

WRONGFUL DEATH IN THE PROBATE CONTEXT

“The Interaction Between Tort and Probate”

AWARENESS – STATUTE OF LIMITATIONS.

The first tool in the probate practitioner’s box is awareness of circumstances.

Tort actions for wrongful death have a three year statute of limitations, found in RCW 4.16.080:

RCW 4.16.080

Actions limited to three years.

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated...

When a probate case presents, the practitioner should get the facts and circumstances of the death. If obvious potentially actionable events led to it, (i.e. including, but not limited to plane, train and automobile wrecks, medical mistakes, medication errors/over dose, falling, smashing, stabbing, choking, shooting or other general mayhem) the wise attorney makes note of the date(s) involved and calendars the same in their tickle system.

A personal representative has a fiduciary duty to evaluate claims of the decedent.

RCW 11.48.010

General powers and duties.

It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate. The personal representative shall collect all debts due the deceased and pay all debts as hereinafter provided. The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.

If you feel a “tinge” that there could be an actionable cause, you need to bring it to your client’s attention for prompt action. Sometimes people experiencing grief wait a long time to see an attorney, and don’t understand they may have a wrongful death claim. You don’t want to have let the opportunity for a recovery slip away due to a time bar while on your watch.

MAKE SURE PERSONAL REPRESENTATIVE HAS AUTHORITY TO PURSUE CASE.

Wrongful death actions may only be brought by the personal representative of the estate. RCW 4.20.010; 4.20.046; and 4.20.060. Even though the personal representative must bring the action, only the statutorily set forth individuals are allowed to be beneficiaries of the recovery, which may or may not include the personal representative.

It is incumbent upon the probate practitioner to lay the foundation for the tort attorney to pursue a valid case. That means crossing all the t’s and dotting all the i’s in getting the personal representative validly appointed, letters issued, and authorized to pursue the case.

The easy situation is where there is a Will with a qualified nominee to serve as personal representative, without bond, and with nonintervention powers. Obtain your order confirming personal representative and of solvency; have the clerk issue the Letters Testamentary, and proceed. With nonintervention powers, the personal representative can pursue the wrongful death case without further order.

RCW 11.68.090

Powers of personal representative under nonintervention will—Scope—Relief from duties, restrictions, liabilities by will.

(1) Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, convey, and otherwise have the same powers, and be subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW with regard to the assets of the estate, both real and personal, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court. Except as otherwise specifically provided in this title or by order of court, a personal representative acting under nonintervention powers may exercise the powers granted to a personal representative under chapter 11.76 RCW but is not obligated to comply with the duties imposed on personal representatives by that chapter. A party to such a transaction and the party's successors in interest are entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent's estate.

(2) Except as otherwise provided in chapter 11.108 RCW or elsewhere in order to preserve a marital deduction from estate taxes, a testator may by a will relieve the personal representative from any or all of the duties, restrictions, and liabilities imposed: Under common law; by chapters 11.54, 11.56, 11.100, 11.102, and 11.104A RCW; or by RCW 11.28.270 and 11.28.280, 11.68.095, and 11.98.070. In addition, a testator may likewise alter or deny any or all of the privileges and powers conferred by this title, and may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by this title. If any common law or any statute referenced earlier in this subsection is in conflict with a will, the will controls whether or not specific reference is made in the will to this section. However, notwithstanding the rest of this subsection, a personal representative may not be relieved of the duty to act in good faith and with honest judgment.

The practitioner has to be more diligent in the all too common occurrence where there is intestacy and little or no assets, and the reason for filing a probate at all is for pursuing the wrongful death case.

In those instances, the practitioner must determine who can serve as administrator RCW 11.28.120; give appropriate notice if required under RCW 11.28.131 and/or obtain consents from any party that could contest the appointment. If there is a bond requirement, then follow all the steps to implement it, including the court's signature approving the bond. If the estate is solvent, then obtain the order of solvency. If applicable, give appropriate notice and/or obtain consents from any party that could contest the petition. RCW 11.68.041.

RCW 11.68.041

Petition for nonintervention powers—Notice requirements—Exceptions.

(1) Advance notice of the hearing on a petition for nonintervention powers referred to in RCW 11.68.011 is not required in those circumstances in which the court is required to grant nonintervention powers under RCW 11.68.011(2) (a) and (b).

(2) In all other cases, if the petitioner wishes to obtain nonintervention powers, the personal representative shall give notice of the petitioner's intention to apply to the court for nonintervention powers to all heirs, all beneficiaries of a gift under the decedent's will, and all persons who have requested, and who are entitled to, notice under RCW 11.28.240, except that:

(a) A person is not entitled to notice if the person has, in writing, either waived notice of the hearing or consented to the grant of nonintervention powers; and

(b) An heir who is not also a beneficiary of a gift under a will is not entitled to notice if the will has been probated and the time for contesting the validity of the will has expired.

