How a California Wrongful Death Recovery Is Divided Among the Heirs

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A wrongful death case usually ends with one number. One verdict, or one settlement, paid for the loss of one person.

But a family is rarely one person. A husband and two grown children. A mother, a father, and the decedent's young son. A second spouse and the children of a first marriage. Each of them lost someone different: a partner, a parent, a child.

So the question comes, often quietly and often late: *How is the money divided?*

Many families assume it follows a will or the rules of inheritance. It does not. California divides a wrongful death recovery according to each heir's own loss. The heirs can agree on that division themselves, and the best time to do it is before settlement discussions begin. When they cannot agree, a judge decides.

This article explains how that works, why it matters, and how to keep the question of money from dividing a family that is already grieving.

One Death, One Case, Every Heir

Code of Civil Procedure section 377.60 lists who may bring a wrongful death claim: generally the surviving spouse or domestic partner, the children, and the issue of deceased children, or, if there are none, those who would inherit by intestate succession. A putative spouse, stepchildren, or parents may also qualify if they were dependent on the decedent.

Each of those heirs has a personal and separate claim for their own loss. But California requires them to bring it together. In *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 694, the California Supreme Court explained that "all heirs should join or be joined in the action and that a single verdict should be rendered." The Court later described these claims as "joint, single and indivisible," to be "joined together in one suit." (*Corder v. Corder* (2007) 41 Cal.4th 644, 652.)

Three consequences follow for families:

- **Every known heir must be brought into the case.** An heir who will not join as a plaintiff may be named as a defendant. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697.) Such an heir, though named as a defendant, is in reality a plaintiff. (*Watkins v. Nutting* (1941) 17 Cal.2d 490, 498.) Learn more about the nominal defendant.
- **Naming is not enough; the heir must actually be joined.** Merely naming an heir as a nominal defendant, without joining that heir in the case, is not the same as joining them. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808–809.)
- **Leaving an heir out has consequences.** An heir who is wrongly omitted may have a claim against the heirs who brought the case without them. (*Id.* at pp. 809–811; *Watkins*, *supra*, 17 Cal.2d at p. 499.)

Because every heir shares in one recovery, the division among them is not a side issue. It is part of the case from the first day.

The Money Is Divided by Loss, Not by Inheritance Shares

The most important rule is also the least understood. A wrongful death recovery is not an inheritance. It is not divided by the decedent's will, and it is not divided by the percentages of intestate succession.

The Court of Appeal put it directly: the division is "not based on an heir's statutory share under intestacy, but … the proportion that the heir's personal damage bears to the damage suffered by the others." (*Smith*, *supra*, 41 Cal.App.4th at p. 698; see *Changaris v. Marvel* (1964) 231 Cal.App.2d 308, 313.) The California Supreme Court has likewise described apportionment as "based on the pecuniary damages suffered by each heir." (*Corder*, *supra*, 41 Cal.4th at p. 653.)

What counts as an heir's loss? The same categories that make up wrongful death damages. Under CACI No. 3921, the jury instruction for the death of an adult, they include:

- The financial support the decedent would have provided.
- Gifts or benefits the heir would have received.
- The reasonable value of household services the decedent would have provided.
- Funeral and burial expenses the heir paid.
- The loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support, and for a child, the loss of training and guidance.

Future loss of support is measured over the decedent's life expectancy or the heir's, whichever is shorter. (CACI No. 3921.)

Those categories explain why equal shares are not the rule. Consider a surviving spouse who depended on the decedent's income, a minor child who will go without a parent for many years, and an adult child who lived independently in another state. Each lost someone they loved. But their losses of support, services, and daily companionship may be very different, and the law measures each one on its own evidence.

Equal division is not forbidden. Families sometimes choose it. But it is a choice, not a default.

The Statute Gives the Division to the Court

California's wrongful death statute assigns the division to the judge. Code of Civil Procedure section 377.61 provides: "The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

That is why a jury in a wrongful death trial may be told to return one number for all of the heirs. CACI No. 3921 includes an optional instruction: "consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs."

