

Opinion No. 75-29

April 15, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Scott H. Mabry Probate Judge County of Bernalillo Courthouse, 415 Tijeras, N.W.
Albuquerque, New Mexico 87102

QUESTIONS

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1. Must a probate judge require a bond of the administrator of an estate where the only asset of the estate is a cause of action in wrongful death?
2. In what amount should the bond be required?

CONCLUSIONS

1. Yes.
2. See analysis.

OPINION

{*89} ANALYSIS

Necessity of bond.

The applicable portion of 31-1-17, NMSA, 1953 Comp., reads:

The probate judge shall require a bond of the person to whom letters testamentary or administration are granted, . . . and no person shall act as executor or administrator until he shall have given such bond. If any probate judge shall refuse or neglect to take such bond, at the time of granting such letters, he shall himself be liable for all the damages resulting from such {*90} neglect or refusal ,at the suit of any person injured.

The language of 31-1-17, **supra**, is mandatory rather than precatory. If the section is to be read giving the words their clear meaning, one must conclude that the probate judge must require a bond. A cause of action against the probate judge for failure to require a bond is specifically created by the statute. One must also conclude that the bond is a prerequisite to the designated administrator acting for the estate.

Amount of bond required.

A much more difficult question is raised in determining the amount of bond required from the administrator. The applicable portion of 31-1-17 states:

The probate judge shall require a bond of the person to whom letters testamentary or administration are granted to the state of New Mexico, with security to be approved by the court, in a penal sum, if personal sureties are given, at least double the estimated value of the personal estate, and if a surety company bond is given, in a penal sum of ten per cent [10%] in excess of the estimated value of the personal estate, which bond shall be conditioned for the faithful performance of his duties as executor or administrator.

The bond to be posted is a percentage of the estate of the deceased. The problem of fixing a value for the bond translates into a problem of fixing the value of the estate in the hands of the administrator.

The value which the administrator must protect is the value of a possible cause of action which he may pursue. It has been held that a cause of action in wrongful death is part of the personal estate sufficient for the issuance of letters of administration. **McKenzie v. K.S.N. Company**, 79 N.M. 314, 442 P.2d 804 (Ct. App. 1968).

In **McKenzie** the issue was raised as to whether the probate judge had jurisdiction to name an administrator where the deceased had no home or other personal estate in the county other than a cause of action in wrongful death. The court found that the cause of action in wrongful death was a part of the decedent's personal estate.

Where an estate consists solely of a cause of action in wrongful death, the judge is called upon to estimate the value of that cause of action. In estimating this value the probate judge should consider the likelihood of success of the suit, the possible judgment which could be rendered, and the likelihood that the named administrator will be called upon to pursue the action.

In determining the likelihood that the administrator will pursue the wrongful death action, the judge should consider that there are cases where the administrator would not act as personal representative. There are other possible personal representatives of the decedent who may pursue the wrongful death action instead of, or in conjunction with the administrator. For example in a wrongful death action brought against the railroad or a public conveyance under 22-20-4, NMSA, 1953 Comp. a personal representative may not pursue the action unless the kindred named as beneficiaries in the act do not exist, or unless the named kindred fail to bring suit within nine [9] months of the death of the deceased.

{*91} It is important to note that the recovery in a wrongful death action does not pass through the estate of the deceased but goes directly to the statutorily designated beneficiaries. The administrator therefore does not administer the recovery as part of the ordinary estate. **Stang v. Hertz Corporation**, 81 N.M. 69, 77, 463 P.2d 45, 53 (Ct. App. 1969) **aff'd** 81 N.M. 467 P.2d 14 (1970). The court in **Stang** did not discuss the

question of whether the cause of action in wrongful death was part of the deceased's personal estate. **Stang** and its predecessor, **Trefzer v. Stiles**, 56 N.M. 296, 243 P.2d 605 (1952), interpreted statutes which establish the method of distribution for a wrongful death recovery. The court in **McKenzie** established that a cause of action in wrongful death is a part of the estate even though the recovery is not distributed through the estate.

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