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Conflict issues in wrongful-death actions

WHEN MULTIPLE HEIRS ARE JOINED IN A WRONGFUL-DEATH ACTION DUE TO THE "SINGLE ACTION RULE," THE POTENTIAL FOR CONFLICT CAN BE HIGH

Wrongful-death cases strike at the heart of a family's dynamic. Often a decedent leaves behind multiple loved ones, each with unique connections and losses from the decedent's untimely death. Some of those loved ones may pursue wrongful-death claims, and some may not. But, in many cases, multiple heirs will each have a right to hold accountable those persons responsible for the death.

This article addresses the challenges and potential conflicts wrongful-death cases pose when, as is often the case, there is more than one heir. Relying on the familial relationship between heirs is not a substitute for recognizing and addressing potential conflicts of interest. In addition to avoiding violations of ethical rules, attorneys addressing these issues head-on ensure conflicts do not affect the case against the tortfeasors.

History of wrongful-death actions in California

Conflict issues arising in wrongful-death actions can be traced to the creation and evolution of the claim. In short, because the law contemplates a single action for multiple heirs, it must simultaneously account for the heirs' unity and divergence of interest. Understanding the history of wrongful-death actions helps understand how potential conflicts arise.

Wrongful-death actions exist only because of legislative enactment. Common law did not recognize the claim for a simple reason: The dead could not go to court. Since the victim of the harmful conduct was now deceased, and the common law prohibited the dead to

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2021

sue, civil repercussions for the wrongdoer died as well. Over time, the absurdity of the common law became clear: While a defendant could be held liable for severely injuring a person, liability vanished if the defendant's actions resulted in death. (*Kramer v. San Francisco Market St. R. Co.* (1862) 25 Cal. 434, 435 (noting "the legal maxim which has obtained since the earliest days of the common law – *actio personalis moritur cum persona* [a personal action dies with the person]").)

In 1846, recognizing the perverse incentive the common law rule created – liability for injury, no liability for death – the British Parliament enacted Lord Campbell's Act to create an action "for the benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased." (*Buckley v. Chadwick* (1955) 45 Cal.2d 183, 191, fn1.)

California followed suit in 1862, enacting the state's first wrongful-death statute. Like Lord Campbell's Act, the 1862 statute permitted an action only by the "administrator or executor" of the decedent's estate. Courts construed the requirement strictly. For instance, in *Kramer*, the court sustained a demurrer to an action filed by the "father and sole heir" of a minor who had not sued as "administrator or executor." (*Kramer v. San Francisco Market St. R. Co.*, *supra*, 25 Cal. at p. 436.)

California's wrongful-death statute has been revised substantially to its present form in Code of Civil Procedure section 377.60 et seq. As explained below, amendments have expanded the potential plaintiffs, defined who is an "heir," and permitted allocation of wrongful-death damages by a court. These provisions outline the rules for wrongful-death actions and parameters of the potential conflicts.

Wrongful death: The "single action rule" for all heirs

California law permits only a "single action" for wrongful death instituted by either the heirs directly or a personal representative on behalf of the heirs. (Code Civ. Proc., § 377.60 ["A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf."].) Although heirs have a right to bring the action, they may not each bring separate, individual cases against the wrongdoer. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697 (*Smith*).) Instead, heirs must join together in one action and name any other known heirs as nominal defendants. (*Ibid.*)

Code of Civil Procedure section 377.60 dictates "heirs at law," who are qualified to make a wrongful-death claim. Some categories track the original language of Lord Campbell's Act, such as the decedent's "surviving spouse" and "children." (Code Civ. Proc., § 377.60, subd. (a).) Others have been added over the years, including those who would receive the decedent's assets through intestate succession and a "putative spouse." (*Ibid.*) As recently as 2020, the legislature added, "legal guardians" of a deceased child as if they were parents. (See Leg. Counsel Digest, Deering's Ann. Code. (2021 ed.) Code Civ. Proc., § 377.60.) Attorneys must be mindful of these categories when vetting a potential wrongful-death claim by making an affirmative inquiry about the identities of other heirs, as discussed below.

The "single action" rule does not create a "joint cause of action," but is instead a rule of compulsory joinder. (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692.) Each heir has a "separate claim" required to be joined with the separate claims of other heirs. (*Ibid.*) As a result, a known heir is a "necessary party" that must be joined "so that all heirs are before the court in the same action." (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808.) But merely naming the omitted heir is not enough. In order to be properly joined, a nominal defendant heir must also be served with process. (*Ibid.*)

Failure to effect service of process against known heirs can have consequences for wrongful-death plaintiffs and the attorney who represents the heirs. Relying on the "single action" rule, a defendant may defeat subsequent lawsuits by omitted heirs of which it had no knowledge because they were not joined in the action. (*Salmon v. Rathjens* (1907) 152 Cal. 290, 296.) It is also a likely consequence the released tortfeasor will recover attorney's fees or costs incurred pursuant to the indemnity provision of the contractual release.