(3) The notice required by this section must be either personally served or sent by regular mail at least ten days before the date of the hearing, and proof of mailing of the notice must be by affidavit filed in the cause. The notice must contain the decedent's name, the probate cause number, the name and address of the personal representative, and must state in substance as follows:

(a) The personal representative has petitioned the superior court of the state of Washington for county, for the entry of an order granting nonintervention powers and a hearing on that petition will be held on, the day of,, at o'clock, . . M.;

(b) The petition for an order granting nonintervention powers has been filed with the court;

(c) Following the entry by the court of an order granting nonintervention powers, the personal representative is entitled to administer and close the decedent's estate without further court intervention or supervision; and

(d) A person entitled to notice has the right to appear at the time of the hearing on the petition for an order granting nonintervention powers and to object to the granting of nonintervention powers to the personal representative.

(4) If notice is not required, or all persons entitled to notice have either waived notice of the hearing or consented to the entry of an order granting nonintervention powers as provided in this section, the court may hear the petition for an order granting nonintervention powers at any time.

If there is not solvency, then the personal representative must also obtain an Order under RCW 11.48.010, to pursue the litigation. This can be a separate order, or combined in the petition for appointment of the administrator. Keep it simple and open ended. For example:

In the Petition:

“The circumstances of the decedent’s death are such that there may be a cause of action available pursuant to the legal theories of wrongful death and/or survival of actions. The Administrator petitions the court for authority to investigate the viability and to pursue any such potential claims and/or legal theories that may be applicable or available under the law.”

In the Order:

“The court hereby authorizes the Administrator to investigate the viability and to pursue any such potential wrongful death and/or survival of actions claims that may be available under the law.”

WRONGFUL DEATH CASES ARE CREATURES OF STATUTE.

Washington’s wrongful death statutes are found in RCW 4.20. In technical terms, the phrase, “wrongful death” is only one component of a set of statutes involving three types of death claims, each with distinct parts.

If you are not the attorney pursuing the actual tort claim, then why should you understand the various causes of action? Because you as the probate attorney, may need at some point to be involved in the handling of any recovery that is made or jury verdict that is rendered.

When there is an unallocated pool of settlement money in a wrongful death action, the seminal case providing the legal method by which it is apportioned is *Parrish v. Parrish*, 44 Wash App. 449, 722 P.2d 878 (1986).

In wrongful death actions, there are three statutory frameworks under which a recovery is made. Under *Parrish*, Id at 456, the first task is to divide the pool of funds into the three causes of action, to wit:

First, RCW 4.20.010 and 4.20.020. These statutes are for a defined set of family members to receive compensation ***for each of their personal*** losses (economic

and non-economic) as a result of the wrongful death of their loved one. These statutes state:

RCW 4.20.010

Wrongful death — Right of action.

When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

RCW 4.20.020

Wrongful death — Beneficiaries of action.

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death.

Second, RCW 4.20.046. This statute is for the economic recovery elements that the decedent himself could have pursued had he lived, i.e. lost wages and earnings capacity. It is referred to as the “general” survival statute. It states:

RCW 4.20.046

Survival of actions.

(1) All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: PROVIDED, HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for

the action. The liability of property of spouses or domestic partners held by them as community property to execution in satisfaction of a claim enforceable against such property so held shall not be affected by the death of either or both spouses or either or both domestic partners; and a cause of action shall remain an asset as though both claiming spouses or both claiming domestic partners continued to live despite the death of either or both claiming spouses or both claiming domestic partners.

(2) Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his or her death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the personal representative of such person.

Third, RCW 4.20.060. This statute is for the pain and suffering that the decedent could have recovered. It is referred to as the “specific” survival statute. It states:

RCW 4.20.060

Action for personal injury survives to surviving spouse, state registered domestic partner, child, stepchildren, or heirs.

No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse, state registered domestic partner, or child living, including stepchildren, or leaving no surviving spouse, state registered domestic partner, or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters, or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse or state registered domestic partner, or in favor of the surviving spouse or state registered domestic partner and such children, or if no surviving spouse or state registered domestic partner, in favor of such child or children, or if no surviving spouse, state registered domestic partner, or such child or children, then in favor of the decedent's parents, sisters, or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death.

Once the initial separation is made between the causes of recovery, then each is apportioned between the allowed statutory beneficiaries. Id at 455.

As to 4.20.010 and 020 – Each statutory beneficiary claims *their personal* economic and non-economic losses as result of the death. Id at 454.

As to 4.20.046 – The Estate receives the **net** accumulated economic recovery. *Crisuola v. Andrews*, 82 Wash 2d 68, 70, 507 P.2d 149 (1973). That means net of the claims made in 4.20.010 and 020. Id at 70.

As to 4.20.060 – The decedent’s pain and suffering is awarded pursuant to intestacy. *Parrish* at 455; RCW 11.04.015.

