



# Beware! The Pitfalls of Wrongful Death and Survival Actions

by Miranda L. Soucie & James D. Spiros



A client walks into your office after recently losing a family member. After discussing the case with the client, and reviewing some documents they have brought with them, you have a high degree of suspicion that the family member's death was caused by someone else's negligence. You perform an initial investigation, review the medical records, talk to witnesses, and determine that a meritorious cause of action does indeed exist. So where do you go from there?

## Determining the statute of limitations

After meeting with the client, the first step usually is determining what causes of action may exist, and what the relative statutes of limitation may be. This is where you should be aware that the statutes of limitations for a wrongful death action and survival action are typically different.

An action for wrongful death results when a person's death is caused by a "wrongful act, neglect or default."<sup>1</sup> An action for wrongful death is generally subject to the same statute of limitations as when the decedent was alive, because "a wrongful death action will lie only where the decedent had a claim that was not time-barred on or before his death."<sup>2</sup> As a result, if the acts or omissions which led to the wrongful death occurred more than two years prior to the death and the decedent knew or should have known of the injury, the claim may be time-barred. However, if the claim was not time-barred upon the decedent's death, the "action shall be commenced within two years after the death of such person."<sup>3</sup>

A survival action related to a wrongful death generally as exists where there is evidence that the decedent experienced pain and suffering, loss of earnings, medical expenses, and physical disability prior to their death as a result of the wrongful conduct.<sup>4</sup> A survival action is normally subject to a different statute of limitations than a wrongful death action. Where a decedent dies before the expiration of the statute of limitations for an action for injuries, the survival claim must be filed within the later of one year of the date of death or the expiration of the underlying statute of limitations for the injury itself.<sup>5</sup>

## What do I need to do before filing suit?

Filing a wrongful death case requires the appointment of a representative of the estate, often referred to as the administrator. The administrator must be appointed according to the Illinois Probate Act or Wrongful Death Act, depending upon whether there are other assets of the estate, or a will. Assuming that the cause of action is the only asset of the estate, in order to be appointed as the administrator, the motion for appointment must be brought by any person who is entitled to recover under the Wrongful Death Act.<sup>6</sup> The representative is not the party, but "is merely a nominal party acting on behalf of the true beneficial plaintiffs."<sup>7</sup> They are essentially acting as the "statutory trustee" on behalf of the true parties in interest.<sup>8</sup>

Appointing an administrator requires opening an estate with the

probate court. Accordingly, it is important to think about the time necessary to open a probate case and have an appropriate representative appointed. Asking the court to make that appointment months before the statute of limitations expires will reduce the chances that the case will not be timely filed, and thus be time-barred.

Where the wrongful death claim is the only asset of the decedent's estate and there is no petition for letters of office on file, a special administrator may be appointed. The special administrator must be someone entitled to recover under the Wrongful Death Act.<sup>9</sup> However, a special administrator is not authorized to bring a survival action.<sup>10</sup>

## What are the duties of the representative?

The representative of the estate is "obligated to act in the utmost good faith to protect the beneficiaries' interests and must exercise at least that degree of skill and diligence that a reasonably prudent person devotes to his or her personal affairs."<sup>11</sup> Implicit in this obligation is the duty to "identify and notify those individuals who are the proper eligible beneficiaries of the wrongful death award."<sup>12</sup> Where a representative does not appropriately analyze and determine the proper beneficiaries, that representative may be found to have breached their duty to the estate.

## Who are the beneficiaries?

Beneficiaries in a wrongful death  
*beware! the pitfalls continued on page 56*



beware! the pitfalls continued from page 54

claim are the decedent's next of kin. Illinois courts look to the laws of intestacy to determine a decedent's next of kin within the meaning of the Wrongful Death Act.<sup>13</sup> The next of kin include the "blood relatives of the decedent who are in existence at the time of the decedent's death."<sup>14</sup> A child born after the death of the intestate decedent is considered to be "in existence" at the time of death.<sup>15</sup>

### Guide to Determining the Beneficiaries

Descendants	Beneficiaries
Spouse & No Children	Spouse
Children & No Spouse	Children
Spouse & Children	Spouse & Children
Parents & No Spouse, No Descendants, No Siblings	Parents
Siblings & No Spouse, No Descendants, No Parents	Siblings
Parents & Siblings	Parents & Siblings

In contrast, the amount recovered in a survival action is for the benefit of the decedent's estate. Therefore, if the decedent had a will, the beneficiaries receiving the proceeds from a Survival Act claim will be determined according to the decedent's testamentary wishes, as outlined in the will.

