **wrongful death** action is brought in the name of a decedents special representative, the damages recoverable are for the “exclusive benefit” of the survivors, not the decedent:

Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of *32 requires knowing the basics of probate and tort law, and understanding potential conflicts of interest that may arise.

Who is the client? First, you must understand who your client is - and in a **wrongful death** or survival case, it might not be the person who came in to see you. If the decedent left a will, the executor is the person with authority to hire an attorney and prosecute both a survival and **wrongful death** claim. If the person seeking to hire you is not the executor, explain that only the executor has

kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person.⁹

Understanding that a **wrongful death** is for the “exclusive benefit” of the spouse and next of kin is critical. It doesn’t matter how big the medical bills were or whether or how much the deceased suffered. A **wrongful death** action compensates the survivors for *their* loss. Any amount they receive is their property free from medical liens and claims of the decedents creditors.¹⁰

And because **wrongful death** actions belong to the survivors and not the decedent, admission of medical bills or testimony concerning the decedents pain and suffering will be excluded from a suit alleging only **wrongful death**, as such evidence is not relevant to the claim.¹¹

Why it matters: Pitfalls, liens, and heirs

In the context of accidents resulting in death, advising clients competently authority to hire an attorney.¹²

If the decedent didn’t have a will, the surviving spouse is usually appointed executor. If the decedent is a child, the parents are typically named as co-executors.

Of course, there are exceptions to these rules, and often family members fight over who should be appointed executor. Ultimately, the probate judge decides. As was explained previously, you do not always need to open an estate.

If an estate is not opened, the presiding law judge can appoint a special administrator to pursue a **wrongful death** action.¹³ Don’t make the mistake of thinking that a special administrator can file both a **wrongful death** and survival action. His or her

authority is limited to **wrongful death**, and it ends if an executor is appointed.¹⁴

Also note that the attorney hired by the estate or special administrator does not represent any particular heir.¹⁵ If you're that attorney, you represent the estate and/or next of kin. The interests of particular heirs are not identical, which is why you must understand the scope of your representation.¹⁶ Ultimately, the executor or special administrator is a fiduciary and must act for the benefit of all beneficiaries with the "degree of skill and diligence any reasonably prudent person would devote to her own personal affairs."¹⁷

Who is the residuary beneficiary? If there's a will in your case, it probably has a residuary clause that reads something like this: "I give the rest, residue and remainder of my estate, however and wherever situated, whether real, personal or mixed to"

Since the proceeds of a survival action are rarely recited as a specific bequest, ***33** they are typically awarded to the residuary beneficiary. Sometimes the residuary beneficiary is a church, charity, or other non-family member. If that's the case, explain to the client at the outset that a non-family member may receive the proceeds of a survival claim.

What are the claims against the estate? Remember, in a survival action, the proceeds are property of the probate estate and will be available first to pay creditors of the deceased. If he or she had unpaid bills, including large unpaid credit cards, medical expenses, etc., the creditors will be paid before proceeds are distributed to heirs.¹⁸ It's possible that the heirs will receive very little in a survival action, making that an unattractive option.

How much are the medical liens? Similarly, if the bulk of the proceeds will be subject to liens, it might be best to pursue only a **wrongful death** claim, especially when there is a limited pool for recovery such as an automobile insurance policy. Remember, the proceeds of a **wrongful death** action compensate the next of kin, not the decedent, and are usually not subject to medical liens by providers.¹⁹ Whether they are subject to ERISA, Medicare, and other types of liens is beyond the scope of this article but must be carefully considered.

The final steps: Allocation of proceeds and distribution

If the suit goes to trial, the jury will provide an itemized award setting forth the sum allocated to survival and to **wrongful death**. The jury will also determine the degree of dependency for survivors of the decedent in a **wrongful death** case.

In determining the "degree of dependency" (a term of art from probate law), the fact-finder may depart from the laws of intestacy and look instead to the emotional and financial relationship between the deceased and the next of kin. For example, an adult child might recover nothing and the surviving spouse 100 percent.²⁰ Survival action proceeds are distributed pursuant to the will or, if there is no will, the laws of intestacy.²¹

Settlement offers typically include a compromise of all claims and do not allocate specific sums to one claim or the other. Thus, the first step in settlement approval is to petition the court to allocate the proceeds between the two counts, which requires notice to all heirs and beneficiaries. Once the court approves the allocation, the next step is distribution.