An omitted heir may also be barred by the statute of limitations and unable to use the relation-back doctrine. (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1551.) Their recourse for being excluded is against the heirs at law who recovered wrongful-death compensation. (*Smith*, *supra*, 41 Cal.App.4th at p. 697.)

Although an attorney for one heir does not owe a duty of care to an omitted heir (e.g., to be identified as an heir at law), the attorney may be liable for malpractice to the heirs she does represent if she does not properly advise them that omitting the heir could have serious repercussions and that the (only) advisable course of action is to join the missing heir as a defendant – and attempt to make service of process for purposes of a default or appearance. (See *Hall v. Superior Court* (2003) 108 Cal.App.4th 706, 714-15.)

The situation can arise when one heir has significant issues with other family members, or where heirs are at odds with each other. One or another may claim the decedent loved them more than, or to the exclusion of, the other heirs at law.

Alternatively, it could be one or more rightful heirs at law were not a significant part of the decedent's life – in another heir's *opinion* (or even the rest of them). Thus, one heir, who may be the very client seeking your representation, could be tempted to pursue a wrongful-death claim without informing others.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2021

Whether driven by a false or grandiose belief that it is a race or one or another heir at law has superior moral authority (i.e., as the oldest or most successful issue) or one postulates the *decedent* would *want it that way* – as a matter of law, no heir at law may exclude any other from participating in the claim.

When representing a wrongful-death claimant, an attorney must discuss these issues at the outset. Failing to do so can expose your client to liability to the omitted heirs and you to malpractice liability for failing to inform your client of the law's requirements.

"Lump sum" damages and apportionment by the court

Given that only "one action," is authorized, trial courts historically received lump-sum verdicts or judgments for all heirs. Before Code of Civil Procedure section 377.61, the established procedure in California was to take the wrongful-death award and have a separate proceeding to apportion the award to each heir. (See *Corder v. Corder* (2007) 41 Cal.4th 644, 654, and fn.5 (*Corder*), citing *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 530, 534 and fn. 10. The trial court's apportionment was equitable and not formulaic.)

That does not mean heirs' individual damages, such as divergence in the "pecuniary value," of lost love, affection, solace, moral support, society, companionship, care and protection, were irrelevant until the equitable apportionment was conducted. Rather, the jury is tasked with determining the total damages for all heirs and "return[ing] an aggregate verdict for one sum." (*Ibid.*) Apportionment of the lump sum may be performed by the court following the jury's award or settlement. (*Corder*, *supra*, 41 Cal.4th 654; *Smith*, *supra*, 41 Cal.App.4th at p. 698.) Conversely, if all heirs agree, the jury may be asked to return individual verdicts. (*Canavin v. Pacific Southwest Airlines*, *supra*, 148 Cal.App.3d at pp. 536-537; see also, *Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1314 [combination of survival and wrongful-death causes of action].)

Special rules apply to wrongful-death settlements as well. Although there may be only "one action," a defendant is permitted to settle with some, but not all, of the wrongful-death heirs. (*Smith*, 41 Cal.App.4th at p. 698.) In so doing, the defendant risks continuation of the action by the other heirs and waives the protection of the "one action" rule.

Settlements may also be made with all heirs in a lump sum which is more common. A court may be petitioned to apportion that settlement just as it would a lump-sum jury award. As with a verdict, the apportionment of a settlement "is not based on an heir's statutory share under intestacy but is based on the proportion that the heir's personal damage bears to the damage suffered by the others." (*Smith*, 41 Cal.App.4th at p. 698.)

Of course, the heirs are not obligated to request apportionment by the court; they may simply work out the details themselves, either through respective counsel or with each other. In many cases, heirs make that agreement among themselves without need for court intervention or third-party dispute resolution, regardless of whether each heir is separately or jointly represented. But disputes can arise, and, as the statute provides, the parties may ask the court to settle them.

Defendants have no say in how lump sums are allocated. California courts have long held that neither a trial nor settling defendant has any interest in how the heirs apportion a lump-sum settlement award. (See e.g., *Corder, supra*, 41 Cal.4th at p. 659.) Because allocation is a matter between the heirs, a defendant has no right to intrude upon it. Thus, although a defendant may settle with less than all heirs, that defendant does not have any involvement in how the court or the heirs allocate an aggregate amount.