### What effect do subrogation liens have?

In addition to potential beneficiaries, there may be subrogation interests. However, subrogation liens generally do not apply to the wrongful death aspect of the claim because a wrongful death claim is for the exclusive benefit of the

next of kin.<sup>16</sup> However, a subrogation lien typically will attach itself to a survival action since the survival action is for the benefit of the estate.

Workers' compensation liens are distinguished from subrogation liens, in that an employer does have a right to attach a lien to a wrongful death claim. However, the lien does not apply to any amounts allocated to loss of consortium.<sup>17</sup>

### How do I determine who gets what?

Many attorneys mistakenly believe that the proceeds of a wrongful death settlement or judgment are divided according to intestate succession, or equally among the next of kin. Despite the fact that intestate law is used to determine next of kin, the Wrongful Death Act specifically abandons intestate succession "for determining how wrongful death proceeds are distributed among the class of eligible beneficiaries."<sup>18</sup> Instead, the determination is based upon the proportionate percentage of dependency of each of the next



# TAILORED TO LAW FIRMS

(Signature Bank has products suited for law firms.)

---

Turn to Signature Bank for loan and cash management programs custom fit for law firms. Signature Bank delivers the big bank products with a personal style you can count on. See how our legal industry specialists can design a financial program cut out for your law firm. Visit [signature-bank.com/lawfirm](http://signature-bank.com/lawfirm) or call Mick O'Rourke, President, at 312.506.3400.

---

191 N. Wacker, Chicago, IL | 312.506.3400 | [signature-bank.com/lawfirm](http://signature-bank.com/lawfirm)






of kin.<sup>19</sup> Dependency is “the support obtained by a party from a previously existing relationship with the decedent.”<sup>20</sup> However, there are also many other factors taken into account, including loss of society which is defined as “the mutual benefits that each family member receives from the other’s continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection.”<sup>21</sup>

Implied in the word dependency is a previous relationship with the decedent.<sup>22</sup> Accordingly, where there is the loss of a child, there is a rebuttable presumption for loss of society with regard to the parents.<sup>23</sup> In addition, where the decedent leaves direct lineal kin, or a widow or widower, there is a presumption that they have suffered some substantial pecuniary loss by reason of the death.<sup>24</sup> This presumption applies even if the direct lineal kin are adults.<sup>25</sup>

There is no firm formula to determine the proportion of dependency, though generally, it is defined as the “proportion of dependency to the total amount of dependency.”<sup>26</sup> Accordingly, where the beneficiaries do not agree, the

trial court is often tasked with the role of holding a dependency hearing to determine the levels of dependency.<sup>27</sup> In doing so, the trial court should “. . . assign percentages to each of the eligible beneficiaries.”<sup>28</sup> To determine proportionate dependency, the trial court calculates the damages awarded to each beneficiary while “taking into account any reduction arising from either the decedent’s or the beneficiary’s contributory fault.”<sup>29</sup> Dependency, however, is not a basis for dividing the settlement proceeds relating to a survival action. Instead, the proceeds are divided according to the terms of the probate estate.

**Apportioning the settlement between wrongful death and survival actions**

Given the difference in apportionment between a wrongful death claim and survival action, it is the express instruction of the appellate court that the circuit court “evaluate the fairness and reasonableness of the allocation in view of the survival and wrongful death claims involved.”<sup>30</sup> While not all inclusive, Illinois courts have provided the following guidance as to properly allocating the funds:

Follow ITLA  
on Facebook  
and Twitter




**Survival Action:** pain and suffering, loss of earnings, medical expenses, physical disability, and property damage.<sup>31</sup>

**Wrongful Death:** loss of benefits of the survivors, which includes pecuniary injuries such as money, goods and services received by the next of kin. The loss of consortium of the surviving spouse. The “moral training and superintendence of education” of the surviving children. The loss of society of an unmarried adult child.<sup>32</sup>

Generally, the division of an award in a wrongful death or survival action is left to the circuit court’s discretion.<sup>33</sup> However, the courts often conduct a hearing “to evaluate both the settlement and the apportionment of the settlement between survival

*beware! the pitfalls continued on page 58*



**Cloud-based business phone solutions**

We simplify phone systems and voice services for lawfirms of all sizes. Our "Hands-on-Hosted VoIP" approach takes the complexity and headache out of dealing with phone service. It’s really that simple.

