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# THE SPOTLIGHT

BROUGHT TO YOU BY ROBINS KAPLAN LLP'S  
WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

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**THE RIGHT WAY TO HANDLE A  
WRONGFUL DEATH CASE**

# WELCOME TO THE SPOTLIGHT

## BROUGHT TO YOU BY ROBINS KAPLAN LLP'S WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

The Spotlight is the result of ongoing collaboration between our national trial practice and estate planning groups, with the goal of providing a forum to discuss the latest news and other issues impacting the trusts and estates community. Whether you are a trustee, beneficiary, trust officer, attorney, financial advisor, or other professional in this area, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

As leaders and teachers in the field of wealth planning and administration, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations from basic to complex testamentary planning. We counsel individuals and business owners in all aspects of estate planning and business succession, providing them with peace of mind and reassurance that their legacy is in the best of hands.

Furthermore, should a conflict arise, our wealth disputes attorneys are well positioned to resolve the matter with thoughtfulness, creativity, and compassion. Our national reputation for litigation excellence includes wins in the fiduciary arena for trustees and fiduciaries, personal representatives, beneficiaries, guardians, and conservators. Whether litigating fiduciary matters, inheritance issues, or contested charitable donations, we help clients cut through confusion to find a path to resolution.

Is there a topic affecting your practice that you would like us to discuss in an upcoming issue of the Spotlight? Let us know at [TPentelovitch@RobinsKaplan.com](mailto:TPentelovitch@RobinsKaplan.com).

- Denise S. Rahne and Steven K. Orloff

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## BEFORE THE CLAIM: KNOWING YOUR STATE'S WRONGFUL DEATH LAW

**ANTHONY A. FROIO AND SCOTT A. JURCHISIN**

When a person is injured by the negligence of another, the question of who will bring the claim is usually straightforward: the injured person. But in wrongful death suits, one of the preliminary issues is identifying the proper party to bring the action. This may be more contentious than expected, because people who are in line to bring the claim often do not want the responsibility, and people who are not designated want the opportunity to fight for justice.

Attorneys must be familiar with a state's laws to confirm their client is the proper person to bring a claim. While different states use similar terms in their processes and requirements regarding who may bring a wrongful death claim, they do vary in meaningful ways.

In Minnesota, the surviving spouse or one of the next-of-kin may petition the court to appoint a trustee to bring a lawsuit. The petition must identify all of the decedent's next-of-kin and must be accompanied by a consent and an oath that the trustee will faithfully and justly perform the duties of trustee. That person will then have authority to bring a wrongful death claim for the benefit of the decedent's next-of-kin. This process can also be followed to appoint a trustee when an injured party dies after a case has been filed but before it has been resolved.

In North Dakota, there is a hierarchy for who may bring a wrongful death claim. A surviving spouse has priority, followed by surviving children, then parent, then grandparent, and then the personal representative or the person who had primary physical custody of the decedent before the wrongful act. Should your client not be at the top of the list, they can make a demand that an action be brought by the person with priority. If that person fails to do so within 30 days, the next person may bring an action. Should any trustee die during the pendency of an action, the next person on the list will be made trustee by order of the court.

South Dakota utilizes a personal representative of the decedent's estate to bring a wrongful death action. The personal representative may have been chosen by the decedent while living and included in the decedent's estate plan. If a personal representative was not designated—or if he or she cannot or chooses not to serve in that role—the court will appoint someone capable of furthering the interests of the decedent's surviving spouse and children, or surviving parents.

Wisconsin allows a wrongful death action to be brought by a personal representative but it also allows a claim to be brought "by the person to whom the amount recovered belongs," likely a surviving spouse, child, or parent of the decedent. When a case does resolve, Wisconsin law requires that, regardless of who is appointed personal representative, the court determines whether it is appropriate to set aside an amount of the recovery for the decedent's spouse and minor children in recognition of the duty and responsibility of a parent to support their minor children. So, a spouse does not waive rights to recovery by having another person appointed as personal representative. Even if a



family member brings the wrongful death action, he or she may still recover expenses on behalf of any person who has paid for medical, funeral, and burial expenses.

Iowa also requires a personal representative of the decedent's estate to bring a wrongful death claim. A personal representative may be designated in the decedent's will. Absent a designation, the court will appoint a personal representative—then called an “administrator.” The administrator will usually be the surviving spouse or one of the decedent's heirs. If there is no surviving spouse or heirs, or if they do not wish to bring a claim, the court may appoint a creditor of the decedent or another person showing good cause. The petition to appoint an administrator should include the identity of the decedent and surviving spouse, a complete list of heirs, and an estimated value of the decedent's personal property.

In Massachusetts, only the duly appointed personal representative of the decedent's estate may bring the wrongful death claim. If the decedent died testate, the duly named personal representative is the person with standing to bring the action. If the decedent died intestate, the probate court may appoint any number of individuals as personal representative, including but not limited to, a surviving spouse, heir-at-law, other family member, or even an attorney.