If the case goes to a jury trial, then the jury is going to do the allocation. For example, the verdict form could look like this:

Economic damages for surviving spouse	\$ _____
Non-economic damages for surviving spouse	\$ _____
Child #1 – economic damages	\$ _____
Child #1 – non-economic damages	\$ _____
Child #2 – economic damages	\$ _____
Child #2 – non-economic damages	\$ _____
Estate of deceased economic damages	\$ _____
Decedent’s pain, suffering, & fear of impending doom	\$ _____

Sometimes, however, personal injury attorneys tactically want to present the case to the jury without parsing out the economic damages for each individual beneficiary and the estate. The theory being that they believe there is likelihood of a greater overall recovery if there is only one line item for the jury to fill in entitled under the umbrella, “economic damages.” This request typically coincides with the economic damage award opinion of the expert economist that testifies on behalf of the plaintiff. If that is how the case is presented, then there will still need to be a later allocation (away from the jury) as to each individual beneficiary’s slice of that economic damage pie.

If there is not an agreed upon allocation by the potential beneficiaries before the trial, then it is wise to seek an agreement for how the allocation is to be determined. Mediation or arbitration should be encouraged.

BRIEF NOTE REGARDING TAXES

Generally, the recovery on a wrongful death matter, including all of its components (economic and non-economic), is not taxable **income** to the recipient or the estate, *Internal Revenue Code Section 104*. See Appendix A.

However, the exception to the general rule of exclusion as taxable income is in the situation of punitive damages. Washington does not provide for punitive damages, however, this can be a factor in a Washington litigated case if there are out of state defendants and another state's law is applicable to parts of the litigation.

PRACTICE TIP: If the estate is allocated a portion of the settlement, though it is not income, it is **includable in the decedent's gross taxable estate** for the calculation of estate taxes. Therefore, in the "pool of money" scenario, it may be advantageous for estate tax purposes to allocate the funds exclusively to satisfy the individual wrongful death claims of the beneficiaries and not to the estate itself.

COMPLICATING FACTORS.

If any of the beneficiaries to the case are minors or incapacitated persons, there will be additional steps required concerning a settlement. Special Proceeding Rule 98.16W governs the procedures and rules that must be followed. A copy is attached as Appendix B. A Settlement Guardian ad Litem is required to report to the court in accordance with SPR 98.16W, and a court order must be entered approving the

settlement on behalf of the minor/incapacitated person. This can and will hold up all of the beneficiaries' receiving their money while court approval is obtained for the minor/incapacitated person.

Sometimes in the interest of securing the money as quickly as possible, the personal injury attorney may want to do a "two step" for the approval. Step one is only for approval of the "gross settlement." Step two is to petition for the exact share that will go to the minor/incapacitated person. Under this scenario, the court will require that all of the money be secured while the allocation shares are determined. The personal representative may be called upon to set up a special estate account just for the proceeds, and the court will additionally order it blocked and safe (fully FDIC insured). In the instance that the funds are large, in order to save having to go to many banks to get full insurance (\$250,000 per institution), there is a resource to simplify the personal representative's mandate. That is the Certificate of Deposit Account Registry Service (CDARS). It is basically a one stop shop for full FDIC coverage on multi-million dollar accounts. The particulars of the program are found at <http://www.cdars.com>. Mechanically speaking, the personal representative finds a CDARS member bank and sets up the required account using the estate's employer identification number. The funds are then housed therein until further court order disbursing them pursuant to the final approved allocation.

ETHICAL CONSIDERATIONS INVOLVING THE PERSONAL REPRESENTATIVE.

A wrongful death action, as we have learned, can only be brought by the personal representative. This person's duty in pursuing the action is to hire appropriate

counsel and go forward to obtain the “biggest pie” possible under all of the facts and circumstances. A personal representative in a lot of cases will also be an individual beneficiary entitled to a slice of that pie. This situation can bring up issues concerning conflict of interest and fiduciary duty when there are more beneficiaries than just the personal representative and/or there is family discord. It may become necessary for the personal representative to have individual counsel to represent him/her as to their personal interest in the matter separate and apart from their job as personal representative assisting the personal injury attorney in pursuing the case. Further, when it finally comes down to allocating the settlement, each of the beneficiaries may need independent counsel to advocate their respective individual interest. The personal injury attorney is not going to advocate for individual beneficiaries, and neither should the probate attorney. Once an allocation is determined (agreement or mediation), it should be reduced to writing in a settlement agreement, and if required under SPR 98.16W, approved by the court.

PRACTICE TIP: In families that do not get along, for the good of the wrongful death action it is best to keep your dirty laundry in the hamper. If the beneficiaries paper the probate file with disparities about one another and/or the decedent, defense counsel will likely access the file and use the information to try and diminish the overall claim. The personal injury attorney pursuing the wrongful death claim will surely thank the family for keeping this important point in mind – particularly when most of these cases are handled on a contingency fee basis.