If you are like me, you may have practiced in the trusts and estates area for years without ever running across a wrongful death or survival claim. However, about 12 years ago, I started a new job that necessitated I pick it up fast. The process was bumpy due to esoteric and counterintuitive nature of these claims. In this article, I will first delineate the difference between wrongful death and survival claims. Next, I will detail the process of obtaining court approval of wrongful death and survival settlements in the trial court and probate court. Finally, I will note some of the ethical concerns raised in representing estates with such wrongful death claims and some peculiarities of the law regarding minors.

Nature of Wrongful Death and Survival Claims

Wrongful Death Claims

Wrongful death claims are a creature of statute. In Illinois, the Wrongful Death Act can be found at 740 ILCS 180/1 et seq. It provides as follows:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Obviously, such a claim is based on a tort—intentional or unintentional—that results in the death of the decedent. This claim does not belong to the decedent’s estate but rather to his or her “spouse and next of kin.” Although the statute is silent in defining “next of kin,” Illinois courts have held that that term means intestate heirs under the Probate Code.

As a result, the takers on a wrongful death claim could be different from the legatees named in the decedent’s will. The statute goes on to provide a mechanism for determining the appropriate amounts to distribute to the spouse and next of kin:

The amount recovered in any such action shall be distributed . . . to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person.

Thus, the judge is tasked with making a finding regarding the degree of dependency the spouse and next of kin had on the decedent. As a consequence, it seems that a wrongful death settlement would have to be approved by a judge as a practical matter whether or not an order is technically required. Without a court approving the settlement, the tortfeasor runs the risk that another family member could come forward claiming to be next of kin and demanding to be compensated for his or her loss.

Determining the degree of dependency is often straightforward but can be tricky. A judge may be inclined to find that the spouse and children of the decedent are dependent in the same percentage they would receive in intestate succession. So, assuming the decedent is survived by a husband and 2 adult children without disability, the spouse would be awarded 50% and the children 25% each. Of course, determining dependency can be greatly complicated if the spouse and/or one or more next of kin have disabilities that require 24-hour medical care.

The word “dependency” is much broader than one would think at first glance. Common usage of dependency...
regarding family relationships would suggest that an adult child without a disability should be found to have 0% dependency on the decedent. Think of the child support situation where support ends for a child at 18 or graduation from high school, whichever is later.3 Wrongful death differs from family law on this point. Multiple Illinois appellate opinions have held that adult children without a disability can have dependency on the decedent.4 This type of non-financial dependency is akin to a loss of society.5

Since the wrongful death claim belongs to the spouse and next of kin of the decedent, it is not a probate asset.6 Consequently, it is not subject to probate claims or the expenses of administration.7 It also is not subject to subrogation liens, with the exception of a Worker’s Compensation lien.8

Who is the plaintiff in a wrongful death case? There are two (2) possibilities. First, the trial court can name a special administrator to pursue the wrongful death claim.9 Second, if a representative of decedent’s estate appointed by the probate court, that representative is the plaintiff.10 If a special administrator has been appointed by the trial judge and a representative is later appointed by the probate court, the probate executor/administrator trumps the special administrator.

**Practice tip:** If you or your firm are handling the wrongful death claim, the best practice is to open an estate and have an administrator or executor appointed to ensure that a petition to open a probate estate will not become an issue.

**Survival Act Claims**

Under the Common Law, an individual’s legal claims died with him or her.11 Eventually, state legislatures including Illinois passed Survival Acts which allowed a variety of claims to “survive” the death of the decedent. Illinois’ Survival Act can be found in Sec. 27-6 of the Probate Code. That provision states:

> 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.’

