

Over the years, it has become apparent that a crossover between the personal injury practice of our members and the areas of probate and public benefits exists. Our very own Bridget O'Brien Swartz spearheads this column which highlights issues of relevance and importance in these areas to our members. If you have issues of particular interest you would like addressed, please notify Bridget at boswartz@dbfazlaw.com



Make a Claim, Any Claim-If You Dare!

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The case: Plaintiff suffers serious injuries eventually resulting in death. Many potential claims exist, including wrongful death actions, survival actions and even actions under the Adult Protective Services Act. But before jumping in feet first, some important considerations include who are the statutory beneficiaries in the wrongful death action? Who are the heirs/devisee in a survival action? In the survival action, is any recovery subject to medical liens and/or to estate creditors? When combining such actions, what are the duties of the personal injury attorney to all these interested parties?

A. Introduction:

Three fact patterns:

1. A plaintiff suffers serious injuries in a vehicular accident caused by the negligence of a defendant. A personal injury action is filed. The plaintiff later dies prior to the resolution of the personal injury matter. The death is due to the injuries caused by the defendant. A wrongful death action is now appropriate. What is the disposition of the personal injury action?
2. A plaintiff suffers serious injuries in a vehicular accident caused by the negligence of a defendant. The plaintiff lives for a period of time subsequent to the injuries and then dies as result of the injuries. Both a personal injury action and a wrongful death action are available. A wrongful death action will almost always be filed. Is it beneficial to file a personal injury action?
3. A plaintiff allegedly suffers abuse and neglect in a nursing home and subsequently dies as a result of the abuse and neglect. A wrongful death action, a survival action and an action under the Arizona Adult Protection Services Act are contemplated.

In the first two fact patterns, two separate actions can be maintained:

1. A personal injury action (hereinafter a survival action under A.R.S. § 14-3110), and,
2. A wrongful death action under A.R.S. § 12-611.

In the third fact pattern, a wrongful death action, a survival action, and an action under the Arizona Adult Protective Services Act pursuant to A.R.S. § 46-455 can be maintained.

This article will discuss the following issues in the personal injury attorneys' evaluation of filing/maintaining survival actions and wrongful death actions in the same case:

1. Conflicts may arise among the interested persons to the wrongful death and survival actions which conflicts may present to the Personal Representative and the attorneys representing the Personal Representative.
2. Medical liens that may be asserted against survival action awards/settlements but that cannot be asserted against wrongful death proceeds.
3. Creditor claims arising out of the death of the decedent that may be asserted against the award/settlement in the survival action but that could not be asserted against wrongful death proceeds.
4. Actions under the Adult Protective Services Act (APSA).

B. Comparison of Damages in Wrongful Death Actions, Survival Actions and Actions Under the Arizona Adult Protective Services Act.

1. Damages in a Wrongful Death Action

In a wrongful death action, the damages belong to the statutory beneficiaries which include and are limited to the following:

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- a. Surviving husband or wife, child, parent or guardian, or
- b. if there are no survivors under a., then the estate of the decedent.

A.R.S. §§ 12-612.A and 12-613.

Under A.R.S. § 12-613, a jury must award damages that are “fair and just with reference to the injury resulting from the death to the surviving parties.”

Damages include the decedent’s prospective earning capacity, loss of love, affection, companionship, guidance, consortium, personal anguish, and suffering. *See Vasquez v. State*, 206 P.3d. 753, 220 Ariz. 304 (App. 2008)(Memorandum Decision).

Economic damages may include:

1. Financial support the deceased would have provided to the family over the course of the deceased’s lifetime.
2. The loss of gifts or benefits that the statutory beneficiaries could have expected to receive from the deceased during the deceased’s lifetime.
3. The reasonable value of household services that the deceased would have provided during the deceased’s lifetime.
4. Funeral and burial expenses.

And note, **the amount recovered in wrongful death actions “shall not be subject to debts or liabilities of the decedent, unless the action is brought on behalf of the decedent’s estate”.** A.R.S. § 12–613.

2. Damages in a Survival Action

Damages in a survival action include:

1. Medical expenses incurred. Watch for health insurance liens, Medicare claims for reimbursement, and hospital liens that may exist. (Also, watch for AHCCCS creditor claims for nursing home expenses paid during the decedent’s lifetime known as an “estate recovery claim.”)
2. Loss of earnings up to the time of death. *See Rodriguez v. Lytle*, No. 1 CA-CV 20-0048, Ariz. App. 2021).
3. Funeral and burial expenses.
4. Punitive damages. *See Quintero v. Rodgers*, 212 P.2d. 874, 221. Ariz. 536, (Ariz. App. 2009).

Damages in a survival action **do not include pain and suffering**. *See* A.R.S. § 14-3110. Also excluded under “pain and suffering” are hedonic damages suffered by the decedent. In *Quintero v. Rodgers*, *supra* at 878, the Court of Appeals held that “loss of enjoyment of life” (hedonic damages) are included in the category of “pain and suffering” and, therefore, are excluded damages under the survival statute. Therefore, the Court held that the plaintiff,

the Personal Representative of Quintero’s estate, could not claim damages for the decedent’s loss of enjoyment of life.

