

# Wrongful Death Settlements & Distributions in the Probate Court

The settlement and distribution process of wrongful death claims in probate court is a frequent source of confusion and frustration for practitioners. Attorneys involved in this type of litigation often inadvertently fail to follow the requisite procedures. Noncompliance with relevant statutes and court rules will delay and jeopardize the settlement process and could leave an attorney open to a malpractice claim.

BY HOWARD T. LINDEN

This article will focus on the probate practitioner's perspective of how to manage and direct a wrongful death case through the probate court. It will concentrate on the process of obtaining settlements and judgments where a minor or legally incapacitated individual is to receive a distribution from a wrongful death claim—an area full of pitfalls for the unwary attorney. It will also provide the basic information necessary to fulfill all of the procedural requirements in these cases and highlight special areas of concern.

The settlement and distribution process begins at the initial client interview. If the case is being referred to you for assistance with the probate process, it is an excellent idea to be at the initial meeting with the referring attorney, or, at minimum, advise the referring attorney exactly what information you will require. From a probate perspective, you will want to know many more details about the immediate and extended family members pursuant to the wrongful death statute.<sup>1</sup> The statute lists all interested persons who *may* have a claim to a portion of any wrongful death settlement—information necessary for you to successfully complete your responsibilities.

It is good practice to obtain the proper information from your client at the very onset of your involvement in setting up the probate estate. At the first interview, the client and family members usually provide the most accurate, honest, and detailed information they possess. Since these types of cases can frequently take two years or more to complete, intra-family relationships can change due to death or bad blood, encouraging your informants to alter the correct information. For example, certain interested parties who are entitled to collect might be mysteriously forgotten or edited out of the family altogether. This situation should be avoided at all costs.

After all relevant data has been obtained, you must procure from the probate court letters of authority for a decedent estate and, when necessary, a conservatorship estate for a minor or legally incapacitated individual (LII).<sup>2</sup>

When the underlying cause of action is resolved, either in a settlement pre-suit or after litigation has begun, adhering to the language

in the letters of authority becomes crucial. It is important to note that the burden and ultimate blame for non-compliance with any restrictions in the letters of authority will fall on you as the attorney involved in the probate portion of the case.

A new tool added to specifically guard the rights and estates of minors and LIIs who are to receive a distribution from a wrongful death settlement is MCR 2.420.<sup>3</sup> This rule states what must be done in probate court *prior* to a written judgment being entered in any other court having jurisdiction over the underlying wrongful death case. The main thrust of the rule dictates that a sufficient surety bond must be obtained and filed in the probate conservatorship, usually in an amount equal to the funds the minor or LII will receive.<sup>4</sup>

If a guardian, conservator, or next friend for a minor or LII has been appointed, a proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or LII.<sup>5</sup> No judgment or dismissal can be entered until the court receives written verification from the probate court that it has passed on the bond's sufficiency, and the bond, if ordered, has been filed with the probate court.<sup>6</sup> CAUTION: Even if a circuit court-appointed next friend has proposed to

settle a claim in the circuit court for less than \$5,000, if the probate court has appointed a guardian, conservator, or next friend, the probate court must still pass on the sufficiency of the bond.

The Wayne County probate and circuit courts worked together to develop a procedure to ensure compliance with MCR 2.420 that has now been in place for several years. Specifically, a form is used in cases where minors or LIIs are to receive distributions from a wrongful death claim. The State Court Administrative Office has now approved a form to standardize practice throughout the state.<sup>7</sup>

This procedure provides protection for the minor or LII in three ways: (1) it assures that the funds will be protected, (2) it permits the probate court to assess whether the fiduciary is acting in the best interests of the ward *without* the necessity of a hearing, and (3) it gives the probate court an opportunity to assess the fairness of the settlement.

