

OUTLINE OF LAW & RULES PERTAINING TO SETTLEMENT OF DEATH ACTIONS

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I. STATUTORY BASIS FOR DEATH ACTIONS

A. 42 Pa. C.S.A. 8301 – Wrongful Death Actions

1. Statutorily Created
2. Only beneficiaries are spouse, children or parents
3. Special damages provided in Subsection (c) include reasonable hospital, nursing, medical, funeral expense and expenses of administration necessitated by reason of injuries causing death.

4. Damages pass outside of decedent's estate.

5. For an explanation of nature and types of damages recoverable – look to Pennsylvania Suggested Standard Jury Charge Civil Jury Instructions 6.10 and Case Law Defining Wrongful Death Damages. Wrongful Death Damages are the following:

5.1 Hospital, medical, funeral, burial, and estate administration expenses incurred;

5.2 An award that will fairly and adequately compensate the family of decedent (wife, children, parents, etc.) for their loss of any contributions they would have received between the time of the death of decedent and today. Note: Should also continue into the future. This includes all amounts of money that the decedent would have spent for or given to his/her family for such items as shelter, food, clothing, medical care, education, entertainment, gifts, and recreation;

5.3 All sums decedent would have contributed in support of his or her family between today and the end of his life expectancy;

5.4 Addition to monetary contributions, this includes monetary value of services, society, and comfort that he/she would have given to his or her family had he/she lived, including such elements as work around the home, provision of physical comforts and services, provision of society and comfort;

5.5 On behalf of surviving children, an amount that will fairly compensate the loss of service of decedent as a mother or father would have contributed to his or her children. This would include monetary value of guidance, tutelage, and moral upbringing that you believe children would have received up to the time you believe such services would have been provided had the death not occurred.

B. 42 Pa. C.S.A. 8302 – Survival Action

1. Not a new cause of action, but rather just a codification of the notion that

a cause of action survives death and can be brought by the personal representative of the deceased.

2. Note that any recovery goes to the estate of decedent.
3. Distribution of proceeds depends upon whether decedent died testate or intestate.
4. Proceeds are taxable in the estate at rates depending upon the relationship of beneficiaries of the estate.
5. See Pennsylvania Suggested Standard Civil Jury Charge Jury Instructions 6.10 and Case Law for fuller explanation of type of damages recoverable.

5.1 Total amount decedent would have earned between the time of the accident and death;

5.2 Plaintiff is entitled to the total net amount decedent would have earned between the time of death and today. The net earnings are determined by calculating the total amount of decedent's gross earnings, including fringe benefits between the date of death and today. From this amount you deduct the amount of monetary contributions that would have been made to his family during this period (which you have already awarded to plaintiff under the Wrongful Death Act) and the amount of money decedent would have spent on himself for personal maintenance during this period. The probable costs of personal maintenance includes only the necessary and economical living expenses such as food, shelter and clothing decedent would have been required to spend in order to maintain life during this period;

5.3 Plaintiff is entitled to the value of the net amount the decedent would have earned between today and the end of his life expectancy. Again, the earnings for this period are determined as follows: you must first calculate the total amount of decedent's gross earnings between today and the end of his life expectancy. From this amount you deduct probable costs of necessary and economical living expenses to sustain life during this period (together with amount of monetary contributions he would have made to his family during this period, which you have already awarded under wrongful death). The award to the estate for total lost future net earnings thus represents a total net earnings of the decedent's work life expectancy;

5.4 Plaintiff is entitled to be awarded an amount to compensate for mental and physical pain, suffering, and inconvenience the decedent endured from the moment of his injury to the time of his death as a result of the accident.

C. Please note that Wrongful Death and Survival Act Damages do not overlap or duplicate each other – rather part of the losses go to one cause of action and the balance to the other.

D. Emotional Distress of Other Family Members. Remember that this is a totally separate cause of action and does not pass through anyone's estate unless of course the person so asserting has died.

II. COURT RULES GOVERNING DEATH ACTIONS.

A. PRCP 213. Consolidation, Severance and Transfer of Actions and Issues within a County. Actions for Wrongful Death and Survival Actions.

(e) A cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial.

(1) If independent actions are commenced or are pending in the same court, the court, on its own motion or the motion of any party, shall order the actions consolidated for trial.

(2) If independent actions are commenced in different courts, the court in which the second action was commenced, on its own motion or the motion of any party, shall order the action transferred to the court in which the first action was commenced.

