

# The Deadly Mistake in ‘Wrongful Death’ Litigation

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In New Jersey, there is a common misconception that any lawsuit relating to a death caused by an alleged wrongful act is a “wrongful death” action. While a wrongful act may well have caused a decedent’s death, there are two separate and distinct causes of action in New Jersey that provide relief, N.J.S.A. 2A:31-2 (Wrongful Death Act) and N.J.S.A. 2A:15-3 (Survival Act). Both acts provide distinct forms of relief to distinct parties, but the distinctions are often overlooked by ... everyone. While this article has little application to cases where a decedent dies testate due to an executor’s ability to sue under both acts, it will benefit attorneys involved in litigation based on the death of an individual who died intestate.

As we all know, the importance of estate planning is often neglected. People die without wills. In cases where the family of an intestate decedent intends to bring survival and wrongful death claims on behalf of their decedent’s estate, the estate must first be properly administered prior to the institution of such claims or risk premature disposal of valid claims. In these actions, a plaintiff is more often than not captioned as the “general administrator of the estate” of the decedent with the survival and wrongful death claims typically pled in the same count. However, this inclusive pleading custom can have fatal implications due to the exclusivity of the

two acts and those parties who have standing to pursue causes of action under each. While many plaintiffs are captioned as the “general administrators” of their decedent’s estate, oftentimes they only possess letters of “administration ad prosequendum.” Letters of general administration and administration ad prosequendum provide individuals with two separate and distinct authorities that are evident in the language of the letters themselves. Absent proper forms of administration, a defendant may take advantage and move to significantly limit exposure by challenging standing.

To begin to reconcile the standing requirements for the Wrongful Death and Survival Acts, the plain language of each act must be reviewed and discussed. The New Jersey Survival Act provides:

Executors and *administrators* may have an action for any trespass done to the *person or property, real or personal, of their testator or intestate* against the trespasser, and recover their damages as their testator or intestate would have had if he was living.

The plain language of the Survival Act is clear in that it provides “administrators” with a cause of action for injury to their

decedent's "person or property." N.J.S.A. 2A:15-3. An administrator essentially steps in the shoes of his decedent to maintain any and all causes of action his decedent could have pursued while "living," the key word being living. See Smith v. Whitaker, 160 N.J. 221, 231 (1999); see also Aronberg v. Tolbert, 207 N.J. 587, 593 (2011). *The Survival Act applies irrespective of whether a decedent's death resulted from natural causes or the wrongful act of another.* By way of example, if John Doe breaks his leg in a car accident and dies one year later from a heart attack while running an ultramarathon in Mexico, the administrator of his estate has a potential survival claim for the personal injury he suffered as a result of the car accident. Survival claims are solely for the benefit of a decedent's estate, and all proceeds are subject to estate taxes and creditors. See Alfone v. Sarno, 87 N.J. 99, 107 (1981).

Conversely, the Wrongful Death Act provides:

Every action commenced under this chapter shall be brought in the name of an *administrator ad prosequendum* of the decedent for whose *death* damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

A wrongful death claim differs from a survival claim in two very significant regards: (1) damages are sought for the "death" of a decedent; and (2) the action must be brought in the name of an "administrator ad prosequendum." N.J.S.A.

2A:31-2. The damages are limited to the "pecuniary advantage which would have resulted by continuance of the life of the deceased." Green v. Bittner, 85 N.J. 1, 11 (1980) (quoting Cooper v. Shore Elec. Co., 63 N.J.L. 558, 567 (E. & A. 1899)). Typically, the most common pecuniary damages sought under the Wrongful Death Act are loss of future financial contributions. See Johnson v. Dobrosky, 187 N.J. 594, 607 (2006). "[T]he right of action depends upon the occurrence of a wrongful and ultimately fatal act or omission and is not limited to the availability of decedent's own cause of action had he survived." Alfone, 87 N.J. at 110. *Recovery under the Wrongful Death Act, while distributed through the decedent's estate by its representative, is not subject to estate taxes or creditors.* See Aronberg, 207 N.J. at 593 (citing Alfone, 87 N.J. at 107).