The Survival Act applies to both pending litigation and potential claims arising out of decedent’s death or otherwise. Due to the Survival Act, nearly all potential claims a decedent had at death survive, including, of course, personal injury. The focus of this article is the settlement of personal injury claims so settlement of other types of cases will not be discussed herein. All survival claims are probate assets.12

To pursue survival claims, an estate generally must be opened. Without an estate, there is no “plaintiff” to pursue the claim. Having said that, the decedent’s heirs/legatees can settle with the tortfeasor without opening an estate or filing a lawsuit. However, tortfeasors often will not agree to do that given the possibility that additional “heirs” may come out of the woodwork later claiming that they have the right to pursue the claim.

Survival claims are just like any other probate assets. They are subject to claims in the decedent’s estate. As with any decedent’s estate, it is possible that the decedent had significant unsecured debts like credit card bills or medical bills. As a result, those claims may eat up some or all of the proceeds from the survival claim.

**Practice tip:** Discuss this possibility with the personal representative early on. If it looks likely that the estate is insolvent, the family may not want to pursue the survival claim. At a minimum, it will help manage the expectations of the representative and the family.

**Obtaining Court Approval of Wrongful Death and Survival Settlements**

**Wrongful Death Settlement Approval**

**Lawsuit Filed**

**Trial Court’s Role**

If a lawsuit has been filed, most of the heavy lifting occurs in the trial court. It will be up to the trial judge to determine who the spouse and next of kin are and determine dependency.13

**Practice tip:** Review the court’s local rules and the standing order of your judge regarding petitions to settle.14

As we are all aware, local rules can vary and the specific requirements of each judge can vary even more. Nonetheless, the petition to settle typically sets forth the names of the spouse and next of kin and proposes percentages of dependency on the decedent. If an agreement has been reached by the spouse and next of kin, attestations or the like are executed by each of them stating their agreement, including which individuals constitute the spouse and next of kin, percentages of dependency, the fairness and reasonableness of the settlement, the allocation between wrongful death and survival claims (if applicable), and approval of attorney fees and litigation expenses and waiver of a hearing on the petition. This, of course, is the easy way: everyone is cooperative and agreement has been reached on all issues. In my experience, this is typical.

If the family cannot agree on who the next of kin is and/or the degree of dependency, a three-ring circus can ensue. The court may have no choice but to set a hearing to gather evidence to allow the court to make those findings. **Warning:** War story ahead. I was involved in a contested hearing where the decedent was the only child of two only children who were each from two very large families. The Affidavit of Heirship in the intestate estate was six (6) pages long and identified 36 heirs. The next of kin were not able to reach an agreement on dependency so an evidentiary hearing was held. The hearing lasted about 4 hours and approximately 15 heirs testified. **Moral:** Get the family to agree on dependency, if at all possible.

The trial court also will determine whether the settlement is fair and reasonable, approve attorney fees and litigation expenses and adjudicate any liens. The memorandum entitled, “Final Procedures Concerning Disposition of Settlement of Minors’ and Disabled Persons’ Personal Injury
Cases, Survival Actions and Wrongful Death Cases with Sample Orders,” from the Presiding Judges of the Cook County Probate Division, Law Division and First Municipal District Court dated May 2019 (hereinafter Cook County Settlements Memo) is an excellent guide regarding settlement requirements. This memo can be found on the Cook County judge’s website at http://www.cookcountycourt.org/Portals/0/Law-Division/Standing-Orders/Settl-Aug. 2014.pdf.

After the settlement has been approved and distributed, “vouchers” must be presented to the trial court showing that the settlement proceeds have been distributed in accordance with the settlement order. “Voucher” is a term of art meaning in essence a receipt.18 Like a receipt, vouchers show the court that the representative has distributed all of the settlement proceeds in accordance with the trial court’s settlement order. Consequently, everyone receiving funds from the settlement will need to sign a voucher.

Probate Court’s Role

As noted above, the probate court will only have a part to play regarding wrongful death settlements if an estate was opened for the decedent. Assuming an estate has been opened, the distributable amount of the settlement shall be “accounted for and administered” in probate court.19 The first steps in that process are granting the representative authority to receive the distributable proceeds and setting bond. So, following the entry of the settlement order in the trial court, the estate’s representative will file a petition for authority to receive proceeds from the wrongful death settlement. Note that this petition is not seeking court approval for the settlement because the trial court has already approved the settlement amount, attorney fees and expenses and so forth.