**Some Cool Features:**

- Unlimited In-bound/ Out-bound dialing - At Home extensions
- Mobility, Originate office calls using your mobile device
- After hours / Night mode / Emergency Automations
- Never miss another client call

153 West Ohio Street - Suite 501 Chicago, IL 60654 [www.chicagobusinessvoip.com](http://www.chicagobusinessvoip.com)

**Hundreds of Illinois and Chicago companies already rely on Chicago Business VoIP!**



beware! the pitfalls continued from page 57

and wrongful death claims” prior to entering a good-faith finding with regard to the settlement or judgment.<sup>34</sup>

**Do I have to file a separate cause of action for loss of consortium?**

Where a decedent leaves a spouse, a separate cause of action for loss of consortium is not necessary under Illinois law. It is, however, recommended that it be specifically plead, either in a separate count or in the damages proximately caused by the conduct of the defendant.<sup>35</sup>

When allocating any settlement funds, the court can divide the funds between the wrongful death and the loss of consortium. This is because the amount recovered for loss of consortium is for the exclusive benefit of the spouse.<sup>36</sup> This is important to note when it comes to potential workers’ compensation liens, because the workers’ compensation lien does not apply to the loss of consortium claim.<sup>37</sup>

**What if one of the beneficiaries is a minor or has a disability?**

Where the settlement involves a beneficiary who is a minor or who is under some legal disability, the court has a special duty to protect their interests.<sup>38</sup> While the representative typically has the ability to enter into a settlement agreement, this ability is removed when a minor or person with disability is involved. The court must then review the settlement and approve it.<sup>39</sup> Accordingly, where a settlement involves a minor or a person with a disability, the court should appoint a guardian *ad litem* to protect that beneficiary’s interests.<sup>40</sup>

**Conclusion**

There are a number of complex issues involving the interplay between a wrongful death action and a survival action. These issues need to be addressed at the outset of the case. Taking the time to not only think through these issues early on in the

case, but also, to discuss these issues with the representative can help prevent potential logistical, ethical, and malpractice problems later in the case.

**Endnotes**

- <sup>1</sup> 740 ILCS 180/1.
- <sup>2</sup> *Mooney v. City of Chicago*, 239 Ill. 414, 423 (1909); *O’Brien v. O’Donoghue*, 292 Ill.App.3d 699, 703 (1<sup>st</sup> Dist. 1997); *Kessinger v. Grefco, Inc.*, 251 Ill.App.3d 980, 985 (4<sup>th</sup> Dist. 1993); *Wolfe v. Westlake Community Hospital*, 173 Ill. App.3d 608, 612 (1988); *Fountas v. Breed*, 118 Ill.App.3d 669, 674 (1<sup>st</sup> Dist. 1983).
- <sup>3</sup> 740 ILCS 180/2.
- <sup>4</sup> *Murphy v. Martin Oil Co.*, 56 Ill.2d 423, 427 (Ill. 1974).
- <sup>5</sup> 735 ILCS 5/13-209.
- <sup>6</sup> 740 ILCS 180/2.1.
- <sup>7</sup> *Glenn v. Johnson*, 198 Ill.2d 575, 583-84 (2002).
- <sup>8</sup> *Id.* at 583; *Wilmere v. Stibolt*, 152 Ill. App.3d 642, 645 (4<sup>th</sup> Dist. 1987).
- <sup>9</sup> 740 ILCS 180/2.1.
- <sup>10</sup> *Baez v. Rosenberg*, 409 Ill.App.3d 525, 529 (1<sup>st</sup> Dist. 2011) *citing* 740 ILCS

*New to Chicago...*

# Legal Capital Corp.

Offering Pre-Settlement Plaintiff Funding

- One guaranteed flat fee
- No application fee
- No compound interest
- Discount for early settlement

**Call and Compare 312.204.7939**

20 N. Clark Street, 30th Floor  
Chicago, IL 60602



mcgarr@legalcapitalcorp.com  
www.legalcapitalcorp.com

LEGAL CAPITAL CORP. IS AN ILLINOIS-LICENSED FINANCE COMPANY



180/2 (West 2008).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Baez*, 409 Ill. App. at 530.

<sup>14</sup> *Johnson v. Provena St. Therese Med. Ctr.*, 334 Ill.App.3d 581, 589 (2<sup>nd</sup> Dist. 2002) (*Emphasis added*).