As with any legal process, it takes time finding and petitioning for an appropriate person or party to be appointed to bring a claim. To avoid issues with the applicable statute of limitations for such a claim, attorneys should account for this time just as they would account for the time necessary to draft the pleadings or obtain a supportive expert report. Any issues with this process can be avoided with sufficient diligence and familiarity with your state's laws.

## PICKING YOUR TEAM: GETTING THE RIGHT TRUSTEE OR PERSONAL REPRESENTATIVE APPOINTED IN A WRONGFUL DEATH CASE

**TERESA FARISS MCCLAIN AND TIMOTHY W. BILLION**

As a rule, wrongful death cases begin tragically. Appointing a trustee or personal representative can seem like a dull formality compared with the emotions and challenges inherent in losing a loved one unnecessarily. Nonetheless, a trustee or personal representative should be carefully selected to avoid unnecessary consequences down the road.

A trustee or personal representative generally needs to be appointed to pursue a wrongful death claim. That responsibility involves more than simply being a name in the caption of a lawsuit. Generally speaking, a trustee or personal representative must act in the best interest of the next of kin. The trustee or personal representative will also have to take an active role in any resulting litigation, such as signing documents, obtaining records, and making strategic decisions.

This article addresses some of the more common strategic issues to consider when choosing a trustee or personal representative. Some thoughtful consideration at the beginning of a case can avoid or minimize potentially expensive disputes later and can help protect the assets of an estate from additional litigation.

## KNOW YOUR TRUSTEE OR PERSONAL REPRESENTATIVE

It may seem obvious, but it is important to vet the background of a proposed trustee or personal representative. For starters, avoid a trustee or personal representative with a significant criminal history. It likely will not matter if a trustee or personal representative has some speeding tickets. But, if that person has a conviction for fraud or has a felony background, for example, that history likely will pose challenges in the development of the case and may create a risk of a trustee or personal representative acting in his or her own interest rather than in the interest of the victim's heirs. To avoid the risk and expense of dealing with those problems, consider choosing a different trustee or personal representative.

Also consider a candidate's qualifications and skills. A trustee or personal representative will need to make timely decisions on important issues regarding settlements, litigation strategy, and other issues. That person may also need to testify in a deposition or in court. Choose someone with the skills to carry out those functions successfully. Choose someone who can document his or her decision-making process and explain it. Choose someone who will not suffer a significant emotional toll from taking an active role in a wrongful death case. And choose someone available to devote the time and attention needed to properly manage litigation on behalf of the victim's family.

Ultimately, the trustee or personal representative plays an important role in all stages of a wrongful death case. Make sure you get someone you trust to fill that role.

## DO NOT CREATE ADDITIONAL FRICTION

In many circumstances, people choose a family member to act as a trustee or personal representative in a wrongful death case. In addition to the candidate's individual capabilities, discussed above, consider the impact your selection may have on the family dynamics in the case.

For example, many families have complex histories—and sometimes resentments, grudges, or mistrust—that have built up over years. Realistically, those histories do not evaporate overnight, and they can be exacerbated by the stress of a death or significant injury in the family. Try to avoid choosing a trustee or personal representative who is not on speaking terms with some of the family. While disagreement or personal animosity normally is not a reason to legally disqualify a trustee or personal representative, any such conflict can make the practical administration of the estate and the smooth prosecution of a lawsuit difficult. And if the dispute becomes too acrimonious, you may need to find a new trustee or personal representative, which can result in midstream changes to litigation strategy.

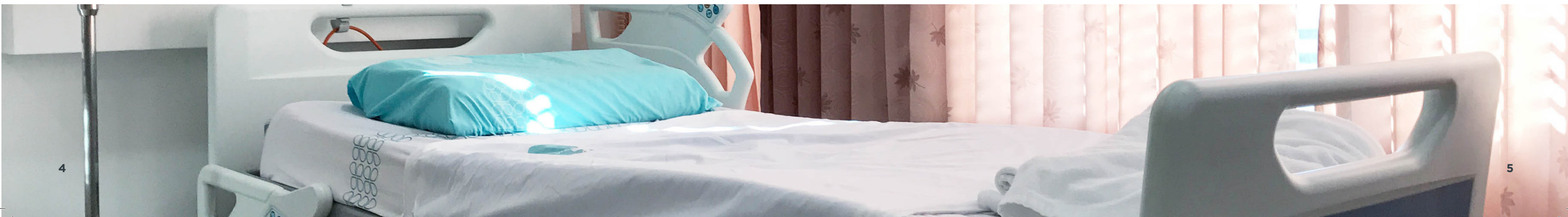
In addition, give particular consideration to the representation of the interests of minor children involved, and consider the appointment of a guardian ad litem to represent the interests of the child if the parents have difficulty cooperating to make decisions on the child's behalf.

