

Probate Pitfalls in Wrongful Death Cases

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Action by the probate court is essential to properly handle a wrongful death case. Some of the pitfalls that can trap wrongful death litigants and their attorneys are:

1. An Unknown Heir Can Bust a Settlement

In a 1997 case from San Antonio, no heirship determination was obtained in the probate court before a wrongful death case was settled for over \$500,000. The settlement was with the three adult children of the deceased, who brought the original suit. Later, a child born six months after the deceased's death brought a second suit against the same defendant. The defendant's motion for summary judgment was denied, and the second suit proceeded.

In addition to exposing the defendant to a second suit, a post settlement claim by an unknown heir can also be harmful to the plaintiff. Most release agreements have provisions that require the plaintiff to indemnify the defendant from such subsequent claims. Such a claim can be avoided by obtaining a declaration of heirship in the probate court.

2. The Estate Representative Must be a Party to the Release

The estate of the deceased can legally act only through the estate's personal representative (the estate executor or the administrator), who must first be formally appointed by the probate court. The personal representative should sign the release in his or her representative capacity.

3. The Probate Court Must Approve the Settlement

The settlement needs to be approved by the probate court to be fully binding on the estate, and to protect the personal representative from claims by estate beneficiaries that the settlement was not a fair one.

4. The Damages Should be Apportioned by the Court

As part of the court approval by the probate court, the court should apportion the settlement funds between the wrongful death damages and the survival damages, since the people receiving those two sets of damages are often different and since the survival damages are exposed to creditor's claims of the deceased. The wrongful death damages bypass the estate and go directly to the statutory beneficiaries: the surviving spouse, children, and parents of the deceased. The survival damages go to the estate and, once creditor's claims are considered, pass to the beneficiaries of the will or to the deceased's heirs in the absence of a will.



5. Conclusion

Wrongful death clients should be advised that probate court involvement is needed to properly handle their claims

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