(3) If an action is commenced to enforce one cause of action, the court, on its own motion or the motion of any party, may stay the action until an action is commenced to enforce the other cause of action and is consolidated therewith or until the commencement of such second action is barred by the applicable statute of limitation.

B. PRCP 2227. Compulsory Joinder.

(a) Persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants.

(b) If a person who must be joined as a plaintiff refuses to join, he or she shall, in a proper case, be made a defendant or an involuntary plaintiff when the substantive law permits such involuntary joinder.

C. PRCP 1020. Pleading More than one Cause of Action. Alternate Pleading. Failure to Join Bar.

(d)(1) If a transaction or occurrence gives rise to more than one cause of action against the same person, including causes of action in the alternative, they shall be joined in separate counts in the action against any such person.

(4) Failure to join a cause of action as required by subdivision (d)(1) of this Rule shall be deemed a waiver of that cause of action as against all parties to the action.

D. PRCP 2201 – 2224 inclusive deal specifically with Actions for Wrongful Death.

1. Rule 2202(a) provides action only by personal representative or statutory beneficiary for benefit of statutory heirs.

2. Rule 2203 provides for removal and substitution of plaintiff.

3. Rule 2204 requires certain specific averments in the pleadings.

4. Rule 2205 provides for Notice to Statutory Beneficiaries. When an action for wrongful death has been instituted, the plaintiff shall give notice by registered mail or in such other manner as the court shall direct by local rule or special order, to each person entitled by law to recover damages in the action that an action has been instituted for wrongful death naming a decedent and stating the court, term and number of the action.

5. Rule 2206 overlaps with Rules 2039 and 2064, but is broader and gives

the Court the power to settle any disputes which might arise as to distribution of wrongful death proceeds. This rule also spells out the types of investment vehicles acceptable for funds going to minors or incompetents. Note: This rule subsection (c) also provides for approval of counsel fees and expenses, the same as does Rule 2039 and Rule 2064.

E. Lycoming County Local Rule 2039

1. Applies where injuries to a minor.
2. Adds requirements for medical evidence.
3. Adds requirements for opinion of counsel.
4. Minors written approval if 16 years or older.

III. PROBATE CODE REFERENCES RELATING TO WRONGFUL DEATH AND SURVIVAL ACTIONS.

A. 20 Pa. C.S.A. § 2101. Intestate Estate

If a person is excluded from a Will and survives the decedent, the share of the decedent's intestate estate passes as if that individual or each member of that class had disclaimed his intestate share..

B. 20 Pa. C.S.A. § 2102. Share of surviving spouse.

The intestate share of a decedent's surviving spouse is:

- (1) If there is no surviving issue or parent of the decedent, the entire intestate estate.
- (2) If there is no surviving issue of the decedent but he is survived by a parent or parents, the first \$30,000 plus one-half of the balance of the intestate estate.
- (3) If there are surviving issue of the decedent all of whom are are [sic] issue of the surviving spouse also, the first \$30,000 plus one-half of the balance of the intestate estate.
- (4) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.
- (5) In case of partial intestacy any property received by the surviving spouse under the will shall satisfy pro tanto the \$30,000 allowance under paragraphs (2) and (3).

C. 20 Pa. C.S.A. § 2103. Shares of others than surviving spouse.

The share of the estate, if any, to which the surviving spouse is not entitled, and the entire estate if there is no surviving spouse, shall pass in the following order:

- (1) Issue. - To the issue of the decedent.
- (2) Parents. – If no issue survives the decedent, then to the parents or parent of the decedent.

(3) Brothers, sisters, or their issue. – If no parent survives the decedent, then to the issue of each of the decedent’s parents.

(4) Grandparents. – If no issue of either of the decedent’s parents but at least one grandparent survives the decedent, then half to the paternal grandparents or grandparent, or if both are dead, to the children of each of them, and half to the maternal grandparents or grandparent, or if both are dead to the children of each of them and the children of the deceased children of each of them. If both of the paternal grandparents or both of the maternal grandparents are dead leaving no child or grandchild to survive the decedent, the half which would have passed to them or to their children and grandchildren shall be added to the half passing to the grandparents or grandparent or to their children and grandchildren on the other side.

(5) Uncles, aunts and their children, and grandchildren. – If no grandparent survives the decedent, then to the uncles and aunts and the children and grandchildren of deceased uncles and aunts of the decedent as provided in section 2104(1) (relating to taking in different degrees).