A trustee or personal representative needs to act on behalf of all the victim's heirs. It is important that the person chosen for the role has functional relationships with the people he or she represents, and that you take steps to avoid or minimize family conflicts spilling over to impact the wrongful death litigation.

## CONCLUSION

Wrongful death cases present plenty of issues to litigate. But, by carefully selecting the trustee or personal representative at the start of the case, you can hopefully avoid additional unnecessary litigation and maximize the assets of the estate. If you have additional questions or concerns, please contact a member of our Wealth Planning and Disputes group or one of our Personal Injury attorneys.

<sup>1</sup> Terminology and requirements vary by jurisdiction. This article addresses general strategic considerations that are separate from, and in addition to, any statutory or other legal requirements in a particular jurisdiction.







## ESTATE PLANNING FOR SETTLEMENTS OR FAVORABLE VERDICTS

**MATTHEW J. FRERICHS AND SARAH J. KHOURY**

Proper settlement planning can be an invaluable service to a client as a lawsuit approaches an end. Funds from a settlement or favorable verdict may greatly affect the status of your client's assets and public benefits eligibility and have federal and state tax implications. Steps should be taken to maximize and safeguard the award to ensure your client's financial future.

Settlement planning for clients who have been injured, or who have a family member who has been injured, often entails the use of a trust vehicle to hold the monetary award. Many trust options might be appropriate for a client, depending upon his or her individual circumstances. Below are summaries of three types of trusts commonly used in connection with settlements or verdicts for injured persons.

### SPECIAL NEEDS TRUST

A special needs trust ("SNT") is a type of irrevocable trust frequently utilized when the injured party is receiving Medicaid or other public benefits. When properly drafted and administered, a SNT can hold assets for the benefit of the injured party and still not count against the asset limits for the purposes of his or her Medicaid or Supplemental Security Income ("SSI") eligibility. Under current law, an SNT can be created by the individual; the beneficiary's parent, grandparent, or legally appointed guardian; or the court. Another requirement is that the trust beneficiary must be "disabled" as defined by the Social Security Act at the time the SNT trust is executed. Additionally, the trust can be funded with only the beneficiary's own assets (including, for example, structured settlement payments), and any distributions from the trust must be for the beneficiary's sole benefit. Upon the termination of an SNT (usually at the beneficiary's death), the remaining trust assets must first reimburse the state(s) for Medicaid benefits the beneficiary received during his or her lifetime. In addition to those mentioned above, the law places many other restrictions and prohibitions on the language used in the provisions of an SNT and regarding how and for what purposes the trust assets can be distributed.

### SUPPLEMENTAL NEEDS TRUST

Like a special needs trust, a supplemental needs trust ("SuppNT") is a trust commonly utilized when a person is receiving public benefits. As with a SNT, the beneficiary of a SuppNT must be "disabled" as defined by the Social Security Act. When properly drafted and administered, the assets held in a SuppNT will not count against the trust beneficiary's asset limit for the purposes of Medicaid or SSI eligibility. Unlike an SNT, a SuppNT is funded with the assets of a third party (e.g., the beneficiary's parents or grandparents). Upon the termination of a SuppNT, there is no requirement to reimburse the state for Medicaid benefits that the beneficiary received during his or her lifetime.

### IRREVOCABLE SUPPORT TRUST

For an injured person who is not receiving public benefits, an irrevocable support trust can be an effective settlement planning tool. Sometimes called a "settlement trust" or a "settlement preservation trust," an irrevocable trust is intended to preserve and protect the beneficiary's assets and ensure that the trust assets are used appropriately for the beneficiary's needs. These types of trusts can be drafted in way that is much less restrictive than SNTs or SuppNTs and can be tailored to permit a wide range of permissible distributions for the benefit of the trust beneficiary.

For each of the trusts described above, many other legal requirements and restrictions apply, and trust attorneys have many planning and drafting options to consider. In particular, SNTs and SuppNTs are heavily regulated, so attorneys must be familiar with the relevant laws, rules, and regulations governing these trusts. Additionally, the relevant income and estate tax laws must be considered, and the client will need practical advice, such as how to choose a suitable trustee. If a practitioner is considering utilizing any type of trust to hold a monetary award for a client or a family member of a client, he or she should consult with an experienced estate planning attorney to assist in selecting the appropriate trust vehicle, drafting the trust, funding the trust, and advising the client on proper trust administration.



## MEET OUR ISSUE EDITORS:



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As an attorney in Robins Kaplan LLP's Wealth Planning, Administration, and Disputes Group, Sarah Khoury represents clients in estate planning, trust and estate administration, trust and estate litigation, and guardianship and conservatorship matters. Sarah works with clients to design and implement comprehensive estate plans reflecting their unique goals and values, both during lifetime and at death.

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