



BY JEB BUTLER

Death Cases:

What Duties You Owe and to Whom You Owe Them

A tractor-trailer blows through a red light. It smashes into a sedan. There is a fire. The woman inside screams in pain as bystanders rush to the car, but she dies before anyone can extricate her. She leaves behind a doting husband, two adult sons from a prior marriage, and a bookstore that she owned and operated. The surviving spouse, who is also the estate's executor, brings the case to you. You take it.

You have just accepted a heavy responsibility. Handling heavy responsibilities is your job. But where, exactly, do your duties lie?

THE DUTIES

You will bring at least two claims: a wrongful death claim on behalf of the husband and sons, and a claim on behalf of the estate. Because the surviving spouse has the sole statutory authority to prosecute the wrongful death claim—including the authority to settle the case without the sons' consent¹—and is also the executor of the estate, the question of to whom your duties are owed seems simple.

It isn't.

Although the surviving husband has the sole authority to settle the wrongful death claim, the wrongful death statute establishes that he must share the proceeds with the decedent's adult sons.² The Georgia Supreme Court has held that the surviving husband brings the wrongful death claim not only in his

own interest, but also “as the representative of the children”—even if the children are adults.³ He bears the duty “to act prudently in asserting, prosecuting and settling the claim.”⁴ If the surviving spouse fails to discharge this duty he owes to the decedent's surviving children, he could be “subject . . . to liability for breach of duty as a representative.”⁵

And as his lawyer, so could you. Where a lawyer brings a wrongful death claim, the lawyer's duty runs not only to the surviving spouse, but also to any surviving child who may share in the recovery.⁶ In such a circumstance, the lawyer “owe[s] a duty of reasonable care to the [decedent's children] as third-party beneficiaries of [the lawyer's] relationship with [the surviving spouse].”⁷ If the lawyer and surviving spouse do not fulfill their duties to the surviving children, the children can sue, and survive summary judgment against, both the surviving spouse and the lawyer—either immediately, or within four years of the day they turn eighteen.⁸ With regard to the wrongful death claim, therefore, your duties (and your potential liabilities) run both to the surviving husband and to the surviving sons.

As in the wrongful death context, the surviving husband's duties as executor of the estate require him to act in a representative capacity. As executor, he owes a fiduciary duty to the estate's beneficiaries.⁹ Unlike in the wrongful death context, however, your client's duty to a third

party does not become your duty. As the Georgia Court of Appeals has held, “the existence of a duty by the administrator to the heirs does not translate into a duty by the administrator's lawyers to the heirs . . . Neither are the heirs of an estate third-party beneficiaries of the attorney-client relationship between an attorney hired by an administrator [or executor].”¹⁰ “[T]he lawyer's client is the administrator [or executor], not the estate.”¹¹

It is not clear why the duties of a wrongful death representative become the duties of the representative's lawyer, but the duties of an executor do not. It may be because the interests of wrongful death claimants are usually aligned (making representation of all interested parties possible), whereas “[t]ypically in estate administration conflicting interests vie for recognition” (making representation of all interested parties difficult).¹²

HOW THE DUTIES MIGHT CONFLICT

Because the surviving husband in this hypothetical must act in two capacities—as the sons' representative in the wrongful death claim, and the estate's representative in the estate's claim—there is a possibility for conflict if the husband favors one claim over the other. In some circumstances, of course, there is nothing to worry about. If the decedent's will prescribes that the husband and sons share equally in the estate, then there is no conflict because



each son, and the surviving husband, is entitled to one-third of the recovery whether the money is recovered by the estate or recovered through the wrongful death claim.¹³ The same would be true if the decedent died intestate.¹⁴

Suppose, however, that the surviving husband is the sole beneficiary under the decedent's will. Suppose that you settle the case and must decide what proceeds to allocate to what claim. Both claims have value because the decedent's pain and suffering from the fire will inure to the estate's claim, and the decedent's future earnings from the bookstore will inure to the wrongful death claim. Recall that you have duties to maximize both claims: you owe a duty to the husband as executor to maximize the estate's claim, and a duty to the husband and sons to maximize the wrongful death claim. But it is in the husband's interest to allocate most of the proceeds to the estate claim, where

he is the sole beneficiary; and in the sons' interest to allocate most of the proceeds to the wrongful death claim, where they may share in the recovery. There is only so much money to allocate. You have a potential conflict.