In addition to the forgoing court process, certain general procedures must be followed in the settlement of wrongful death cases. If a lawsuit has been filed in circuit court, the wrongful death settlement process is handled by circuit court, except for the bond review procedure already discussed. If a lawsuit has not been filed, the settlement is administered and approved by the probate court. Whether in circuit or probate court, the motion or petition filed by the personal representative to have the settlement approved *must* contain language incorporating the requirements of the wrongful death statute,<sup>8</sup> specifically:

1. Enumerating the list of persons who may be entitled to compensation, including the relationship to the deceased and the amount of net proceeds proposed to go to each person.
2. Alleging that the reasonable medical, hospital, funeral, and burial expenses have been paid, if true.
3. Determining whether any compensation is being made for conscious pain and suffering before the decedent died; if so, that portion of the net proceeds will pass through the estate and be distributed either via intestacy or by will, if one exists.
4. Determining whether any compensation is being made for loss of society and companionship of the deceased; if so, that

## FAST FACTS

Noncompliance with relevant statutes and court rules will **delay and jeopardize** the settlement process and could leave an attorney open to a malpractice claim.

Always operate under the premise that your **opposing counsel** has no knowledge of wrongful death settlement and distribution procedures in probate court.

Always, always, always make sure your **letters of authority** are current.

portion of the net proceeds passes outside of the estate.

5. Determining the breakdown of attorney fees and costs related to the wrongful death case itself.

After setting forth the above information in a concise, understandable format, the prayer provision of your motion or petition must contain language authorizing the personal representative to settle the claim and determine if any of the net proceeds should be awarded for decedent's conscious pain and suffering. If no portion of the settlement is for this item, say so, as this is the most im-

interested person to either appear at the hearing to object to the dollar amount of the shares being offered or submit objections in writing. It also provides the added safeguard that if the personal representative has "forgotten" any interested party, other family members may come forward to provide you with this information.

At this point, the information you received at the very beginning of the case comes into play. It is astonishing how many times a "forgotten" relative who should be entitled to damages is left out by an absent-minded or, more likely, a mean-spirited personal representative seeking more than his or

handling this hearing, make sure that the attorney covering the motion always asks those questions. This specific action provides a means to protect you and your referring attorney from any possible liability regarding the distribution process.

Finally, the following miscellaneous practice and procedure points will enhance your proficiency in this specialized area of probate practice:

1. Look before you leap. When you are crafting a wrongful death settlement, attempt to identify potential problems and follow the requisite procedures to ensure the

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portant language your order should contain. The order should also recite all of the previously enumerated information as well as disbursements to interested persons for damages, specifying their legal relationship to the deceased. It is good practice and procedure to use a single line for each person to be compensated, as well as line items concerning attorney fees, costs, and the other expenses you have already highlighted in the body of your motion or petition.

Once the petition or motion has been properly prepared, a notice of hearing and the pleading must be sent to all persons who may be entitled to damages under the wrongful death statute.<sup>9</sup> The notice must contain the name and address of the personal representative and the personal representative's attorney, as well as language to the effect that the personal representative must be advised of any claim for damages *on or before* the date set for hearing for distribution, and that failure to do so could bar the claim to any of the proceeds. Note that the petition or motion and notice of hearing are typically served for the main purpose of advising the interested persons or claimants who have filed a claim with the court, and whose claims remain unpaid, of the proposed distributees and the amount they are to receive. This allows any

her fair share by editing the family tree. It cannot be stressed enough how important it is to be thorough in your information gathering. You should develop a system that works for you so you will be able to anticipate what is needed at the end of a lawsuit when it is time for distribution. You cannot let this task fall solely to a personal injury attorney whose primary interest is to settle the case for the client. If you are not careful to determine well in advance of any settlement the class of individuals who will take in your wrongful death case, you will be left with a very large mess on your hands long after the case in chief has settled and the net proceeds have been distributed.