The Court of Appeal has explained the reasons for leaving the division to the judge: the heirs' "competing and conflicting interests," the difficulty of measuring each minor's lost support, and the efficiency of a proceeding without a jury. (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 535–536.) There is no right to a jury in the apportionment itself. (*Corder*, *supra*, 41 Cal.4th at pp. 656–657; *Canavin*, at pp. 533–534.)

The heirs do have some say. Where all of the heirs, properly represented by counsel, waive judicial apportionment, the trial court should generally have the jury return separate verdicts for each heir, unless other considerations require otherwise. (*Canavin*, *supra*, 148 Cal.App.3d at p. 536.) The current model verdict forms for wrongful death ask the jury to state damages for each named plaintiff. (CACI Nos. VF-3905, VF-3906.)

A Settlement Is Divided the Same Way

Most wrongful death cases settle. A settling defendant and its insurer usually pay one amount to resolve every heir's claim at once.

The California Supreme Court has held that the court's power to apportion applies to settlements as well as verdicts: "there appears no meaningful distinction between a lump-sum award and a lump-sum settlement." (*Corder*, *supra*, 41 Cal.4th at p. 653.) The same case makes a point every family should understand: "the division of a lump-sum wrongful death settlement is of no concern to the settling defendant." (*Id.* at p. 659.) The court does not divide the money according to what the defendant intended or which heir's claim the defendant thought was strongest. It divides the money according to each heir's loss.

In other words, the defense will not solve this problem for the family. Neither will the mediator. It belongs to the heirs, and if they cannot resolve it, to the judge.

Agreeing Before Settlement Discussions Begin

The best time for heirs to agree on the division is before anyone sits down to negotiate with the defense.

A family that is divided over money negotiates from weakness. The defense may learn of the disagreement. A settlement may stall because one heir will not sign. And a hard-won resolution can turn into a second dispute, this time between family members, after the case is over.

A careful approach usually includes these steps:

- **Identify every heir early.** The duty to join all known heirs means the family and the lawyer should confirm, at the start, who has a claim.
- **Explain the law before anyone discusses percentages.** Heirs should understand that the division follows each person's loss, and what evidence bears on that loss.
- **Address the conflict openly.** When one lawyer represents several heirs, their interests in the division may conflict. California's Rules of Professional Conduct require the lawyer to obtain each affected client's informed written consent to the joint representation when there is a significant risk that the representation of one will be materially limited by duties to another. (Cal. Rules of Prof. Conduct, rule 1.7(b).)
- **Put the agreement in writing.** A written apportionment agreement can state each heir's percentage, how shared costs are handled, and what happens if the case settles for more or less than expected.
- **Get each heir's consent to the settlement itself.** A lawyer who represents two or more clients may not enter into an aggregate settlement of their claims "unless each client gives informed written consent," and the lawyer's disclosure must include "the participation of each person in the settlement." (Cal. Rules of Prof. Conduct, rule 1.8.7(a).)
- **Consider independent advice.** Any heir may consult separate counsel about the proposed division. If the heirs' positions become directly adverse, one lawyer may not be able to continue representing all of them in a contest over the division. (See Cal. Rules of Prof. Conduct, rule 1.7(d)(3).)

The lawyer's role is to explain the law and the evidence of each heir's loss. The decision about how to divide the family's recovery belongs to the family.

Courts respect those agreements. In *Corder*, the heirs agreed on how the apportionment would be tried, including the evidence the court could consider, and the Supreme Court saw "no reason why this stipulation should not be honored." (*Corder*, *supra*, 41 Cal.4th at p. 658.)

When a Minor Is One of the Heirs

When a child is among the heirs, a judge will review the child's share even if the family agrees.

