

**Lawyer bringing lawsuit under New Mexico Wrongful Death Act in the name of the personal representative had duty to intended statutory beneficiaries such that a malpractice claim could be brought against lawyer by the beneficiary for a breach of that duty.**

***Spencer v. Barber*, No. 33,133 slip op. (N.M. Sup. Ct. February 28, 2013)**

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In *Spencer v. Barber*, the New Mexico Supreme Court addressed the duty of an attorney representing the personal representative in a wrongful death action, and the duty that attorney owed to the statutory beneficiaries under the New Mexico Wrongful Death Act. The case involved an auto accident where the personal representative was driving her car on the freeway and was struck from behind, causing injuries to her, and the death of her daughter and granddaughter. The personal representative sued multiple defendants individually and as the personal representative of her daughter's estate. The lawyer represented her in both capacities.

The Court found that the statutory beneficiary under the Wrongful Death Act is always the intended beneficiary of the agreement between the personal representative and her attorney, and that the attorney owed a duty of reasonable care to the statutory beneficiary to ensure he received his portion of the proceeds under the Wrongful Death Act.

The Court addressed two potential conflicts for the attorney. One conflict was the personal representative taking the position that her daughter's father, a statutory beneficiary, had abandoned the child, and pursuing a reduction of the amount due to the statutory beneficiary based on this position. Another conflict was that the attorney learned during the representation that the personal representative had been drinking before the accident and had parked the car on the freeway with the lights off, and that she may be liable for the accident.

The Court found that there were genuine issues of material fact regarding whether the attorney satisfied his duty to the statutory beneficiary by intending to reduce the share due to the statutory beneficiary and whether the information he disclosed to the statutory beneficiary was adequate. The Court also found that there were genuine issues of material fact regarding harm caused by the attorney's potential breach of duty owed to the statutory beneficiary in handling the conflict of interest regarding the liability issue.

**Practice Note:** This case discussed the importance of recognizing the various duties owed by an attorney when representing a client as an individual and as the personal representative in a wrongful death action, including those duties to an intended beneficiary that is not the attorney's client.