

# STATE OF NEW YORK

74--A

2021-2022 Regular Sessions

## IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sens. HOYLMAN, ADDABBO, BAILEY, BENJAMIN, BIAGGI, COMRIE, GALLIVAN, GAUGHRAN, GIANARIS, GOUNARDES, HARCKHAM, JACKSON, KAMINSKY, KAPLAN, KENNEDY, KRUEGER, LIU, MYRIE, PARKER, PERSAUD, RAMOS, SALAZAR, SANDERS, SAVINO, SEPULVEDA, SERRANO, SKOUFIS, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the estates, powers and trusts law, in relation to the payment and distribution of damages in wrongful death actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Paragraph 1 of section 5-4.1 of the estates, powers and  
2 trusts law, as amended by chapter 114 of the laws of 2003, is amended to  
3 read as follows:  
4 1. The personal representative, duly appointed in this state or any  
5 other jurisdiction, of a decedent [~~who is survived by distributees~~] may  
6 maintain an action to recover damages for a wrongful act, neglect or  
7 default which caused the decedent's death against a person who would  
8 have been liable to the decedent by reason of such wrongful conduct if  
9 death had not ensued. Such an action must be commenced within [~~two~~]  
10 three years and six months after the decedent's death; provided, howev-  
11 er, that an action on behalf of a decedent whose death was caused by the  
12 terrorist attacks on September eleventh, two thousand one, other than a  
13 decedent identified by the attorney general of the United States as a  
14 participant or conspirator in such attacks, must be commenced within  
15 [~~two~~] four years [~~and six months after the decedent's death~~]. When the  
16 [~~distributees~~] persons for whose benefit an action pursuant to this part  
17 may be brought do not participate in the administration of the  
18 decedent's estate under a will appointing an executor who refuses to  
19 bring such action, the [~~distributees~~] persons for whose benefit an

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 action pursuant to this part may be brought are entitled to have an  
2 administrator appointed to prosecute the action for their benefit.

3 § 2. Paragraph (a) of section 5-4.3 of the estates, powers and trusts  
4 law, as amended by chapter 100 of the laws of 1982, is amended to read  
5 as follows:

6 (a) The damages awarded to the plaintiff may be such sum as the jury  
7 or, where issues of fact are tried without a jury, the court or referee  
8 deems to be fair and just compensation for the [~~pecuniary~~] injuries  
9 resulting from the decedent's death to the persons for whose benefit the  
10 action is brought. In every such action, in addition to any other lawful  
11 element of recoverable damages, [~~the reasonable expenses of medical aid,~~

12 ~~nursing and attention incident to the injury causing death and the~~  
13 ~~reasonable funeral expenses of the decedent paid by the distributees, or~~  
14 ~~for the payment of which any distributee is responsible, shall also be~~  
15 ~~proper elements of damage] compensation for the following damages may~~

16 be recovered: (i) reasonable funeral expenses of the decedent paid by  
17 the persons for whose benefit the action is brought, or for the payment  
18 of which any persons for whose benefit the action is brought is respon-  
19 sible; (ii) reasonable expenses for medical care incident to the injury  
20 causing death, including but not limited to doctors, nursing, attendant  
21 care, treatment, hospitalization of the decedent, and medicines; (iii)  
22 grief or anguish caused by the decedent's death, and for any disorder  
23 caused by such grief or anguish; (iv) loss of love, society, protection,  
24 comfort, companionship, and consortium resulting from the decedent's  
25 death; (v) pecuniary injuries, including loss of services, support,  
26 assistance, and loss or diminishment of inheritance, resulting from the  
27 decedent's death; and (vi) loss of nurture, guidance, counsel, advice,  
28 training, and education resulting from the decedent's death. Interest

29 upon the principal sum recovered by the plaintiff from the date of the  
30 decedent's death shall be added to and be a part of the total sum  
31 awarded.

32 § 3. Section 5-4.4 of the estates, powers and trusts law, paragraph  
33 (a) as amended by chapter 357 of the laws of 1975, and the opening para-  
34 graph of paragraph (a) as amended by chapter 595 of the laws of 1992, is  
35 amended to read as follows:

36 § 5-4.4 Distribution of damages recovered

37 (a) The damages, as prescribed by 5-4.3, whether recovered in an  
38 action or by settlement without an action, are exclusively for the bene-  
39 fit of the decedent's [~~distributees and, when collected, shall be~~  
40 ~~distributed to the persons entitled thereto under 4-1.1 and 5-4.5,~~  
41 ~~except that where the decedent is survived by a parent or parents and a~~  
42 ~~spouse and no issue, the parent or parents will be deemed to be distri-~~  
43 ~~butees for purposes of this section] surviving close family members,  
44 which may include, but are not limited to, spouse or domestic partner,  
45 issue, parents, grandparents, step-parents and siblings. The finder of  
46 fact shall determine which persons are close family members of the dece-  
47 dent under this section based upon the specific circumstances relating  
48 to the person's relationship with the decedent. The damages shall be~~

49 distributed subject to the following:

50 (1) Such damages shall be distributed by the personal representative  
51 to the persons entitled thereto in proportion to the [~~pecuniary~~] inju-  
52 ries suffered by them, such proportions to be determined after a hear-  
53 ing, on application of the personal representative or any [~~distributee~~]  
54 persons for whose benefit the action is brought, at such time and on  
55 notice to all interested persons in such manner as the court may direct.  
56 If no action is brought, such determination shall be made by the surro-

1 gate of the county in which letters were issued to the plaintiff; if an  
2 action is brought, by the court having jurisdiction of the action or by  
3 the surrogate of the county in which letters were issued.

