

The Jurisdiction Between Probate and Death Claims

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The personal representative is the only statutory agent who may commence and prosecute death claims on behalf of the statutorily designated beneficiaries, including any minors.¹ The statutorily designated beneficiaries under the wrongful death statute in Washington include: the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death was wrongfully 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.”² Nearly anyone can be the personal representative, but it is essential that the personal representative is the client in order to properly bring an action under Washington’s death claim laws and avoid potential conflicts and/or malpractice.

“When tortious conduct causes injury or death, three different causes of action may arise. For example, a personal injury claim may be brought by victims for their own damages. Additionally, Washington tort law recognizes two causes of action where a defendant’s negligence causes the death of another. Death claims in Washington may be brought pursuant to the wrongful death statutes, RCW 4.20.010 and RCW 4.20.020, and the survival statutes, RCW 4.20.046(1) and RCW 4.20.060.”³ The personal representative is the only person entitled to bring a wrongful death action.⁴ Likewise, the personal representative is the only person entitled to bring a survival action.⁵

¹ *Atchison v. Great W. Malting Co.*, 161 Wash. 2d 372, 166 P.3d 662 (2007).

² RCW 4.20.020.

³ *Otani ex rel. Shigaki v. Broudy*, 151 Wash. 2d 750, 754-55, 92 P.3d 192, 194 (2004).

⁴ RCW 4.20.010; *Atchison v. Great W. Malting Co.*, 161 Wash. 2d 372, 166 P.3d 662 (2007).

⁵ RCW 4.20.046(1) and RCW 4.20.060; and *Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wash. App. 919, 231 P.3d 1252 (2010).

“Unlike Washington's wrongful death statutes, the survival statutes do not create new causes of action for statutorily named beneficiaries but instead preserve causes of action for injuries suffered prior to death. Washington's wrongful death statutes, RCW 4.20.010 and RCW 4.20.020, create causes of action for specific surviving beneficiaries of the deceased. This means that wrongful death claims begin at the death of the decedent for the benefit of the persons named in the statute. Thus, wrongful death and survival actions can be distinguished in that the wrongful death statutes govern postdeath damages of the deceased and the survival statutes govern predeath damages.”⁶ “The general survival statute, RCW 4.20.046(1), preserves all causes of action that a decedent could have brought if he or she had survived. Alternatively, the special survival statute, RCW 4.20.060, is limited to personal injury causes of action that result in death. Specifically, recovery under the general survival statute is for the benefit of, and passes through, the decedent's estate, whereas recovery under the special survival statute is for the benefit of, and is distributed directly to, the statutory beneficiaries.”⁷

On behalf of the beneficiaries of a decedent, wrongful death claims under RCW 4.20.020 and survival claims for non-economic damages under the special survival statute (RCW 4.20.060) may be brought by the personal representative and would be considered a non-probate asset with the legislature having designated the beneficiaries. Damages recovered under those statutes may be subject to an apportionment hearing. In addition, on behalf of the estate, survival claims under the general survival statute (RCW 4.20.046(1)) may be brought by the personal representative and would be considered an asset of the estate subject to administration, which would include economic damages such as property losses, medical and funeral reimbursement, and net accumulations.⁸

In the event the beneficiaries include minors, it may be necessary to have guardian(s) ad litem appointed. It may be wise to immediately seek the appointment of a litigation guardian ad

⁶ *Otani ex rel. Shigaki v. Broudy*, supra at 195.

⁷ *Otani ex rel. Shigaki v. Broudy*, supra.

⁸ *Wilson v. Grant*, 162 Wash.App. 731, 258 P.3d 689 (2011).

litem under RCW 4.08.050 or 060. A settlement guardian ad litem would serve in that capacity in connection with damages recovered under RCW 4.20.020 and RCW 4.20.060 for a minor beneficiary pursuant to SPR 98.16W for independent claims and any non-probate asset recovered from the prosecution of the death claims. A probate guardian ad litem would provide representation for a minor beneficiary pursuant to RCW 11.76.080 and/or SPR 98.08W, for settlement of the probate assets, which would include economic damages for general survival claims recovered under RCW 4.20.046(1) as an asset of the estate.

If you represent nine out of ten statutory beneficiaries under the wrongful death statute working the claims (receiving vehicle loss compensation, funeral reimbursement and other economic damages) while number ten hires another attorney and is appointed personal representative, you likely committed malpractice. Economic damages flow through the estate as an asset of the estate. Only the personal representative has legal authority to negotiate for assets of the estate. An attorney violates the rules of practice by purporting to represent a decedent's estate without authority.⁹ The court has authority to consider allegations of unethical conduct in determining attorney fees.¹⁰ "Professional misconduct may be grounds for denying an attorney his fees...When an attorney is guilty of fraudulent acts or gross misconduct in violation of a statute or against public policy, the client may have a complete defense to the attorney's action for fees."¹¹

Conflicts and/or malpractice can be avoided in the intersection between probate and death claims by beginning the investigation phase with a court appointed personal representative and guardian(s) ad litem if minors are involved. Crafting the complaint with the different types of claims in mind and navigating the recovery of those claims as probate or non-probate assets may help maximize the total recovery for the statutory beneficiaries. A word of caution: do not negotiate death claims without the only statutory agent having legal authority to do so.

⁹ *In re: Disciplinary Proceeding Against Stansfield*, 164 Wash.2d 108 (2008).

¹⁰ *Ross v. Scannell*, 97 Wash.2d 598, 647 P.2d 1004 (1982).

¹¹ *Ross v. Scannell*, *supra*.