In practice, the distinctions discussed above are often overlooked without any party recognizing the significant legal blunder aptly described as failure to obtain standing. The issue of standing arises when a plaintiff simultaneously pursues wrongful death and survival claims without first properly administering the decedent's estate. Plaintiffs are forgoing their obligation to obtain letters of general administration, largely due to the bonding requirements, and are instead applying for letters of administration ad prosequendum only, which does not have a bonding requirement. See N.J.S.A. 3B:10-11. While letters of administration ad prosequendum provide plaintiffs standing to pursue wrongful death claims—without letters of general administration—they do not have standing to pursue survival claims. Albeit, many of you reading this may think this is just a technicality or form over

function, but it is not. The implications can be significant—especially for cases involving geriatric decedents who are not necessarily providing their heirs with a “pecuniary advantage.” In those cases, the overwhelming majority of damages are derived from the decedent’s pain and suffering, which are only recoverable under the Survival Act.

In cases where plaintiffs fail to obtain either letters of general administration or ad prosequendum, and both survival and wrongful death claims are pursued, standing should be challenged by the defense. Survival claims are singularly intended to benefit a decedent’s estate and preserve a cause of action for his estate’s representative(s) to pursue damages for injuries sustained during his lifetime. If the estate does not have a legal representative, it cannot act to pursue such claims (similar to a corporation). Thus, a proper party must apply to the surrogate’s court for letters of general administration “on the estate of the decedent” if he intends to bring a survival claim on its behalf. N.J.S.A. 3B:10-1. In the same regard, wrongful death claims are intended to benefit a class, i.e., heirs. The heirs cannot pursue wrongful death claims individually. They must be collectively represented by an administrator ad prosequendum “*specially* appointed for that purpose.” See McMullen v. Maryland Cas. Co., 127 N.J. Super. 231, 238-39, (App. Div. 1974), *aff’d sub nom.*, McMullen v. Conforti & Eisele, 67 N.J. 416 (1975).

It is evident by the language of the Wrongful Death Act that only an administrator ad prosequendum may pursue wrongful death claims. See N.J.S.A. 2A:31-6. However, the legislature’s use of “administrators” in the Survival Act leaves

room for discussion as to who may pursue survival claims, with many plaintiffs arguing administrator includes administrator adprosequendum. This argument defies logic when considering the context of the acts’ legislative history and supporting case law. See N.J.S.A. 1:1-1. First, the Wrongful Death and Survival Acts were enacted in the same body of legislation, 1st Special Session, Chapter 344, in 1955. The two acts are exclusive of one another, and if the legislature had intended for an administrator ad prosequendum to have standing to pursue survival claims, it would have specifically included it in the Survival Act as it did the Wrongful Death Act, and vice versa. Moreover, the language of the Survival Act is clear in that it provides a decedent’s *estate* with a cause of action for “any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser” and letters of general administration are granted “on the estate of the decedent.” N.J.S.A. 2A:15-3 and N.J.S.A. 3B:10-1.

On the other hand, a wrongful death action is “brought for the exclusive benefit of the persons entitled to take intestate property of the decedent (heirs) [and] [t]he administrator ad prosequendum is merely anominal representative of the class mentioned, since he acts as fiduciary for the general administrator who is charged with distribution of the funds recovered.” Kasharian v. Wilentz, 93 N.J. Super. 479, 481 (App. Div. 1967); *see also* Gerzberg v. Jacuzzi Whirlpool Bath, 286 N.J. Super. 197, 201 (App. Div. 1995) (“Under our Death Act, in cases of intestacy an action for damages arising out of a wrongful death may be brought only by an administrator ad [prosequendum] *specially* appointed for that purpose.”); *see also* N.J.S.A. 3B:10-11 (titled

*“Administration ad prosequendum on death by wrongful act”). An administrator ad prosequendum does not represent a decedent’s estate, and “no payment in settlement [] or satisfaction of judgment” for wrongful death claims may be made in his name and must be made “only to the duly appointed general administrator.” N.J.S.A. 2A:31-6.*

If an administrator ad prosequendum is specially appointed for the purpose of bringing wrongful death claims, how can he

act without appropriate appointment on behalf of the estate? The answer is self-evident. He cannot!



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