ATTORNEY'S FEES IN WRONGFUL DEATH CASES

by Ted Babbitt

Any lawyer who represents a client in a wrongful death suit needs to be aware of a recent opinion of the Fourth District in In Re: Estate of Richard C. Catapane, 25 F.L.W. D584 (Fla. 4th DCA, March 8, 2000). That opinion resulted from an appeal of a trial court's order apportioning attorney's fees among counsel who represented two survivors of the decedent.

The decedent died in an automobile accident survived by his wife who was also appointed Personal Representative and his daughter from a prior marriage. There was limited insurance coverage for the accident which caused the decedent's death and there was a clear conflict of interest between the two survivors because, presumably, the total of their combined damages far exceeded the amount of insurance available. Each survivor hired their own attorney and each entered into a contingency fee contract with their respective counsel.

At the time of the apportionment hearing, the trial court awarded each survivor a proportionate share of the available insurance coverage and apportioned attorney's fees to each of their counsel in accordance with their respective contingency fee contracts. The attorney representing the estate appealed this order, contending that since he represented the estate he was entitled to a fee on the entire recovery, not just the portion awarded to his client.

In light of the clear conflict of interest between the survivors and the legion of cases decrying interference with an attorney's contract with a client, one would assume that this appeal would have resulted in an affirmance without an opinion. To the contrary, the District Court ruled that because the Wrongful Death Act requires that all actions be brought by the decedent's Personal Representative who recovers on behalf of all of the decedent's survivors, that the attorney representing the Personal Representative does have a right to receive a fee from all survivors even though there is no contractual relationship between that attorney and the survivors other than the Personal Representative.

> One of the purposes of our present wrongful death act, which was enacted in 1972, was to 'eliminate the multiplicity of suits that resulted from each survivor bringing an independent action,' which could occur under the prior act. Ding v Jones, 667 So.2d 894, 897 (Fla. 2d DCA 1996). The Act obviously contemplates that one lawyer, selected by the personal representative, will pursue the tort claim for the benefit of the survivors who are entitled to recover damages. The only client David & French were required to have a contingent fee contract with, under the Act, was the personal representative.

The Court rejected the contention of the attorney for the Personal Representative that he was entitled to the entire fee and instead held that in light of the conflict of interest between the survivors on the issue of damages the trial

court was required to determine what proportion of the representation of the remaining survivors other than the Personal Representative related to damages and to compensate the attorney for those survivors based upon that ratio. The Court then gave a formula for making that determination with a caveat that the total fee paid by any survivor cannot exceed the maximum contingent fee permitted by Rule 4-1.5 of the Rules regulating the Florida Bar.

The District Court seems to have ignored the practicalities of its opinion. In a wrongful death action, the individual named as the personal representative may have no relationship to the real party in interest in the wrongful death litigation. It is not at all unusual to have a decedent name a personal representative in a will who is not even a survivor under the Wrongful Death Act. This may be an attorney, an accountant or just a trusted friend. While the Catapane case dealt with a clear liability situation, that is often not the case. A survivor with major damages who is not the personal representative is going to have a difficult time finding an attorney who is willing to invest substantial costs and time in a case where the lion's share of attorney's fees is going to go to the attorney representing the personal representative. The reality of this opinion is that huge battles will be pitched in the Probate Court whenever there are multiple survivors in a wrongful death action. Those battles will be fought over who will be named personal representative, not because one person may be better suited

than another for the job but for the simple reason that the one who is successful will be able to obtain counsel and the remaining survivors will not. Who is going to represent a survivor in a complicated medical malpractice or product liability suit when compensation for that representation is, at best, uncertain until the litigation is concluded and, at worst, will result in the lawyer being grossly under compensated?

The reality is that, after this opinion, no one other than the personal representative is going to be able to find a lawyer willing to represent them if the lawyer cannot be assured that his or her contingent fee contract will be honored. Clearly, under this opinion, it will not. The result, I am afraid, is that despite a clear conflict of interest among survivors in a wrongful death suit some of those survivors are not going to be able to find lawyers and are, thus, not going to be properly compensated.

It is hard to understand why the Fourth District did not simply leave the law as it was. There doesn't seem to be any complaint from trial judges that too many lawyers are taking part in wrongful death suits. Judges deal every day with multiple parties and, therefore, multiple lawyer, cases. This case imposes on a client an obligation to pay a fee to a lawyer that the client did not chose and conversely interferes unnecessarily with the client's right to contract with the attorney of their choice. It puts the representation of clients in wrongful death suits in limbo.

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