

## Trusts and Estates Law

## Expert Analysis

# Practical Concerns When Settling a Wrongful Death Action

Practitioners litigating wrongful death actions must confront challenges beyond simply litigating the claim itself. Settling these actions involves a specific procedure between the trial court and the Surrogate's Court which must be complied with.<sup>1</sup> This article seeks to provide practical advice concerning the potentially tricky process.

### Who Has Authority to Litigate?

When the action is brought after the decedent has died, a fiduciary of the estate must be appointed and their authority to litigate the claims determined. The fiduciary is the one to bring the survival action for pain and suffering (which recovery is payable to the estate and subject to estate taxes, claims and commissions) and for wrongful death (on behalf of the



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distributees who suffered a pecuniary loss).

It is not uncommon for a court to grant limited letters of administration (where the decedent died intestate without a will). The limited

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letters could allow the fiduciary to commence (or defend) a personal injury or wrongful death action, but also restrain the fiduciary from settling the action or enforcing a judgment recovered until further order from the court. See SCPA 702(1). The advantage of limited letters is that

the court can reduce the amount of a bond or eliminate it completely.

### When Settlement Is Reached

After a settlement is reached, a fiduciary with limited letters needs to petition the Surrogate's Court for approval of the settlement, the attorney fees sought and any payable expenses. This petition must be made to the Surrogate's Court, even if the trial court has already approved the settlement and the attorney fee.

The Surrogate's Court is in the best position to determine the allocation of the settlement proceeds, in large part, because settlement proceeds are distributed differently if they are attributable to wrongful death *versus* those attributable to pain and suffering.

Proceeds related to wrongful death are not included in the decedent's gross estate. A decedent's distributees, pursuant to EPTL 4-1.1 and 5-4.4 are entitled to the wrongful death in a proportion to their pecuniary loss. This may include a calculation

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pursuant to the Kaiser formula, a formula set forth in *Matter of Kaiser*, 198 Misc. 582 (Kings Co. Surr. Ct. 1950), which is relied upon as a method of allocating and distributing assets in a wrongful death case. This is regardless of whether individuals died with or without a will. For example, pursuant to EPTL 5-4.4, where an individual is survived by a spouse and no children, the parents or parent will be deemed to be distributees for the purposes of distributing any damages recovered for wrongful death—even if the decedent had a will leaving the entire estate to a spouse. The parent may be able to show that they relied upon their deceased child for monetary support, and thus they suffered a pecuniary loss.

Proceeds related to pain and suffering are includable in decedent's gross estate (because the decedent suffered the loss) and are distributed to the beneficiaries of the estate pursuant to an admitted will or intestacy.

Written approval of a compromise by the trial court is conclusive evidence of the adequacy of the compromise. However, a settlement is often for a lump sum without a determination of what amount is attributable to wrongful death, and what is attributable to pain and suffering. The Supreme Court can determine the allocation between wrongful death and pain and suffering, however it often defers to the Surrogate's Court on apportionment.

The Surrogate's Court is in the best position to gain jurisdiction over all necessary parties including creditors or the taxing authority, appoint a guardian ad litem for any minor beneficiaries or distributees, and assess how the settlement should be allocated and distributed. The Surrogate's Court can use its equitable power to determine if any party should not be entitled to proceeds, i.e., a surviving spouse who abandoned the decedent during life, or even an individual who may have caused the individual's death and cannot now benefit from their wrongful actions pursuant to *Riggs v. Palmer*, 115 N.Y. 506 (1889).

The consequences for failure to comply with this procedure can be harsh and could later lead to a decree being vacated. See *Matter of Sims*, 2016 WL 1070416 (Surr. Ct. NYC. 2016) (creditor was able to vacate a prior court decree because they did not receive notice of a petition).

Even more notable, in *Matter of Stokes*, 2012 NY Slip Op. 22144 (Surr. Ct. Queens Co.), the attorney who handled the wrongful death action had taken counsel fees after the entry of the Supreme Court order regarding the settlement, but before seeking approval of the settlement and the attorney fees from the Surrogate's Court. The Queens County Surrogate's Court ordered the attorney to return all counsel fees (which were previously paid to and retained in the lawyer's escrow account).

As a practical matter, the compromise proceeding is often done in the context of an accounting proceeding. If the fiduciary has limits or restrictions on their letters, they may need to first seek approval from the Surrogate's Court before they can enter into the settlement agreement.

### Practice Tips

- Before settling any wrongful death actions, review the authority of the fiduciary as set forth in their letters.
- Consider who has an interest in the proceeds and who must be given notice of the compromise and the allocation plan.
- The settlement funds must be kept in a created interest-bearing account. EPTL 5-4.6(a)(1).
- An attorney for the fiduciary in the wrongful death action "shall continue" to serve as attorney for the estate until the entry of a final decree in Surrogate's Court. EPTL 5-4.6(a)(3).

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1. See Hillman Jennifer, "NY EPTL 5-4.6 and Compromise Orders," [www.lexisnexis.com/legalnewsroom/estate-elder-blog/archive/2012/06/22/ny-eptl-5-4-6-and-compromise-orders.aspx](http://www.lexisnexis.com/legalnewsroom/estate-elder-blog/archive/2012/06/22/ny-eptl-5-4-6-and-compromise-orders.aspx).