**Practice Tip:** As every probate practitioner is aware, probate judges vary greatly in the degree of scrutiny they give to petitions and motions brought before them. On several occasions, I have had a probate judge questioning the reasonableness of litigation expenses. Although this is not the province of the probate judge, I nonetheless had to deal with those concerns which can delay the settlement process. Therefore, it is best if the petition for authority is focused on receiving the wrongful death proceeds and merely restates the pertinent portions of the trial court’s settlement order. By keeping the focus on the probate court’s role of setting bond and approving probate fees and expenses, you can reduce the chance the probate judge will take issue with other aspects of the settlement.

After the settlement has been approved and distributed, vouchers are presented to the probate court showing the trial and probate attorney fees and expenses have been paid, and the spouse and next of kin have received their shares in accordance with the settlement order.

**No Lawsuit Filed**

The probate court is responsible for all aspects of approving and distributing the settlement. It is unclear whether receipts are required in addition to vouchers when the estate had no probate assets and was only administering the wrongful death claim. Although it may not be technically required, my practice has been to have the spouse, next of kin, legatees and heirs sign receipts indicating they have received what they are entitled to from the estate.

**Survival Claim Approval**

**Lawsuit Filed**

The trial court must approve the settlement as with any other personal injury case. The only difference is that the representative of the estate is the plaintiff and he or she petitions the court for approval and signs any releases. The trial court will not need to determine who the next of kin are or the degree of dependency of the spouse and next of kin as in a wrongful death case. The court will still need to determine whether the settlement is fair and reasonable, approve the attorney fees and litigation expenses and adjudicate any liens.

As with wrongful death settlements, vouchers are presented to the trial court and probate court showing that all sums have been distributed pursuant to the settlement order. Since the survival claim is an asset of the estate, the representative signs a voucher showing the estate has received the proceeds. Then, the heirs/legatees sign receipts as per usual indicating they have received their due from the estate.

**No Lawsuit Filed**

The probate court will determine whether the settlement is fair and reasonable, approve attorney fees and litigation expenses, adjudicate liens, and so forth. The probate court will also need to set bond, if bond has not been waived by decedent’s will and the current bond is not sufficient to cover 150% of the distributable amount of the settlement. Otherwise, the distributable amount of the survival claim is like any other probate asset. It will, of course, be distributed to the legatees/heirs pursuant to the will/intestate succession after deducting all claims and administrative expenses. If there is a will, it is possible the decedent could have provided for the distribution of this claim as a specific bequest, but more likely it will be part of the residiary. The legatees/heirs will sign receipts as per usual indicating they have received their share from the estate.

**Wrongful Death and Survival Claim Approval**

It is not uncommon for a lawsuit to include both wrongful death and survival claims. This arises when the decedent was injured, lived for some time after the injury and then died. Think of a car accident where the decedent was badly injured and died several days later. The injuries sustained by the decedent and the pain she endured prior to her death are the survival claim and, of course, her death is the wrongful death claim. Given the nature of those claims, it would be a practical necessity, if not a legal requirement, that a lawsuit be filed and that the plaintiff would be the representative of the decedent’s estate. The settlement of both wrongful death and survival claims can be complicated.

**The Trial Court**

Typically, cases settle globally. The parties agree to a gross figure to settle all claims and do not delineate how much pertains to wrongful death and how much to survival. The plaintiff in the petition to settle then proposes an allocation to the trial judge.20 The trial court will require that this allocation bear some relationship to the injuries sustained, the amount of time the decedent lived after being injured, whether the decedent was conscious after the
injury, and similar considerations. Given the ambiguity of the situation, one can see that some practitioners might attempt to manipulate the allocation to favor the next of kin (wrongful death) over creditors (survival claims) or even some family members over others. For example, if the estate was insolvent and the claims far exceeded the value of the probate assets, the family may be inclined to put all of the settlement into the wrongful death category which is not subject to probate claims. If the decedent lived for weeks in agony after the injury, the trial judge is likely to question that allocation. Therefore, there is a requirement that the allocation have some relationship to the underlying claims and that the plaintiff explain the basis for the proposed allocation.