At the hearing on your petition or motion for settlement, make sure your personal representative appears with you to testify under oath. If it is a combined petition or motion seeking court approval of the settlement generally and distribution specifically, it must be placed on the record that the personal representative knows and understands that this is a full, final, and complete settlement against all defendants (assuming that it is) and, most importantly, that he or she, as the personal representative, has provided you with the names of all interested parties as defined by the wrongful death statute. If you are not

timely and appropriate approval and distribution of any proceeds payable pursuant to the wrongful death claim. It is much more productive to bring any contesting or unhappy claimants together with the personal representative, yourself as attorney, and the guardian ad litem (if one has been appointed) to discuss the issues. Reasons for each side's feelings can be exchanged and, in most cases, a slight variation as to what is being proposed will satisfy those involved. Defusing these issues in private is far superior to waiting for the court date and airing this information in an open, public forum.

2. Do not assume anything. Always operate under the premise that your opposing counsel has no knowledge of wrongful death settlement and distribution procedures in probate court. By doing so, you can help ensure proper implementation of the settlement by preventing unwarranted and unnecessary impediments to receiving the settlement check.
3. If the personal representative is proposing a distribution that, to you, fails the smell test, it most likely will not be approved. Keep in mind that at the end of the day, not only will the personal representative

look to you for advice and guidance as to how the proceeds of the cause of action should be divided, but so will your referring attorney. If you are new to this area of law or have not had a great deal of experience with it, you should call or ask someone with experience. Attorneys with a track record in wrongful death cases can be extremely helpful because, while there are no absolutes, generally accepted distribution patterns have developed over the years and most distributions now fall within certain parameters. Remember: your clients will likely hang on every word of advice offered, so it is an excellent idea to have a working knowledge of customary distribution percentages. It is highly desirable to use percentages when speaking to clients; if you plant a monetary figure in a client's head too early on and it changes, that will *always* present a problem.

4. If the settlement or judgment does not give over \$5,000 to a minor in any calendar year during minority, instead of establishing a conservatorship, the money can be distributed pursuant to the Estates and Protected Individuals Code's "\$5,000 direct payment provision,"<sup>10</sup> typically to an individual who has the care and custody of the minor and with whom the minor resides.
5. Children of the decedent's *predeceased* spouse are not entitled to make a claim in the decedent's wrongful death action.<sup>11</sup> Even though the wrongful death statute authorizes the children of the deceased spouse to receive damages for the decedent's wrongful death, case law has determined that when the decedent's spouse predeceased the decedent, the stepchildren are not considered children under the wrongful death statute.<sup>12</sup>
6. Always, always, always make sure your letters of authority are current. A personal representative who is not empowered to give that testimony and accept the settlement will render the agreement null and void and may put you out of a job.
7. Insist on controlling the money being received for a minor or LII. That is, have the attorney handling the case in chief send you the check for the minor or LII,

payable to his or her estate. This will ensure your ability to obtain an appropriate bond, that the funds can be properly placed in a restricted bank account with your direction and supervision, and that a properly amended inventory can be signed by your client. It will safeguard the minor's or LII's money and allow you to comply with all mandatory court rules and requirements. Finally, it will ensure that your malpractice insurance carrier does not have to reimburse inappropriately paid monies.

The evolution of the wrongful death settlement and distribution process has brought new changes and safeguards to the original statute dictating procedure. Hopefully, the information provided in this article will help clarify areas that were once somewhat confusing and unclear. It will also help ensure that your client's interests are protected. ♦



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#### Footnotes

1. MCL 600.2922.
2. A discussion of this topic is beyond the scope of this outline. See MCL 700.3601 to 700.3606; MCL 700.5410 to 700.5412; and MCR 5.202.
3. For a detailed discussion of this rule, see Hon. Milton L. Mack, Jr., *Probate Settlements & Judgments: Amended MCR 2.420 changes the process for minors and legally incapacitated individuals*, 82 Mich BJ 8 (August 2003).
4. MCR 2.420(B)(3).
5. *Id.*
6. *Id.*
7. Form MC95—Request for Approval of Bond and Notice/Settlement/Judgment/Wrongful Death Settlement.
8. MCL 600.2922.
9. MCL 600.2922(3).
10. MCL 700.5102.
11. *In re Combs Estate*, 257 Mich App 622; 669 NW2d 313 (2003).
12. *Id.* at 625.