A minor's claim may be compromised only with court approval. (Code Civ. Proc., § 372; Prob. Code, § 3500.) The petition must contain "a full disclosure of all information that has any bearing upon the reasonableness of the compromise." (Cal. Rules of Court, rule 7.950.) The Judicial Council petition form asks how the settlement will be apportioned among all of the plaintiffs, including the adults, and requires the reasons for that apportionment. (Judicial Council form MC-350, item 11b.) The shorter expedited form is not available for wrongful death claims. (Judicial Council form MC-350EX, item 3a.)

This matters most when a surviving parent is both the child's representative and a competing heir. The court will want to know why the parent's share and the child's share were set where they were.

The court also controls what happens to the child's money. It approves the attorney's fees paid from the child's share under a reasonable-fee standard (Cal. Rules of Court, rule 7.955), and it orders how the balance will be held, such as in a blocked account withdrawable only with court authorization, an annuity, or a trust. (Prob. Code, §§ 3600, 3611.)

When the Family Cannot Agree, the Judge Decides

Sometimes agreement is not possible. A second spouse and adult children from a first marriage may see the decedent's last years very differently. A parent who was absent may claim an equal share with a parent who raised the child. In those cases, the court decides.

The judge divides the verdict or settlement in a separate proceeding and receives evidence of the damage suffered by each heir. (*Corder*, *supra*, 41 Cal.4th at pp. 652, 655.) That evidence usually includes:

- The nature of each heir's relationship with the decedent, including how often they spoke, visited, and relied on one another.
- The financial support each heir received and would have continued to receive.
- The household services the decedent provided to each heir.
- The ages and life expectancies of the decedent and each heir.
- For children, the training and guidance they lost.

The evidence must be real. In *Corder*, the division turned on whether the decedent's marriage was ending. The Supreme Court held that the decedent's own statements about divorce, "standing alone," were insufficient to support that finding, and reversed the division. (*Corder*, *supra*, 41 Cal.4th at p. 666.)

A contested apportionment can be expensive, slow, and painful. Family members may testify about one another. Private relationships become part of a public record. Distribution of the money waits until the court rules. That is one more reason to work toward agreement early, with clear information about the law.

Other Claims and Costs to Account For

The wrongful death recovery is not always the only money in the case.

A survival claim, which belongs to the decedent's estate rather than to the heirs personally, may be joined with the wrongful death action. (Code Civ. Proc., § 377.62.) When both are resolved together, a settlement may need to be allocated between the estate's claim and the heirs' claims before the heirs' share is divided, and the estate's portion passes through the estate. Families may need probate assistance for that part.

A written apportionment agreement should also address how attorney's fees, shared litigation costs, and any liens or reimbursements will be handled, so that every heir understands what their percentage means in dollars.

A Fair Division Protects the Family

A wrongful death case is about accountability for a death that should not have happened. The division of the recovery should not become a second injury.

California gives families a clear framework. Each heir's share follows that heir's own loss. The heirs can agree on the division, in writing and with full information, before settlement discussions begin. When a child is involved, the court reviews the result. And when a family cannot agree, a judge will hear the evidence and decide.

If you have lost someone and other family members share the claim, talk about the division early, get the law explained to everyone, and put any agreement in writing. The recovery is meant to address what each of you lost. It should not cost you each other.

Authorities

- Code Civ. Proc., §§ 372, 377.60, 377.61, 377.62.
- Prob. Code, §§ 3500, 3600, 3611.
- Cal. Rules of Court, rules 7.950, 7.955.
- Cal. Rules of Prof. Conduct, rules 1.7, 1.8.7.
- Judicial Council forms MC-350, MC-350EX.
- CACI Nos. 3921, VF-3905, VF-3906.

- *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690.
- *Watkins v. Nutting* (1941) 17 Cal.2d 490.
- *Corder v. Corder* (2007) 41 Cal.4th 644.
- *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512.
- *Changaris v. Marvel* (1964) 231 Cal.App.2d 308.
- *Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691.
- *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801.

About the author

Richard C. Harris is the principal attorney of Rich Harris, A Law Corporation. His practice is dedicated to helping families pursue wrongful death claims against reckless drivers, careless companies and negligent government agencies in all 58 California counties.

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