Potential conflicts when representing multiple heirs: the importance of informed consent

As set forth above, wrongful-death cases present a myriad of potential conflicts stemming from avarice, ignorance and even "battle fatigue," during the case because of drained energy and emotional reserve from the sheer weight of the litigation, so that one heir or another *insists* on resolution and others balk. Nonetheless, regardless how divergent heirs' positions may be on these issues, they share an overarching unity of purpose pursuing the wrongful-death claim. Anticipating potential conflicts and taking steps to mitigate them is essential to finish the case whole (client and counsel).

Ensuring proper joint representation

The most common initial potential conflict is representation of multiple heirs. There is nothing uncommon about doing so, especially because the heirs may conclude joint representation is advantageous. Although there is a potential for conflict among heirs, unity of representation presents many advantages. Regardless of any divergence in interest in distribution of proceeds at the end of the case, all heirs share an identical interest in holding the defendant or defendants accountable. Retaining joint counsel reduces costs, sharpens trial presentation, and helps guard against any effort by defendants to undermine the heirs' liability case.

Attorneys should not confuse the "single action" rule as obviating the need for proper conflict disclosures and written waivers. As with any joint representation, obtaining conflict waivers early and often is critical. As explained above, although wrongful-death heirs must join their actions together, each heir possesses an independent, individual claim and a proportional interest in the damages awarded. Attorneys may not simply rely on familial relationships to cover for a true conflict waiver. Nor are simple statements or boilerplate fee agreements about undefined conflicts sufficient; a true acknowledgement and waiver must specify the potential conflict and contain all required language to comport with the Rules of Professional Conduct.

Keeping clients informed of newly arising potential conflicts

Obtaining the waiver at the outset of

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2021

representation likely will not reflect later developments in the case. For instance, although defendants may settle with only some heirs and not others, often they seek a global resolution to resolve their liability. Global negotiations are often in the heirs' interest as well, both because of the strength of negotiating with all heirs at the table and the extra incentive for defendants to resolve the entire matter.

But, just as with joint representation, global negotiations are not a foregone conclusion. Attorneys must thoroughly discuss the global negotiation strategy with clients and obtain written consent before employing it. That should include each heir's written waiver of his or her ability to negotiate and settle individually with the defendant in favor of the global negotiations. Obtaining these written agreements is essential for attorneys representing multiple heirs to ensure all heirs understand and agree with the global strategy.

Allocation of proceeds: A trap for the unwary

A potential ethical trap is for the attorney to set the structure of recovery or distribution for the heirs. Recommendations or suggestions by the attorney regarding apportionment could create a conflict of interest. Weighing joint clients' claims implicitly requires an attorney to place one client over the other. That is true even if the attorney's recommendation is an equal split.

Clients, often unaware of the particulars of an attorney's ethical obligations, may request or even expect the attorney to suggest or perform the allocation, especially if there is a dispute among the heirs. The law is clear in this regard. Doing so places the attorney in a "conflict of interest." (*Corder*, 41 Cal.4th at p. 655.)

The better practice is to advise clients of their need to either agree on an allocation independent of the attorney (such as through mutual agreement) or to submit the agreement for resolution to someone other than the attorney, like a retired judge.

In many cases, clients will agree among themselves how to split a global amount, and, once communicated to the attorney, that agreement can be confirmed in writing. If, however, clients are unable to agree on apportionment, they can submit the matter for allocation by the court in a petition for distribution of the settlement fund (*Corder*) or interpleader. (See *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1513-1514; *Kim v. Yi* (2006) 139 Cal.App.4th 543, 549-550.) *Cavallo LLP v. Highland*)

But just as an attorney may not allocate proceeds as he or she sees fit, an attorney may not impose the use of a third party on the clients for allocation. Instead, an attorney must discuss these issues with the multiple heirs, explaining the attorney's inability to allocate proceeds and the need for the heirs to either agree among themselves or agree to a process of using a retired judge to make allocation. If all heirs come to a free and voluntary agreement among themselves about the distribution, an attorney should prepare, discuss, and have executed an additional, written acknowledgement and agreement with all clients.

Conclusion

Failing to recognize and address potential conflicts and other issues arising from multiple heirs in a wrongful-death matter can have serious consequences for attorneys and their clients. A client who is not properly informed about the need to join and serve all heirs, even as nominal defendants, risks personal liability, and an attorney who fails to inform his or her client of that obligation risks malpractice liability.

When representing multiple heirs, attorneys must take care to ensure robust joint representation agreements are obtained upfront. These agreements must also account for future developments, such as global negotiations. Attorneys must also take care to avoid conflicts in allocation of wrongful-death awards, either by verdict or settlement. Awareness of these potential conflicts will ensure attorneys can represent heirs in the best possible manner to achieve justice for the loss of their loved ones.

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