(6) Commonwealth. – In default of all persons hereinbefore described, then to the Commonwealth of Pennsylvania.

D. 20 Pa. C.S.A. § 2104. Rules of succession.

Establishes the shares passing under this chapter to the issue of decedent, to the issue of his parents or grandparents or to his uncles or aunts or to their children, or grandchildren.

E. 20 Pa. C.S.A. § 2105. Spouse’s rights.

The share of the estate to which a widow is entitled shall be in lieu and full satisfaction of her or his rights of dower or curtesy, respectively, at common law.

F. 20 Pa. C.S.A. § 2106. Forfeiture.

A spouse who for one year or upwards previous to the death of the other spouse has willfully neglected or refused to perform the duty to support the other spouse or who for one year has willfully and maliciously deserted the other shall have no right or interest under this chapter in the real or personal estate of the other spouse.

That is also true for a parent who for one year previous to the death of the parents minor or dependent child has failed to support the minor or dependent child or who for one year has deserted the minor or dependent child or who have been convicted of an offense regarding concealing death of the child, endangering welfare of children, or sexual abuse or the federal equivalent.

This section also deals with a slayer’s share.

G. 20 Pa. C.S.A. § 2107. Persons born out of wedlock.

Children born out of wedlock shall be considered the child of his mother.

This section also deals with how to identify child of father. The child is considered a child of father if the couple has been married, if the father openly holds out the child as his child or if there is clear and

convincing evidence, which may include a court determination of paternity but apparently is not necessary.

H. 20 Pa. C.S.A. § 2108. Adopted person.

Adopted people are considered issue of adopting parent or parents.

I. 20 Pa. C.S.A. § 2202. Right of election; nonresident decedent.

When a married person not domiciled in this Commonwealth dies, the rights, if any, of his surviving spouse to an elective share in property in this Commonwealth are governed by the laws of the decedent's domicile at death.

J. 20 Pa. C.S.A. § 2203. Right of election; resident decedent.

When a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of the following property: property passing from the decedent by will or intestacy. The section goes on to include income or use for the remaining life of the spouse of property conveyed by the decedent during his marriage to the extent that decedent had use of the property, property with a right of survivorship, survivorship rights conveyed to a beneficiary by an annuity contract, etc.

This section shall not apply to the following except to the extent that they pass as part of decedent's estate to his personal representative, heirs, legatees or devisees: any conveyance made with the express consent or joinder of the surviving spouse, proceeds of any insurance, including accidental death benefits, on the life of decedent, interest under any broad-based nondiscriminatory pension, profit sharing, stock bonus, deferred compensation, disability, death benefit or other such plan established by an employer for the benefit of its employees and their beneficiaries, property passing by the decedent's exercise or nonexercise of any power of appointment given by someone other than the decedent.

K. 20 Pa. C.S.A. § 2204. Disclaimers, releases and charges against elective share.

Deals with election by spouse as representing a disclaimer in the matters listed.

The following are disclaimed by taking the elective share:

- (1) Property subject to the spouse's election not awarded to the spouse as part of his elective share.
- (2) Property appointed by the decedent's exercise of a general or special power of appointment, and property passing in default of appointment to the extent that the decedent had power to exclude his spouse from any interest therein.
- (3) Property in any trust created by the decedent during his lifetime.
- (4) Proceeds of insurance, including accidental death benefits, on the life of the decedent attributable to premiums paid by him, his employer, partner or creditor.
- (5) Any annuity contract purchased by the decedent, his employer, partner or creditor.
- (6) Any pension, profit sharing, stock bonus, deferred compensation, disability, death benefit or other plan established by an employer for the benefit of its employees and their beneficiaries, exclusive of the Federal social security system and railroad retirement system, by reason of services performed or disabilities incurred

by the decedent.

(7) Community property in the proportion that it represents the decedent's earnings or contributions.

(8) All intangible or tangible personal property and all real property owned by the decedent and his spouse by the entirety or jointly with right of survivorship, in the proportion that such property represents contributions by the decedent.

(9) All intangible or tangible personal property and all real property given to his spouse by the decedent during his lifetime which, or the proceeds of which, are still owned by his spouse at the time of the decedent's death.