4 (2) The court which determines the proportions of the [~~pecuniary~~]  
5 injuries suffered by the [~~distributees~~] persons for whose benefit the  
6 action is brought, as provided in subparagraph (1) of this paragraph,  
7 shall also decide any question concerning the disqualification of a  
8 parent, under 4-1.4 of this chapter, or a surviving spouse, under 5-1.2  
9 of this article, to share in the damages recovered.

10 (b) The reasonable expenses of the action or settlement and, if  
11 included in the damages recovered, the reasonable expenses of medical  
12 aid, nursing and attention incident to the injury causing death and the  
13 reasonable funeral expenses of the decedent may be fixed by the court  
14 which determines the proportions of the [~~pecuniary~~] injuries suffered by  
15 the [~~distributees~~] persons for whose benefit the action is brought, as  
16 provided in subparagraph (1) of this paragraph, upon notice given in  
17 such manner and to such persons as the court may direct, and such  
18 expenses may be deducted from the damages recovered. The commissions of  
19 the personal representative upon the residue may be fixed by the surro-  
20 gate, upon notice given in such manner and to such persons as the surro-  
21 gate may direct or upon the judicial settlement of the account of the  
22 personal representative, and such commissions may be deducted from the  
23 damages recovered.

24 (c) In the event that an action is brought, as authorized in this  
25 part, and there is no recovery or settlement, the reasonable expenses of  
26 such unsuccessful action, excluding counsel fees, shall be payable out  
27 of the assets of the decedent's estate.

28 (d) For the purposes of this section, the term "domestic partner"  
29 shall have the same meaning as defined pursuant to section two thousand  
30 nine hundred sixty-one of the public health law.

31 § 4. Paragraphs (a) and (b) of section 5-4.6 of the estates, powers  
32 and trusts law, paragraph (a) as amended and paragraph (b) as added by  
33 chapter 719 of the laws of 2005, are amended to read as follows:

34 (a) Within sixty days of the application of an administrator appointed  
35 under section 5-4.1 of this part or a personal representative to the  
36 court in which an action for wrongful act, neglect or default causing  
37 the death of a decedent is pending, the court shall, after inquiry into  
38 the merits of the action and the amount of damages proposed as a compro-  
39 mise either disapprove the application or approve in writing a compro-  
40 mise for such amount as it shall determine to be adequate including  
41 approval of attorneys fees and other payable expenses as set forth  
42 below, and shall order the defendant to pay all sums payable under the  
43 order of compromise, within the time frames set forth in section five  
44 thousand three-a of the civil practice law and rules, to the attorney  
45 for the administrator or personal representative for placement in an  
46 interest bearing escrow account for the benefit of the [~~distributees~~]  
47 persons for whose benefit the action is brought. The order shall also  
48 provide for the following:

49 (1) Upon collection of the settlement funds and creation of an inter-  
50 est bearing escrow account, the attorney for the administrator or  
51 personal representative shall pay from the account all due and payable  
52 expenses, excluding attorneys fees, approved by the court, such as  
53 medical bills, funeral costs and other liens on the estate.

54 (2) All attorneys fees approved by the court for the prosecution of  
55 the action for wrongful act, neglect or default, inclusive of all  
56 disbursements, shall be immediately payable from the escrow account upon

1 submission to the trial court proof of filing of a petition for allo-  
2 cation and distribution in the surrogate's court on behalf of the  
3 decedent's estate.

4 (3) The attorney for the administrator or personal representative in  
5 the action for wrongful act, neglect or default who receives payment  
6 under this section shall continue to serve as attorney for the estate  
7 until the entry of a final decree in the surrogate's court.

8 (b) If any of the [~~distributees~~ persons for whose benefit the action  
9 is brought] is an infant, incompetent, person who is incarcerated or  
10 person under disability, the court shall determine whether a guardian ad  
11 litem is required before any payments are made, in which case the court  
12 will seek an immediate appointment of a guardian ad litem by the surro-  
13 gate's court or, if the surrogate's court defers, the court shall make  
14 such appointment. Any guardian appointed for this purpose shall continue  
15 to serve as the guardian ad litem for the person requiring same for all  
16 other purposes.

17 § 5. This act shall take effect immediately and shall apply to all  
18 pending actions and actions commenced on or after such date.