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:

Section 1. Paragraph 1 of section 5-4.1 of the estates, powers and trusts law, as amended by chapter 114 of the laws of 2003, is amended to read as follows:

1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent [~~who is survived by distributees~~] may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within [~~two~~] **three** years **and six months** after the decedent's death; provided, however, that an action on behalf of a decedent whose death was caused by the terrorist attacks on September eleventh, two thousand one, other than a decedent identified by the attorney general of the United States as a participant or conspirator in such attacks, must be commenced within [~~two~~] **four** years [~~and six months after the decedent's death~~]. When the [~~distributees~~] **persons for whose benefit an action pursuant to this part may be brought** do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to 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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action pursuant to this part may be brought are entitled to have an administrator appointed to prosecute the action for their benefit.

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

(a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the [~~pecuniary~~] injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, [~~the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage~~] compensation for the following damages may be recovered: (i) reasonable funeral expenses of the decedent paid by the persons for whose benefit the action is brought, or for the payment of which any persons for whose benefit the action is brought is responsible; (ii) reasonable expenses for medical care incident to the injury causing death, including but not limited to doctors, nursing, attendant care, treatment, hospitalization of the decedent, and medicines; (iii) grief or anguish caused by the decedent's death, and for any disorder caused by such grief or anguish; (iv) loss of love, society, protection, comfort, companionship, and consortium resulting from the decedent's death; (v) pecuniary injuries, including loss of services, support, assistance, and loss or diminishment of inheritance, resulting from the decedent's death; and (vi) loss of nurture, guidance, counsel, advice, training, and education resulting from the decedent's death. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded.

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

§ 5-4.4 Distribution of damages recovered

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

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

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

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

(b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the [~~pecuniary~~] injuries suffered by the [~~distributees~~] **persons for whose benefit the action is brought**, as provided in subparagraph (1) **of this paragraph**, upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.

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

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

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

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

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

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

submission to the trial court proof of filing of a petition for allocation and distribution in the surrogate's court on behalf of the decedent's estate.

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

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

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