



## Alerts

### Attorneys Owe Duty to Next of Kin in Wrongful Death Action

May 8, 2013

*Lawyers for the Profession® Alert*

*Estate of Powell ex rel. Harris v. John C. Wunsch, P.C.*, 2013 IL App (1st) 121854, \_\_\_ N.E.2d \_\_\_, 2013 WL 1290610 (2013)

#### Brief Summary

The First District Appellate Court in Illinois held that attorneys owed a duty to a decedent's next of kin in a wrongful death action, even though the next of kin did not execute a retainer agreement with the attorneys.

#### Complete Summary

The public guardian brought this legal malpractice action on behalf of a disabled adult (Son). In the underlying legal proceeding that led to the Son's legal malpractice claims, the circuit court entered an order approving two settlements reached in that action. The amount allocated to the Son in the first settlement totaled \$5,000 and, in the second settlement, \$118,091.34. The Son claimed that the settlement amounts were not distributed through the probate court as required by Section 2.1 of the Illinois Wrongful Death Act (Act) (740 ILCS 180/2.1 (West 2008)). The Son claimed on appeal that the trial court erred in dismissing his legal malpractice counts because defendants owed a duty to him, as a decedent's next of kin, even though he was not defendants' direct client.

The trial court adjudicated the Son disabled due to profound disability on April 25, 1997, and appointed his parents (Father and Mother) to serve as co-guardians of his person. But the parents were not appointed to serve as a guardian of the Son's estate. The Father died on April 11, 1999 from surgical complications. He was survived the Mother and his two children, one of whom was the Son and the other who was the son's sister (Sister). On April 12, 1999, the Mother executed an attorney-client agreement with an attorney for the purpose of bringing a wrongful death action against the medical providers who treated the Father before his death. The Father died intestate and his estate had no assets.

On January 31, 2001, the Mother filed a petition to appoint a special administratrix (petition for appointment) naming herself as the special administratrix of the Father's estate. The petition for appointment identified the Mother, the Son and the Sister as the Father's next of kin and stated that they were entitled to recover under the Act and the Illinois Survival Act (755 ILCS 5/27-6 (2010)). The trial court approved the petition for appointment and

#### Attorneys

Terrence P. McAvoy

#### Service Areas

Counselors for the Profession  
Lawyers for the Profession®



appointed the Mother as special administratrix of the Father's estate. The attorney then filed a wrongful death action.

Four years later, the Mother filed an amended verified petition for settlement and distribution of wrongful death case (first settlement) seeking the trial court's approval of a settlement reached with certain named defendants in the wrongful death action. After attorneys' fees and costs, the amount distributable to the Mother, as special administratrix, totaled \$15,000. The Mother, the Son and the Sister were identified as the Father's surviving next of kin. The first settlement identified the Son as a disabled adult and the Mother as his sole keeper and provider. Each of the next of kin was to receive \$5,000 under this settlement. The trial court approved the first settlement, and the Son's settlement distribution of \$5,000 was to be paid to Mother.

On October 15, 2005, the attorney referred the wrongful death action to another law firm, which took over prosecution of the wrongful death action. The Mother executed an attorney-client agreement with subsequent counsel. On November 14, 2005, the Mother, through her new attorneys, filed a petition to approve the second settlement. The Mother, the Son and the Sister were listed as the Father's heirs, and the Son was identified as the Father's son and having physical disabilities that prevented him from working outside the home, earning an independent living or living independently. The trial court entered an order approving the second settlement and distributing \$118,091.35 to the Mother and \$118,091.34 to the Son. The Sister waived her right to any of the second settlement proceeds.

In approximately 2008, the Sister became concerned about the Son's well-being after visiting him at the Mother's home. On December 5, 2008, the Sister petitioned the probate court to remove the Mother as guardian of the Son's person, or to appoint her as co-guardian, because the Mother had become incapable of providing the necessary care to the Son. This petition also asserted that the funds distributed to the Son from the second settlement were deposited into a joint bank account in the Son's and the Mother's name. The petition further alleged that the Son's funds from the second settlement were not being expended toward his care.

On January 23, 2009, the probate court entered an order appointing a guardian *ad litem* (GAL) for the Son. On February 2, 2009, the GAL filed an emergency petition to appoint a temporary guardian of the Son's person and seeking to suspend the Mother's authority as guardian. On June 9, 2009, the probate court entered an order removing the Mother as the Son's guardian of his person and appointing the Sister as the plenary guardian of the Son's person. On July 8, 2009, the probate court appointed the public guardian as plenary guardian of the estate of the Son. The public guardian then filed the legal malpractice action against defendants. Defendants moved to dismiss on the basis that they owed no duty to the Son because the attorney-client relationship was to benefit the Father's estate and not the estate beneficiaries. The trial court granted the motion, and the Son appealed.

The appellate court reversed and remanded on the basis that the Wrongful Death Act provides that "the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2 (2008). The court noted that defendants had not entered into an attorney-client relationship with the Son, but held that such a relationship was not necessary because a wrongful death action, even though it is not brought by the next of kin, is litigated for the exclusive benefit of the next of kin. The court further noted that each next of kin is prohibited under the act from bringing separate causes of action because such an action may only be brought by the decedent's personal representative.

### **Significance of Opinion**

This case is significant because the court held that although there was no attorney-client relationship between the attorneys and the next of kin, the attorneys owed the Son a duty because wrongful death actions are brought for the exclusive benefit of the surviving spouse and next of kin. This is yet another cautionary tale for attorneys to understand to whom they may owe duties.

For further information, please contact [Terrence P. McAvoy](#).