<sup>15</sup> *Id.* at 590.

<sup>16</sup> *National Bank of Bloomington v Podgorski*, 57 Ill.App.3d 265 (4<sup>th</sup> Dist. 1978).

<sup>17</sup> *Borden v. Servicemaster Mgmt. Servs.*, 278 Ill.App.3d 924, 930 (1<sup>st</sup> Dist. 1996).

<sup>18</sup> *Baez*, 409 Ill.App.3d at 530.

<sup>19</sup> *Id.*; and *Johnson*, 334 Ill.App.3d at 592.

<sup>20</sup> *Id.*

<sup>21</sup> IPI. Civ. 31.11.

<sup>22</sup> *Johnson*, 334 Ill.App.3d at 589.

<sup>23</sup> *Bullard*, 102 Ill.2d at 514; *see also* IPI Civ. 31.00 Introduction.

<sup>24</sup> IPI Civ. 31.00 Introduction.

<sup>25</sup> *Id.*

<sup>26</sup> *Johnson*, 334 Ill.App.3d at 592.

<sup>27</sup> 740 ILCS 180/1.

<sup>28</sup> *Id.*

<sup>29</sup> 740 ILCS 180/2; *Johnson*, 334 Ill. App.3d at 589.

<sup>30</sup> *Readel v. Towne*, 302 Ill.App.3d 714, 719 (2<sup>nd</sup> Dist. 1999); *Muro v. Abel Freight Lines, Inc.*, 283 Ill.App.3d 416, 420 (1<sup>st</sup> Dist. 1996).

<sup>31</sup> *Murphy*, 56 Ill.2d at 427; *see also* IL-IPICIV 31.10 (2012).

<sup>32</sup> IPI. Civ. 31.00; *Muro*, 283 Ill.App.3d at 420; *Foster*, 241 Ill.App.3d at 681.

<sup>33</sup> *Adams v. Turner*, 198 Ill.App.3d 353, 356 (1990). *Johnson*, 334 Ill.App.3d at 588; *Readel*, 302 Ill.App.3d at 719.

<sup>34</sup> *Readel*, 302 Ill.App.3d at 719.

<sup>35</sup> *Glenn*, 198 Ill.2d at 583.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Baez*, 409 Ill.App.3d at 529.

<sup>39</sup> *Will v. Nw. Univ.*, 378 Ill.App.3d 280, 293-94 (1<sup>st</sup> Dist. 2007).

<sup>40</sup> *Id.*

*Miranda Soucie is an up and coming plaintiff's advocate. Miranda began her career at Spiros Law in 2010, and became a partner in 2013. She is a member of the Illinois Trial Lawyers Association, where she serves on the Legislative committee.*

*Jim Spiros has been a plaintiff's advocate for 19 years. His practice is located in central Illinois, with offices in Champaign, Danville and Kankakee. Jim is currently serving on the Illinois Trial Lawyers Association Board of Managers, Medical Negligence Committee and Executive Committee.*

*Jim, Miranda and the other attorneys at Spiros Law, P.C. handle catastrophic injury cases involving medical negligence, serious traffic and trucking accidents, nursing home neglect and abuse, wrongful death and work place injuries.*

## How can YOU GET INVOLVED in ITLA?

Take advantage of the many membership benefits included with your ITLA membership.

### - ITLA COMMITTEES -

**Amicus Curiae** - Extensive volunteer efforts in filing "friend of the court" briefs at the Supreme Court level.

**Civil Practice & Rules** - Generally concerned with the Civil Practice Act and given wide latitude to cover questions relating to legislation, rules and other issues. Offers proposals to the Supreme Court Rules Committee.

**Legislative** - Actively involved in ITLA's legislative efforts, key contact list, as well as proposed and pending legislation.

**Medical Negligence** - Actively involved in issues relating directly to medical negligence.

**Membership** - Development of a larger and more stable membership base for the Association.

**Product Liability & Insurance Law** - Issues relating directly to product liability. Makes recommendations as to how insurance law issues could be modified through rule or legislation.

**Workers' Compensation** - Studies proposed changes by the Illinois Workers' Compensation Commission and the legislature. Plans Workers' Compensation Seminar and authors Workers' Compensation Trial Notebook.

**Young Lawyers' Division** - Established to attract and engage young lawyers and law students as well as to promote membership and provide social opportunities for those practicing less than 10 years.

*Call ITLA today to join a committee.*

