

## **Surviving Wrongful Death Part I:**

### **An Overview**

By Mark McGrath

As statutes go, North Carolina's wrongful death statute is a seemingly benign piece of legislation. Under common law, all tort claims were extinguished or "abated" by the death of their holder, regardless of the degree of pain, suffering or general misery endured by the deceased prior to his demise. Our General Assembly saw fit to rectify that inequity by enacting the North Carolina wrongful death statute, presently codified at G.S. section 28A-18-2.

In essence, the statute provides that the legal representative of a decedent's estate may bring an action against any person who is responsible for causing the decedent's death.

While the statute is largely self-explanatory, several points should be kept in mind. The suit must be brought by the legal representative of the decedent's estate. This means that an estate must be opened, and a personal representative must be appointed by the clerk. It is not enough that a person is named as executor in the decedent's will. There must be a formal appointment.

From the plaintiff's perspective, the client will be the estate of the decedent. Accordingly, the attorney representing the plaintiff will be accountable to the estate's legal representative, not the children of the deceased, not the spouse of the deceased, and not the family as a whole. Counsel should be careful to avoid including non-clients in meetings and discussions, as the participation of non-parties will likely render the substance of those meetings discoverable.

Because the proceeds of a successful wrongful death action do not become assets of the estate, these proceeds are not subject to the claims of creditors. The statute does provide, however, that the estate is responsible for funeral expenses and pre-death medical expenses up to \$4,500, said amount not to exceed 50 percent of the total recovery.

The estate is not, however, the economic beneficiary of the wrongful death action. Rather, the proceeds of a judgment or settlement obtained in a wrongful death action must be distributed to the heirs of the decedent in accordance with the Intestate Succession Act.

The statute of limitations is two years from the date of death. Counsel must keep in mind, however, that an applicable statute of repose, which will begin running when the last act of actionable negligence occurs, can cut short the two-year statute of limitations, or even render the claim time-barred before the decedent dies.

Wrongful death settlements require court approval, unless all of the statutory beneficiaries are adults and have consented to the settlement in writing. This provision is found in G.S. section 28A-13-3(23).

The contributory negligence of a beneficiary will bar his recovery under the statute. For example, if a son's negligence caused his father's death, the son's contributory negligence will prevent him from taking his intestate share of the proceeds. Moreover, where the proceeds are the product of a jury

verdict, the total award will be reduced by the amount the negligent beneficiary would have otherwise taken by application of the Intestate Succession Act.

While the statute appears to be a model of simplicity and reasoned legislation, its interpretation by the courts has yielded some surprising and downright bizarre rulings. In subsequent installments of this series we will explore issues of pleading, damages, statutes of limitation, professional conduct and other vagaries of wrongful death claims.