Otherwise, the trial court's role is the same as noted above, concerning the determination of the reasonableness of the settlement, the dependency of the spouse and next of kin, the approval of attorney fees and expenses and the adjudication of any liens. Vouchers must be presented showing that the settlement has been distributed in accordance with the court's settlement order.

Probate Court

Once again, the probate court's role is to set a bond, oversee the distribution of the probate asset. As noted previously, it is also for the probate court rather than the trial court to approve probate attorney fees and expenses. Vouchers are presented to the probate court showing that all sums have been distributed pursuant to the settlement order. Since the survival claim is an asset of the estate, the representative signs a voucher showing the estate has received the proceeds. Then, the heirs/legatees sign receipts as per usual indicating they have received their share of the estate.

Other Considerations

Who Is Your Client?

Anytime we are representing more than one person or entity, we must consider who is and is not your client. Regarding the survival claim, this analysis is the same as in any estate.

The issue can become significant regarding a wrongful death claim by itself or in combination with a survival claim. Regarding the wrongful death claim, the attorney handling the litigation and the probate attorney (assuming an estate has been opened), owe a duty to the spouse and next of kin as well as whoever it is that signed the retainer agreement. This means that when evaluating degree of dependency on the decedent, the attorney cannot simply assume that a) her “client” (the person who signed the retainer agreement) gets 100%; b) that intestate succession should be followed; or c) everyone should get an equal amount. If the decedent was married, the surviving spouse has never worked outside the home and has very limited means and their two children are both billionaires, awarding 100% to the surviving spouse may be appropriate. On the other hand, if there is no surviving spouse, and one of the two children of the decedent has a disability that will never allow him to work and requires 24-hour medical care, that disabled child probably should receive a much greater percentage than the other child. As noted previously, it is optimal if the spouse and next of kin can reach agreement to avoid putting this determination into the hands of the trial judge. The point here is, however, that the attorney cannot advocate for one family member over another in this scenario. Doing so would likely be a breach of duty and an ethical violation.

If there is an evidentiary hearing, the role of the estate's attorney is once again complicated. First, it is possible that everyone involved—including the person who signed the retainer agreement—may retain their own attorney. If everyone does so, that takes you off the hook. You are essentially just a neutral observer at the evidentiary hearing. Complications arise if any of the next of kin are pro se. In the example referenced above of the two family with 36 heirs, no one retained their own counsel. To avoid ethical pitfalls and breaches of duty, I realized I could not advocate for anyone. Instead, I drafted a series of standard questions to ask every witness. At the hearing, I asked every witness the same questions in the same order. To avoid any perception that I was favoring one person over the other, I asked only a few follow up questions which were limited to clarifying the witness' testimony. In this specific case, the judge asked a number of pointed questions which in effect served the purpose of cross examination. It bears repeating that it is best if the family can reach an agreement.

Small Estate Affidavit

As noted above, the survival claim is a probate asset. Like other personal property, the proceeds from the survival settlement can be distributed to the legatees/heirs via a small estate affidavit. This has all the benefits and potential drawbacks of using a small estate affidavit in other circumstances. When the distributable amount of the settlement is less than $100,000, the small estate affidavit can be presented to the trial court at the time the settlement is approved. In those rare cases where there is a survival claim only, settlement is reached pre-suit, and the personal estate is worth less than $100,000, the small estate affidavit can be presented to the tortfeasor/insurer as part of the finalization of the settlement.

