

Surrogate's Court Wrongful Death Compromises 101

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In any wrongful death action, a successful outcome for your client will doubtlessly be hard won. However, whether recovery comes from an “action or by settlement without an action,”¹ counsel’s job is far from over once an award is procured in the Supreme Court as the final phase of wrongful death litigation involves Petitioning the Surrogate’s Court to direct the final distribution of the recovery from the Decedent’s Estate to the proper parties.

Without question, navigating the procedural mandates regarding Wrongful Death Compromises can be a difficult and time consuming task. However, despite the guidance offered in EPTL 5-4.4 through 5-4.6, and Rules of the Surrogate’s Court 207.38, questions and complications inevitably arise during this process that can frustrate practitioners, and the Court, alike. Indeed, there has been a degree of friction between the Surrogate’s Court and the Supreme Court as of late regarding the correct way to proceed in these matters, one Surrogate’s having recently Ordered the return of Attorney’s fees paid out from the Estate, approved by a Supreme Court Justice, until such time as the Compromise Order was completed properly.²

As indicated above, EPTL 5-4.1 through 5-4.6, in conjunction with Rule of the Surrogate’s Court 207.38, establish the statutory and procedural framework for Wrongful Death Compromises. Though these statutes and rules ostensibly offer a complete description of the requirements for this application, they do not offer the clearest guide for how to properly Petition the Surrogate for the relief required. Though far from exhaustive, the following is a basic roadmap and primer to the world of Wrongful Death Compromises in the Surrogate’s Court.

At the outset, counsel should first be sure to have the Supreme Court approve of the compromised settlement in writing, such as in a “so ordered” Stipulation or Decision and Order. If this is done, the settlement is presumed reasonable. If the Supreme Court fails to do so, the Surrogate will consider the adequacy of the settlement as part of their review of the Petition and attending documents which seek the issuance of the Compromise Decree.

Although the Supreme Court has the authority to direct the allocation of settlement funds in a Compromise Order, due to the procedural nuances mandated by EPTL 5-4.6 this is nevertheless a task often best left to the Surrogate. So much so that the statute

itself requires that the Surrogate's Court attended to issues of allocation unless there is "good cause shown."

The compromise proceeding is initiated in the Surrogate's Court by filing a Petition which must include, *inter alia*, the basic facts surrounding the wrongful death matter, the Distributees, the desired allocation between the pain and suffering award and those attributed to wrongful death, litigation expenses, etc.³ Monies awarded and attributable to Wrongful Death, as opposed to Personal injury, are allocated to Distributees only, the rationale being that this is a direct compensation for their loss given their direct dependence on the Decedent. Conversely, damages attributable to personal injury and pain and suffering are allocated through the Estate, either by testate or intestate distributions.⁴ Importantly, the filing fee for the Petition is determined based upon the amount of the gross settlement.

The Petition itself must be supported by: 1) an Attorney Affirmation, reciting legal services rendered, specific means of attorney compensation, etc.⁵; 2) a simple accounting by the Fiduciary of the Estate including the gross proceeds, expenses, and a proposal detailing the allocation of the funds; and 3) a proposed Decree.

The Proposed Decree, which includes a recapitulation of the relief sought, must provide, where applicable, details of how the funds are allocated between wrongful death and pain and suffering damages; Guardian ad litem fees; reimbursements of expenses; and fiduciary commissions. If an infant is the recipient, or one of the recipients, of the Wrongful Death settlement, the Decree must direct sums below \$10,000 toward the parents or natural guardian; if there is a compromise above \$10,000, it must include language directing payment to an appointed guardian. In the event that an infant is involved and a sum of over \$10,000 is to be allocated, counsel should be sure to have the proper party Petition, pursuant to SCPA Article 17, for letters of Guardianship over the infant's property prior to seeking the compromise Decree. If no such letters have been issued, the Decree must include language that payment will not be released for 60 days pending the issuance of letters and appointment of a Guardian.

As with most Petitions Submitted to the Surrogate's Court, a Citation will issue, and must be served upon the interested parties so as to obtain proper jurisdiction over them. Absent the service of Citation, jurisdiction can also be obtained upon Waiver and Consent. Interested Parties who require the service of a Citation include the Decedent's Distributees, and the personal representatives thereof if any Distributee has post-deceased the Decedent.⁶ Importantly, for purposes of a Wrongful Death Compromise, the Decedent's parents are included in the class of interested parties who must receive notice of the Citation return date.⁷ Additionally, the Decedent's attorney who handled the

Supreme Court action , creditors, and any beneficiaries under a will granted probate are interested parties, requiring notice, as well.

The monies attributed to wrongful death will still be allocated based in the allocation equation set forth in Matter of Kaiser (198 Misc 582 [Kings Sur 1950]), which produces a percentage award to the distributees based in their life expectancy and their dependency upon the Decedent's. However, the automatic application of the Kaiser equation is not mandated. Indeed, where Kaiser would produce an inequitable outcome, due to Kaiser's emphasis on the Distributee's age or otherwise, a Surrogate, in their discretion, may allocate funds under their powers of equity so as to produce the fairest result. (see Matter of Acquafredda, 189 AD2d 504 [App Div 2nd 1993]).

Regarding an issue close to the hearts of the Westchester County Bar Association's readership, the allocation of attorney's fees are closely reviewed by the Surrogate, especially in circumstances where children are involved. While retainer agreements are given consideration, they are nevertheless not determinative as the Surrogate has the ultimate decision regarding what the attorney will be paid out of the Estate. Notably, as is also typical in SCPA 2110 proceedings, most disbursements will not be recoverable by counsel.

Though far from a complete explanation of the Wrongful Death Compromise process, this basic guide hopes to lay a foundation for Practitioners so as to streamline their application for relief to the Surrogate, and prevent the unnecessary delays that might occur for those unfamiliar with the requirements of the EPTL.

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¹ EPTL 5-4.4 (a)

² see In re Stokes, NYLJ 5/30/12, p. 27

³ see Uniform Rules of the Surrogate's Court 207.38 (b) (1-8) for a more detailed list of required information.

⁴ EPTL 5-4.3

⁵ see Uniform Rules of the Surrogate's Court 207.38 (d) (1-5)

⁶ see EPTL 4-1.1 and 5-4.4

⁷ see EPTL 5-4.4