This issue has reached the Court of Appeals. In *Home Insurance v. Wynn*, the decedent in a car wreck was survived by his spouse, Mrs. Wynn, and four adult sons from a prior marriage.¹⁵ Mrs. Wynn was the sole beneficiary under the

decedent's will.¹⁶ She brought two claims under which she stood to retain all of the recovery (a claim on behalf of the estate and a loss-of-consortium claim) and one claim under which she would have to share any recovery with the decedent's sons (a wrongful death claim).¹⁷ Mrs. Wynn's lawyer settled the case for \$650,000 against the at-fault driver's liability insurer.¹⁸ The lawyer allocated half of the recovery to the wrongful death claim and half to the claims under which Mrs. Wynn would

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retain all of the recovery.¹⁹ However, the lawyer took a disproportionate majority of his fee out of the wrongful death proceeds—thereby benefitting Mrs. Wynn at the expense of the decedent’s sons.²⁰ Neither Mrs. Wynn nor her lawyer gave the sons any notice about the settlement, and when Mrs. Wynn received the wrongful death proceeds, she deposited all of them in a bank account bearing only her name.²¹ The sons did not receive their share of the money and did not learn about the settlement until eight months later.²²

The sons sued Mrs. Wynn, Mrs. Wynn’s lawyer, and the liability insurer.²³ A jury returned a verdict, including punitive damages and attorneys’ fees, against Mrs. Wynn and her lawyer.²⁴ The Court of Appeals upheld those portions of the verdict.²⁵

WHAT YOU CAN DO ABOUT IT

The Court of Appeals in *Home Insurance* did not articulate the solution to the surviving spouse’s conflict as clearly as it articulated the problem, but it did include this sentence: “[t]he trustee [a reference to Mrs. Wynn] must avoid being placed in such a position, and if she cannot avoid it, she may resign, may fully inform the beneficiaries of the conflict, or may request the court to appoint a guardian ad litem to protect the unprotected interests.”²⁶ This sentence provides some guidance.

The court’s use of the disjunctive—i.e., the word “or”—indicates that a plaintiff has options. In this article’s hypothetical, the surviving husband could resign as executor. So doing, however,

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would frustrate the intent of the testator. Alternatively, the husband (and you, his lawyer) could “fully inform the beneficiaries of the conflict” by sending a letter to the sons explaining the situation. If the husband and the sons cannot agree on a fair way to divide the proceeds, you could advise the sons to retain counsel. If the surviving children were minors, you could petition the court for the appointment of a guardian ad litem.²⁷

It would also be wise to avoid the other mistakes that the lawyer made in *Home Insurance*. Give the sons notice of the claim and of any proposed settlement. Allocate money fairly, and do not take your fee disproportionately from proceeds due to the sons. Be forthright. Make sure the sons get the money to which they are entitled. Although the Court of Appeals did not give precise directions for navigating this conflict, these steps should help prevent problems.

CONCLUSION

Death cases can bring vindication to surviving family members and, in a limited way, compensate them for what they have lost. Handling such cases is one of the reasons many of us became lawyers. But if a lawyer doesn’t understand what

duties he owes and to whom he owes them, these potentially rewarding cases can turn disastrous. ●

Notes

- 1 O.C.G.A. § 51-4-2(c).
- 2 O.C.G.A. § 51-4-2(d).
- 3 *Mack v. Moore*, 256 Ga. 138, 138 (1986), *overruled on other grounds by Brown v. Liberty Oil & Ref. Corp.*, 261 Ga. 214 (1991); *Home Ins. Co. v. Wynn*, 229 Ga. App. 220, 224-25 (1997).
- 4 *Mack*, 256 Ga. at 138.
- 5 *Id.*
- 6 *Home Ins.*, 229 Ga. App. at 224-25.
- 7 *Id.*
- 8 *Id.*; *Toporek v. Zepp*, 224 Ga. App. 26, 28 (1996).
- 9 *Rhone v. Bolden*, 270 Ga. App. 712, 718 (2004); accord O.C.G.A. § 53-7-1; *Greenway v. Hamilton*, 280 Ga. 652, 653-54 (2006).
- 10 *Rhone*, 270 Ga. App. at 718, 720 (2004).
- 11 *Id.*
- 12 *Rhone*, 270 Ga. App. at 718 (quoting *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1269 (1990)).
- 13 § 51-4-2(d) (wrongful death statute prescribes one-third recovery for each in this situation).
- 14 O.C.G.A. § 53-2-1(c)(1) (probate code prescribes one-third recovery for each in this situation).
- 15 *Home Ins.*, 229 Ga. App. at 220.
- 16 *Id.* at 221-22.
- 17 *Id.* at 220-21.
- 18 *Id.* at 220.
- 19 *Id.* at 221.
- 20 *Id.*
- 21 *Id.*
- 22 *Id.*
- 23 *Id.*
- 24 *Id.*
- 25 *See generally id.*
- 26 *Id.* at 222.
- 27 *See In re Woodall*, 231 Ga. App. 391, 396 (1998) (“[I]n any legal proceeding wherein the interest of the ward could be adverse to that of the guardian, the guardian must petition the court for the appointment of a guardian ad litem”).

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