The judge presiding over the civil action will determine the fairness of the proposed settlement, the degree of dependency, and reasonable attorney fees and expenses. He or she will also adjudicate liens and set a date for presentation of vouchers. The presiding civil law judge will further direct that any funds awarded to the estate for the survival action be determined by the probate court and distributed pursuant to order of the probate court.

Know the difference

Understanding the way **wrongful death** and survival actions are initiated and resolved, the impact on net recovery, and the potential for conflicts between beneficiaries is critical for the practitioner to appreciate. As with all areas of the law, being able to explain the process to clients and manage their expectations is essential to effective representation.

TAKEAWAYS >>

- A survival action is brought by the executor of a decedent's estate to recover damages for injuries to the decedent. Typical damages sought include recovery for medical bills, pain, suffering, lost wages, and all other damages the decedent would otherwise have the right to assert had he or she survived.
- A **wrongful death** action seeks to compensate family member for the grief, sorrow, and mental anguish the death has caused them to endure. The decedent's next of kin are entitled to recover and since the cause of action belongs to them, **wrongful death** actions typically do not require the opening of a probate estate.
- The proceeds of a survival action are the property of the probate estate and will be available first to pay the deceased's creditors. If the deceased had unpaid bills (e.g., credit cards, medical expenses, etc.), creditors will be paid before proceeds are distributed to the heirs.

ISBA RESOURCES >>

- Robert T. Park, *Appellate Court Applies Limitations Statute to Uphold Dismissal of Wrongful Death Action Against Physicians*, Trial Briefs (Apr. 2015), <http://www.isba.org/sections/civilpractice/newsletter/2015/04/appellatecourtapplieslimitationssta>.
- Mark Rouleau, *Clear Warning for Attorneys in Wrongful Death Cases*, Trial Briefs (Aug. 2014), <http://www.isba.org/sections/civilpractice/newsletter/2014/08/clearwamingattorneyswrongfuldeathc>.
- Elizabeth Felt Wakeman & Gregory J. Barry, *Pursuing Claims for Grief Under the Wrongful Death Act*, 101 III. B.J. 34 (Jan. 2013), <http://www.isba.org/ibj/2013/01/pursuingclaimsforgriefunderthewrong>.
- Timothy J. Reuland & Shirley A. Murphy, *Scientific Evidence About Grief in Illinois Wrongful Death Cases*, 97 III. B.J. 146 (Mar. 2009), <http://www.isba.org/ibj/2009/03/scientificevidenceaboutgriefinillin>.

Footnotes

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¹ *Buttman v. Chamales*, 73 Ill. App. 2d 399 (1st Dist. 1966).

² 755 ILCS 5/27-6.

³ *Kasongo v. United States*, 523 F. Supp. 2d 759, 810 (N.D. Ill. 2007).

⁴ *Caterpillar, Inc. v. Wilhelm*, 824 F. Supp. 2d 828, 835 (CD. Ill. 2009).

⁵ 740 ILCS 180/2.

⁶ *Johnson v. Provena St. Therese Medical Center*, 334 Ill. App. 3d 581, 589 (2d Dist. 2002).

⁷ 740 ILCS 180/2.1.

⁸ *See, e.g.*, Cook County LR § 12.15; Will County LR § 5.02; 13th Jud. Cir. LR § 11.14.

⁹ 740 ILCS 180/2.

¹⁰ *Berard v. Eagle Air Helicopter Inc.*, 257 Ill. App. 3d 778, 781 (3d Dist. 1994).

¹¹ *See, e.g., Grant v. Adrian*, 32 Ill. 2d 345 (1965).

¹² *Will v. Northwestern University*, 378 Ill. App. 3d 280, 289 (1st Dist. 2007).

¹³ 740 ILCS 180/2.1.

¹⁴ *Gushing v. Greyhound Lines, Inc.*, 2012 IL App (1st) 100768, ¶ 104.

¹⁵ *Id.*

¹⁶ *Will*, 378 Ill. App. 3d at 289.

¹⁷ *Id.*

¹⁸ See 755 ILCS. 5/18-12.

¹⁹ See *Caterpillar, Inc. v. Wilhelm*, 824 F. Supp. 2d 828, 835 (C.D. Ill. 2009).

²⁰ *Johnson v. Provena St. Therese Medical Center*, 334 Ill. App. 3d 581, 589 (2d Dist. 2002); see also 1 Horner Probate Prac. & Estates § 13:4.

²¹ 755 ILCS. 5/2-1.

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