A survival action under A.R.S. § 14-3110 is an asset of the estate of the decedent. Any recovery by the estate may be subject to medical liens and subject to creditor claims, including taxes, health care provider billings, credit card debt, etc.

Special Note: When a personal injury case is filed and a loss of consortium claim is made, the loss of consortium claim **does** survive the death of the person suffering the injury. *See Martin v. Staheli*, 248 Ariz. 87, 457 P.3d. 53, (Ariz. App. 2019). This situation may arise, as it did in *Martin*, when the person suffering the injury dies during the personal injury claim, and the death is **not** related to the personal injury and, thus, there is no wrongful death action.

3. Damages in an Adult Protective Services Act (APSA) Action

Damages under the APSA are additive to the normal damages in a survival action and require special knowledge, research and experience. The defendants under the Adult Protective Services Act will generally be health care providers, guardians, agents under powers of attorney, de facto fiduciaries.

Damages under APSA include:

1. The payment of actual and consequential damages, as well as costs of suit, to those persons injured by the tortfeasor’s conduct. **Pain and suffering is such a damage.** *See Denton v. American Family Care*, 945 P.2d. 1283, 190 Ariz. 152 (Ariz. 1997).
2. The award of punitive damages under common law principles that are generally applicable to the award of punitive damages in other civil actions.
3. Possible intervention by the Attorney General’s Office and possible severe consequences to the alleged tortfeasor including restrictions on future activities of the tortfeasor up to permanent injunctions of the future activities or investments of any tortfeasor including prohibiting the tortfeasor from engaging in the same type of endeavor or conduct.

C. Discussion

So, with this background, some pointers to consider. If you are contemplating (a) a wrongful death action and a survival action, or (b) a wrongful death action, survival action and APSA action, check for possible conflicts at the beginning, understand the

possible conflicts and plan for resolution of the possible conflicts.

In a survival action:

- The takers of the estate are the devisees under a decedent’s Last Will and Testament or the heirs of an intestate estate. The Personal Representative has duties of fairness and loyalty to the takers of the estate.
- The estate is subject to medical liens and creditors’ claims. Creditor claims could include medical expenses, credit card balances outstanding, as well as other debts of the decedent. The Personal Representative has duties of fairness and impartiality to lien holders and to creditors.

In a wrongful death action:

- The statutory beneficiaries include the spouse, parents and children of the decedent. The damages to these statutory beneficiaries are measured in part by the relationship of the statutory beneficiary to the decedent and the support the decedent provided to the statutory beneficiary. The Personal Representative has fiduciary responsibilities to act on behalf of the statutory beneficiaries.

Where an attorney is representing the Personal Representative who has varying and conflicting duties to interested persons including statutory beneficiaries, heirs/devisees of a decedent’s estate, and creditors/lien holders of a decedent’s estate, the attorney has the duty of impartiality and fairness to all of these interested persons. *See Estate of Shano*, 869 P.2d.1203, 177 Ariz. 550, (App. 1993); *see Estate of Fogleman*, 3 P.3d. 1172, 197 Ariz. 252, (Ariz. Ct. App. 2000).

Analyze the duties of the Personal Representative with respect to the wrongful death action and the survival action and whether conflicting duties exist, determine if conflict waivers are possible, separate representation is necessary, or foregoing one of the actions makes sense.

Be aware of the situation where the ultimate resolution may not be served by the filing of a survival action where damages include medical expenses subject to substantial liens or substantial creditor claims involving the debts of the decedent including AHCCCS estate recovery claims which may exist.

Once you have determined both a survival action and a wrongful death action are appropriate, an interesting note is the holding in the *Barragan v. Superior Court of Pima*

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County, 470 P.2d. 722, 12 Ariz. App. 402 (Ariz. App. 1970):

We hold, therefore, that a claim under the survival statute and a claim under the wrongful death statute are separate and distinct notwithstanding they originate from the same wrongful act. The former permits recovery for the wrong to the injured person and is confined to his personal loss while the latter is for the wrong to the beneficiaries, confined to their loss because of the death. The latter begins where the former ends and recovery on both is not a double recovery for a single wrong but rather separate recoveries for different wrongs. (citation omitted). *Id.* at 723.

So ride that opinion as far as you can - but remember that if the matter moves to settlement prior to trial, damages in a survival action are quite different from those in a wrongful death action and the persons who are statutory beneficiaries may be quite different from the heirs//devisees of the decedent's estate as well as the existence of lien holders and the existence of creditors in the survival action who would have no claims in the wrongful death action.

As the authors reviewed the developing law in this area, further continuing legal education in this area seems warranted. This article is just the "tip of the iceberg." This is especially true with the powerful APSA action that may be contemplated as well as a wrongful death action if the death arose out of the APSA claim. If the reader has interest in assisting the authors in developing additional education in this area, please feel free to contact us. ■

Endnotes

- 1 See A.R.S. § 36-2935 regarding AHCCCS right to pursue a claim against a decedent's estate to recover the cost of long term care services (Arizona Long Term Care System benefits) rendered to the decedent at age 55 years and later.

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