Minors

Minors can become involved in wrongful death and survival settlements in two (2) ways: 1) the minor is receiving a share of the wrongful death claim or is inheriting funds from the survival claim; and 2) the minor herself is injured. Both of those scenarios will typically require that a minor guardianship be opened. Doing so early in the litigation process may avoid the appointment of a guardian ad litem by the trial court regarding a wrongful death settlement. The reason for this once again is that the dependency of the next of kin may vary greatly and someone must be looking out for the best interests of the minor.

As with a trial court settlement being received by a decedent's estate, the guardianship court's role is limited to authorizing the guardian to receive the settlement, setting the bond and overseeing the distribution of the asset. In a situation where the minor has been injured, the guardian is the plaintiff in the case. Otherwise, it is much the same as a decedent's estate pursuing a claim.

Guardian ad Litem

As noted above, if a guardian has not been appointed prior to settlement in the
trial court, the trial court may appoint a guardian ad litem to protect the minor’s interest. As noted above, the appointment of a guardian ad litem may be avoided if a guardian of the minor is appointed before the wrongful death settlement is reached. The cost of a guardian ad litem is usually deducted from the minor’s share. On the positive side, a good GAL can help talk sense to a difficult guardian who either wants more money in the settlement (to an unwarranted degree) or is willing to settle too low given the circumstances.

Minor’s and Disabled Person’s Small Estate Affidavit

In addition to small estate affidavits for decedent’s estate, the probate code also provides for the distribution of amounts of less than $10,000.00 without requiring the opening of a guardianship for the estate of the minor or a disabled person.23 The affiant for such affidavit is to be “a parent or a person standing in loco parentis to the minor or is the spouse of the ward or, if there is no spouse of the ward, that affiant is a relative having the responsibility of the support of the person under legal disability or ward.” 24 It is generally presumed that the parent etc. is to use these funds for the best interests of the minor or disabled person but the statute does not state that or place any other limitation on the parent’s use of the funds. Nonetheless, some courts will require that such funds be placed into a restricted account in the minor’s name.25

If the minor has suffered a personal injury and no lawsuit has been filed, the tortfeasor may insist that a guardianship be opened even though the settlement is less than $10,000. The reason for this is that a minor retains his or her right to pursue a legal claim for personal injury for a period of 2 years after the minor reaches 18.26 Consequently, a settlement release signed by the minor’s parent without a court order does not release the minor’s claims against defendant.27

Practice tip: Given the fees and expenses involved in opening a minor’s estate, obtaining court approval of the settlement and depositing the funds, the attorney for the estate may want to request that defendant pay the fees and expenses associated with the guardianship proceeding. Such an effort may or may not be successful but is worth a shot. After all, there can be no settlement if the parties cannot agree on all terms.

Conclusion

To avoid pitfalls and delays, you should determine what the claims are in the case (wrongful death, survival, or both), who the spouse and next of kin are, whether decedent had a will, whether any minors are involved and who you a duty to, as soon as practicable. You should then read the rules and determine what is needed at each step in the process. Planning ahead will lead to optimal efficiency and the best outcome. When in doubt, consult with or retain an attorney who knows the ropes.

---

Steven A. Wade is an associate at Anesi, Ozmon, Rodin, Novak & Kohen, Ltd. in Chicago and his practice includes estate administration, guardianships (adults and minors), estate planning, residential real estate, and employment litigation.

1. 740 ILCS 180/1.
2. 740 ILCS 180/2(a).
4. 740 ILCS 180/2(b).
5. 750 ILCS 5/505(a).
7. See Johnson v. Provena St. Therese Medical Center, 334 Ill. App. 3d at 592.
9. Id.
11. 740 ILCS 180/2.1.
12. Id.
16. 740 ILCS 180/2(b).
17. See, e.g., Rules 6.4, 6.5 and 12.15 of the Rules of Cook County Circuit Court.
19. Rule 6.5(a) of the Rules of Cook County Circuit Court.
21. Id.
24. Id.
25. Cook County Settlements Memo, p. 3.
26. 735 ILCS 5/13-211.