



If you have questions or would like further information regarding the Survival Act, please contact:

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## ILLINOIS LAW MANUAL

### CHAPTER IV

### STATUTORY CAUSES OF ACTION

#### B. SURVIVAL ACT

##### 1. Introduction

Before the enactment of the Survival Act in 1873, the common law did not permit a tort action to survive the death of either the victim or the tortfeasor. The Survival Act does not create a statutory cause of action but preserves a cause of action that accrued and existed before death. Myers v. Heritage Enterprises, 332 Ill. App. 3d 514 (2002); Froud v. Celotex Corp., 98 Ill. 2d 324, 334 (1983). It permits a representative of the decedent to maintain those statutory or common law actions which had already accrued to the decedent before death. Wasleff v. Dever, 194 Ill. App. 3d 147, 152 (1990); Myers v. Heritage Enterprises, 332 Ill. App. 3d 514 (2002). The Survival Act preserves those actions which are set forth in the Act. Myers v. Heritage Enterprises, 332 Ill. App. 3d 514 (2002). Actions for medical expenses, lost earnings, and pain and suffering between the time of the accident and the time of the death survive. Murphy v. Martin Oil Co., 56 Ill. 2d 423 (1974); see also Bryant v. Kroger Co., 212 Ill. App. 3d 335 (1991) (loss of consortium survives); Varelis v. Northwestern Memorial Hosp., 167 Ill. 2d 449 (1995).

## 2. Statutory Language

The Survival Act is found under the provisions of the Probate Act. The Survival Act provides as follows:

In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in section 6-21 of “an act relating to alcoholic liquors.”

755 ILCS 5/27-6.

## 3. Actions That Survive

The statute specifically designates certain actions that survive the death of the decedent. Actions to recover damages for an injury to personal property are included. In McDaniel v. Bullard, 34 Ill. 2d 487 (1966), the Illinois Supreme Court expanded the meaning of personal property to include intangible items. For example, the McDaniel court held that a wrongful death action was personal property that survived. Id. See also, Myers v. Heritage Enterprises, 332 Ill. App. 3d 514 (2002).

To determine what other actions survive, courts have used a test based on the assignability of the right asserted in the action. For instance, if a right asserted in an action is assignable, the right survives the death of either party.

Generally, actions for negligence survive the death. Illinois courts have also held that legal malpractice actions and medical malpractice actions also survive the decedent’s death. Fountas v. Breed, 118 Ill. App. 3d 669 (1983); Beastall v. Madson, 235 Ill. App. 3d 95 (1992).

Other “personal property” includes: actions for assault, Murphy v. McGrath, 79 Ill. 594, 595 (1875); actions under the Structural Work Act, Sickler v. National Dairy

Products Corp., 67 Ill. 2d 229 (1977); actions for conversion, Wasleff v. Dever, 194 Ill. App. 3d 147 (1990); actions for loss of consortium, Bryant v. Kroger Co., 212 Ill. App. 3d 335 (1991); and actions for compensatory damages for retaliatory discharge, Raisl v. Elwood Indus., Inc., 134 Ill. App. 3d 170 (1985).

#### **4. Actions That Do Not Survive**

The Survival Act lists several types of actions that do not survive the death of a decedent. Specifically, the Act does not allow actions for slander and libel to survive. 755 ILCS 5/27-6. Slander and libel do not survive because they are so personal in nature that they cannot be assigned to another person. In addition, claims for false arrest, false imprisonment, invasion of privacy, or negligent infliction of emotional distress do not survive the death of the alleged injured party. Strandell v. Jackson County, 648 F. Supp. 126, 135 (1986). While claims for intentional infliction of emotional distress normally also do not survive, at least one trial court has held that the plain meaning of the Survival Act allows such a claim to survive. Owens v. Archer-Daniels-Midland, 30 F. Supp. 2d 1082 (1999) (citing Gragg v. Calandra, 297 Ill. App. 3d 639 (1998)).

#### **5. Damages**

##### **a. Compensatory Damages Available**

In actions that survive, the decedent's estate is entitled to the same compensatory damages that the decedent would have been entitled to up to the time of death. A jury can compensate the estate for damages for conscious pain and suffering, lost earnings, medical expenses, loss of consortium, physical disability, and property damage. Varelis v. Northwestern Memorial Hosp., 167 Ill. 2d 449 (1995); Murphy v.

Martin Oil Co., 56 Ill. 2d 423 (1974); see also I.P.I. 31.10. Funeral expenses are not recoverable. Rodgers v. Consolidated R.R. Corp., 136 Ill. App. 3d 191 (1985).

#### **b. Punitive Damages Generally Not Available**

Generally, punitive damages do not survive the death of a decedent. Mattyasovszky v. West Town Bus Co., 61 Ill. 2d 31, 33-34 (1975); Froud v. Celotex Corp., 98 Ill. 2d 324, 335 (1983); Penberthy v. Price, 281 Ill. App. 3d 16 (1996). The Survival Act itself neither authorizes nor prohibits punitive damages. National Bank of Bloomington v. Norfolk & Western Railway Co., 73 Ill. 2d 160 (1978); Penberthy v. Price, 281 Ill. App. 3d 16 (1996). The Act is merely a vehicle that allows the underlying cause of action to survive. Therefore, if the underlying cause of action permits the award of punitive damages, the claim for those damages may survive the death of the decedent. The Raisl court stated that punitive damages will survive when either:

- 1) there exists a statutory basis for such claims or when such claims are an integral component of the regulatory scheme and of the remedy which is available under it; or
- 2) strong equitable considerations advocate survival.

Raisl, 134 Ill. App. 3d 170 (1985).

As previously discussed, the Public Utilities Act provides an exception to the general rule. The Public Utilities Act is a statutory scheme that expressly provides for punitive damages. Therefore, punitive damages survive only because the legislature provided for that remedy. Froud, 98 Ill. 2d at 334.

#### **6. Relationship Between Wrongful Death Act and Survival Act**

Heirs and the estate may sue for injuries directly related to the deceased's death. The heirs may sue on behalf of themselves under the Wrongful Death Act while the estate may sue on behalf of the deceased under the Survival Act.