L. 20 Pa. C.S.A. § 2206. Right of election personal to surviving spouse.

The right of election of the surviving spouse may be exercised in whole or in part only during his lifetime by him or by his agent in accordance with section 5603(d) (relating to implementation of power of attorney). In the case of a minor spouse, the right of election may be exercised in whole or in part only by the spouse's guardian; in the case of an incapacitated spouse, the right of election may be exercised in whole or in part only by the spouse's guardian or by his agent in accordance with section 5603(d) if the power of attorney qualifies as a durable power of attorney under section 5604 (relating to durable powers of attorney); provided, that, in each case, the election shall be exercised only upon order of the court having jurisdiction of the minor's or the incapacitated person's estate, after finding that exercise of the right is advisable.

M. 20 Pa. C.S.A. § 2207. Waiver of right to elect.

The right of election of a surviving spouse may be waived, wholly or partially, before or after marriage or before or after the death of the decedent.

N. 20 Pa. C.S.A. § 2208. Forfeiture of right of election.

A surviving spouse who under the provisions of section 2106 (relating to forfeiture) would not be entitled to a share of the decedent's estate had he died intestate shall have no right of election.

O. 20 Pa. C.S.A. § 2210. Procedure for election; time limit.

(a) How election made. – A surviving spouse's election to take or not to take his elective share shall be by a writing signed by him and filed with the clerk of the orphans' court division of the county where the decedent died domiciled. Notice of the election shall be given to the decedent's personal representative, if any.

(b) Time limit. – The election must be filed with the clerk before the expiration of six months after the decedent's death or before the expiration of six months after the date of probate, whichever is later. The court may extend the time for election for such period and upon such terms and conditions as the court shall deem proper under the circumstances on application of the surviving spouse filed with the clerk within the foregoing time limit. Failure to file an election in the manner and within the time limit set forth in this section shall be deemed a waiver of the right of election.

P. 20 Pa. C.S.A. § 3371 – This is a cross-reference to 42 Pa. C.S.A. 8302 and simply States that all causes of action survive death.

Q. 20 Pa. C.S.A. § 3375 – Abatement of Action for Failure to Take out Letters – decision in *Salvadia vs. Ashbrook*, 923 A.2d 436 (Pa. Super. 2007) held that if a named party dies after commencement of an action, the attorney of record for the deceased party shall file a notice of death with the prothonotary. Thereafter, letters of administration must be taken out or there will be an abatement of the action for failure to take out letters pursuant to 3375. §3375 provides that the defendant “may” file a petition to abate under circumstances such as those presented in this case. It is up to the defendant to decide whether to file a petition for abatement. Plaintiff must present a reasonable explanation for delay to counteract the petition. The letters of administration must be sought within one year following the filing of the notice of death in a pending action. The fact that litigation is ongoing is not sufficient to prevent the abatement.

R. 20 Pa. C.S.A. § 767 – Parties in Interest – In any proceeding where the orphans’ court division considers that the interests of any taxing authority, including the United States, any state and any political subdivision thereof, may be adversely affected directly or indirectly by a decision of such division because of the effect of such decision on assets subject to tax or for any other reason, the division shall have the power on its own motion or on the application of any party in interest, including the taxing authority, and upon such notice as it may direct, to authorize the taxing authority through its proper officer to appear as a party in interest, and if such an appearance is entered, the taxing authority shall be considered to be a party in interest aggrieved by any decision adversely affecting its interests.

This is the probate code section which gives the taxing authority (Department of Revenue) standing and also gives the Orphan’s Court Division the power to require notice.

S. 20 Pa. C.S.A. § 3323 – Compromise of Controversies.

(a) In General – Whenever it shall be proposed to compromise or settle any claim, whether in suit or not by or against an estate, or to compromise or settle any question or dispute concerning the validity or construction of any governing instrument, or the distribution of all or any part of any estate, or any other controversy affecting any estate, the Court, on petition by the personal representative or by any party in interest setting forth all the facts and circumstances, and after such notice as the Court shall direct, aided if necessary by the report of a Master, may enter a Decree authorizing the compromise or settlement to be made.

(b) Pending Court Action –

(1) Court Order – Whenever it is desired to compromise or settle an action in which damages are sought to be recovered on behalf of an estate, any Court or division thereof in which such action is pending and which has jurisdiction thereof may, upon oral motion by Plaintiff’s counsel of record in such action, or upon petition by the personal representative of such decedent, make an Order appraising such compromise or settlement. Such Order may approve an agreement for the payment of counsel fees and other proper expenses incident to such action.

