

TRUSTS AND ESTATES LAW

Expert Analysis

## Wrongful Death Compromises: A Proposal

**W**hen a decedent passes away as a result of negligence, omission, or a tortious action of another, the personal representative may bring a wrongful death action on behalf of the distributees pursuant to EPTL §5-4.1. The personal representative, whether it be an Executor or Administrator, is granted the power to bring the wrongful death proceeding through Letters Testamentary or Letters of Administration issued by the Surrogate's Court. However, after the power is given through Letters, the wrongful death action is brought in Supreme Court, where only the Executor or Administrator is before the court and other



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interested parties, such as creditors, are not. The Supreme Court oversees discovery, negotiates settlement, or conducts a trial. Once settled, the Surrogate's Court reviews the settlement, approves or disproves the settlement, and orders its distribution. This is the usual procedure, but there are various situations which provide for different results.

If there is a wrongful death claim to prosecute, the personal representative must indicate so on the probate petition. Once appointed and Letters are issued, the Letters will contain a restriction pursuant to SCPA §702(1). The restriction provides

the Executor or Administrator the ability to bring a wrongful death action, but not the ability to compromise or settle the action without a further order of the Surrogate's Court. (See SCPA 702, which provides, "Letters may be granted limiting and restricting the powers and rights of the holder hereof: (1) To the enforcement or prosecution of a cause of action in favor of the decedent or his fiduciary under general or special provisions of law, to the defense of any claim or cause of action against a decedent or his fiduciary, and restraining the fiduciary from compromise of the action or the enforcement of a judgment recovered therein until the further order of the court and the filing of satisfactory security, if required.") This restriction is most often written on the Letters themselves, and indicates to the Supreme Court that after the work to settle the claim is

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completed, the Surrogate's Court must review the settlement before it can be distributed. If approved, the Surrogate's Court will then order the Executor or Administrator to collect the proceeds and distribute them.

The Surrogate's Court faces an issue if the Executor or Administrator does not disclose the wrongful death claim on the probate petition and full Letters are issued without the restriction pursuant to SCPA §702(1). The lack of a restriction can lead defendants and judges to believe the representative has the ability to settle the wrongful death claim, while statutorily they do not. Without the restriction on the Letters, and without any indication to the Supreme Court that the Surrogate's Court must review the settlement, the settlement may be approved, awarded, and allocated by the Supreme Court, in contravention of the statute. This is an issue faced by the Surrogate's Courts throughout the state of New York, and has been raised to the authors by individuals within the courts. A simple solution to this is to issue all Letters, whether Testamentary or Administration, and whether the petition discloses a wrongful death claim or not,

with written SCPA §702(1) restrictions on the face of the Letters. As the ability to commence the action, but not compromise it, is statutory, there should not be a situation where the claim is compromised and distributed without the review of the Surrogate's Court. By providing restrictions on all Letters, whether applicable or not, this removes any room for error and ensures the Surrogate's Court reviews all compromises

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before allocation and distribution. This would also simplify the practice associated with wrongful death actions, and provide clear authority of the personal representative.

One of the most important aspects of the review by the Surrogate's Court is the allocation of the settlement funds between personal injury and wrongful death. Frequently, the complaint filed to initiate the wrongful death action will also include claims of personal injury or conscious pain

and suffering by the decedent, but a gross settlement may be reached without a determination as to what portion of the settlement is attributable to the claim for wrongful death and what portion is attributable to the claim for personal injury. An allocation of funds to personal injury commands the funds be paid to the Estate, subject to distribution by the decedent's will or the rules of intestacy. The damages recovered for personal injury are compensation for conscious pain and suffering endured by the decedent before they passed, and are limited to those that accrued before death and do not include damages for death, other than reasonable funeral expenses. (15 N.Y. Prac., New York Law of Torts §15:32, Survival actions) On the other hand, an allocation of funds to wrongful death commands the funds be paid to the distributees of the decedent as determined by EPTL §4-1.1, with some restrictions. The wrongful death recovery is compensation for the pecuniary loss of distributees who had a reasonable expectation of receiving the financial benefits of decedent's continued existence. (Turano and Radigan, New York Estate Administration, §20.06, Damages) The review by the

Surrogate's Court enables proper allocation between the two. To illustrate the significance of this review, consider this example: a decedent was survived by a spouse and two minor children, and the surviving spouse is the Executor and sole beneficiary under the will. The allocation of the entire settlement to personal injury would be beneficial to the Executor/spouse as he/she would receive the complete recovery pursuant to the Will, and the children would receive nothing. An allocation as such would not compensate the children for the pecuniary loss suffered by them, but an allocation of some or all of the settlement to wrongful death would result in compensation to the children for their expectation of support from their parent. This is something the Supreme Court may not consider, or even be aware of, when allocating the funds.

Once allocated to wrongful death, the "Kaiser formula" is commonly used to calculate the distribution of wrongful death proceeds to the distributees, based upon the pecuniary loss suffered by them. The Kaiser formula is the general rule and is followed by most courts; however, there are instances where it is not

followed and may present difficulties for the courts and/or inequities to the families involved. (In re Kaiser, 198 Misc. 582 (Sur. Ct. Kings Cty. (1950)); but see Matter of Acquafredda, 189 A.D.2d 504 (2d Dept. 1993) (finding "there is no imperative for the automatic application of Kaiser")) The Kaiser formula takes into consideration the age of the decedent and the surviving spouse, the ages, mental and physical condition of the descendants, and whether they will pursue normal occupations or would be dependent on

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decedent beyond the age of 21. (In re Kaiser, 198 Misc. at 584) The fractional parts of recovery to each is then determined by a formula using the aggregate number of years of anticipated dependency of the spouse and next of kin as a denominator and the respective years of the anticipated dependency of each of the spouse and next of kin as the numerator. (Id.) This calculation provides the percentage of the wrongful death proceeds to

be paid to the spouse and next of kin based on the pecuniary loss sustained by each individually.

The systems by which wrongful death actions are commenced, and settled, are integral to the proper reimbursement to families for their loss. As a statutory mechanism for recovery, the procedures followed must be uniform to enable consistent recovery and allocation of funds. The incorporation of SCPA §702(1) restrictions on all Letters would ensure reliability for decedent's families and the courts in these matters.