(2) Order Not Subject To Collateral Attack – The Order of the Court approving such compromise or settlement or an agreement for the payment of counsel fees and other expenses shall not be subject to collateral attack in the Orphans’ Court Division in the settlement of an estate.

(3) Filing Copy Of Order; Additional Security – The personal representative shall file a copy of the Order of the Court approving such compromise or settlement in the Office of the Register of Wills or Clerk of the Court having jurisdiction of the estate. When the personal representative has been required to give bond, he shall not receive the proceeds of any such compromise or

settlement until the Court of the county having jurisdiction of his estate has made an Order excusing him from entering additional security or requiring additional security, and in the latter event, only after he has entered the additional security.

T. 20 Pa. C.S.A. § 3532 Provides that a personal representative may distribute real or personal property without liability to any claimant against decedent, unless the claim of such claimant is known to the personal representative within one year of the first complete advertisement of the grant of letters to such personal representatives of thereafter but prior to such distribution. The statute is a kind of statute of limitations. Therefore when a defendant dies, plaintiff must make sure that notice is given within one year of the death or distribution can be done without any liability to the plaintiff.

U. 20 Pa. C.S.A. §102 – Definitions of “Fiduciary” and “Personal Representative”

V. 20 Pa. C.S.A. 301(a) Personal Estate – “Legal title to all personal estate of a decedent shall pass at his death to his personal representatives, if any, as of the date of his death.”

IV. INHERITANCE AND ESTATE TAX ACT – 72 Pa. C.S.A. 9101 et seq.

A. 72 Pa.C.S.A. 9102 – Definition of “Property” includes:

(2) All intangible personal property of a resident decedent or transferor
i.e. (a cause of action)

B. 72 Pa.C.S.A. 9116 – Inheritance Tax

1. 0% to Spouse since January 1, 1995

2. Effective 7/1/2000:

- From child 21 yrs or younger to parent or stepparent - 0%.
 - Lineal Heirs – 4 ½%.
 - Siblings – 12%
 - Collateral Beneficiaries – 15%

V. WORKMEN’S COMPENSATION LIEN

1. Gillette v. Wurst, 937 A.2d 430 (Pa. 2007).

Gillette waived her right to any share of settlement funds in order to defeat a lien. The matter was properly before a trial court rather than the administrative law judge. The insurer, having paid Gillette, is not subrogated to the amount actually received by Gillette; rather, it is subrogated to the share that Gillette has the right to receive. Just as a party may not apportion an award under the Wrongful Death Act in a way that defeats the workers’ compensation provider’s subrogation right under Section 671, a plaintiff who has instituted an action under the Wrongful Death Statute may not then disclaim entitlement to the award and thereby defeat the right of subrogation under Section 671.

Presumably, if money passing outside the estate goes to children or others by intestacy or presumably by Will, that portion would not be subject to the lien, but this case does not address that.

VI. GRANTING OF LETTERS TESTAMENTARY AND LETTERS OF ADMINISTRATION

The granting of letters testamentary and letters of administration are governed by 20 Pa. C.S.A. §§ 3151 – 3162. Letters testamentary shall be granted by the register to the executor designated in the will, whether or not he has declined a trust under the will. 20 Pa. C.S.A. § 3155(a). Letters of administration shall be granted by the register, in such form as the case shall require, to one or more of those hereinafter mentioned and, except for good cause, in the following order:

1. Those entitled to the residuary estate under the will.
2. The surviving spouse.
3. Those entitled under the intestate law as the register, in his discretion, shall judge will best administer the estate, giving preference, however, according to the sizes of the shares of those in this class.
4. The principal creditors of the decedent at the time of his death.
5. Other fit persons.
6. If anyone of the foregoing shall renounce his right to letters of administration, the register, in his discretion, may appoint a nominee of the person so renouncing in preference to the persons set forth in any succeeding paragraph.
7. A guardianship support agency serving as guardian of an incapacitated person who dies during the guardianship administered pursuant to Subchapter F of Chapter 55 (relating to guardianship support).
8. A redevelopment authority formed pursuant to the Urban Redevelopment Law.

20 Pa. C.S.A. § 3155(b). In the absence of the consent of those entitled to the residuary estate under the will (paragraph 1), the surviving spouse (paragraph 2), or those entitled to intestate shares (paragraph 3), letters of administration cannot be granted to persons other than those parties until 30 days after the decedent's death. 20 Pa. C.S.A. § 3155(c).

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