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Probate for the Personal Injury

Amy L. Papesh, Esq.

PROBATE for the PERSONAL INJURY

MINORS and INCOMPENTENTS

A. Minors

- i. If it is proposed that a claim be settled for the net amount of twenty-five thousand dollars (\$25,000.00) or less after payment of fees and expenses as allowed by the court, the court, upon application by any suitable person whom the court may authorize to receive and receipt for the settlement, may authorize the settlement without the appointment of a guardian and authorize the delivery of the moneys as provided in ORC § 2111.05. The court may authorize the person receiving the moneys to execute a complete release on account of the receipt. The payment shall be a complete and final discharge of that claim. In the settlement, if the ward is a minor, the parent or parents of the minor may waive all claims for damages on account of loss of service of the minor, and that claim may be included in the settlement¹.
- ii. The Ohio Rule of Superintendence 68 pertains to the settlement of injury claims on behalf of minors. It has three specific parts:
 1. Application: An application for settlement of a minor's claim shall be brought by the guardian of the estate. If there is no guardian appointed and the court dispenses with the need for a guardian, the application shall be brought by the parents of the child or the parent or other individual having custody of the child. The noncustodial parent or parents shall be entitled to seven (7) days notice of the application to settle the minor's claim which notice may be waived. The application shall be captioned in the name of the minor.
 - a. *Practitioner's Point:* Please note that in a situation where the child is maintained by somebody else other

¹ ORC §2118.18

than a parent, it may be difficult to get court approval of the settlement. Notwithstanding a court order granting custody of the minor to someone other than a parent, the court will be hard-pressed to grant any application to approve a minor settlement claim.

2. Doctor's Report: The application shall be accompanied by a current statement of an examining physician in respect to the injuries sustained, the extent of recovery, and the permanency of any injuries. The application shall state what additional consideration, if any, is being paid to persons other than the minor as a result of the incident causing the injury to the minor. The application shall state what arrangement, if any, has been made with respect to counsel fees. Counsel fees shall be subject to approval by the court.
3. The injured minor and the applicant shall be present at the hearing².

B. Incompetents

- i. If personal injury, damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible property is caused to a ward by wrongful act, neglect, or default that would entitle the ward to maintain an action and recover damages for the injury, damage, or loss, and when any ward is entitled to maintain an action for damages or any other relief based on any claim or is subject to any claim to recover damages or any other relief based on any claim, the guardian of the estate of the ward may adjust and settle the claim with the advice, approval, and consent of the probate court. It is the duty of the Guardian of the

² Sup R 68

estate to bring suit for the ward when a suit is in the best interests of the ward³

ii. The Ohio Rule of Superintendence 69 pertains to the settlement of injury claims on behalf of an adult ward. It has two specific parts:

1. Application: An application for settlement of a claim in favor of or against an adult ward shall be brought by the guardian of the estate. Notice of the hearing on the application shall be given to all persons who are interested parties to the proposed settlement, as determined by the court. The court may authorize or direct the guardian of the ward's estate to compromise and settle claims as the court considers being in the best interest of the ward. The court may dispense with notice of hearing.

a. *Practitioner's Point*: If the incompetent ward does not have a guardian already appointed, it will be necessary to file for a guardianship under ORC §2111.03. It is good practice to file for the guardianship *prior* to negotiating and/or settling the claim for the ward as the incompetent ward lacks the legal authority to settle their matter. In addition, an application to engage the services of the personal injury counsel must be approved by the probate court under the guardianship.

2. Doctor's Report: The application for settlement of an injury claim shall be accompanied by a current statement of an examining physician describing the injuries sustained, the extent of recovery from those injuries, and permanency of any injuries. The application shall state what additional consideration, if any, is being paid to persons other than the

³ ORC §2111.14

ward as a result of the incident causing the injury to the ward. The application shall state what arrangement, if any, has been made with respect to counsel fees. Counsel fees shall be subject to approval by the court⁴.

- a. *Practitioner's Point:* Oftentimes an incompetent individual who is receiving a personal injury settlement may be receiving some sort of government benefits. Receipt of settlement funds could possibly disqualify ward from continuing to receive their government benefits. Under such a situation, the use of a special needs trust, if applicable, or a pooled trust, maybe a possible solution to allowing them to maintain their benefits and the settlement proceeds.

II. WRONGFUL DEATH

A. Who can file?

- i. The estate representative can sue for the wrongful death of the decedent. The action is brought under ORC §2125.01 and it states in relevant part:

“When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter.

When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such

⁴ Sup R 69

deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action.⁵

- ii. Negligence: To maintain an action for damages for wrongful death for negligence, the plaintiff must show a duty owing to plaintiff's decedent (e.g. the duty to exercise ordinary care), a breach of that duty, and death proximately caused by the breach of the duty. Recovery cannot be predicated upon mere breach of contract⁶. An action for wrongful death may also be based upon an intentional act of the defendant which proximately results in death⁷.

⁵ ORC 2125.01

⁶ *Bennison v. Stillpass Transit Co.* 5 Ohio St. 2d 122, 34 Ohio Op. 2d 254, 214 N.E. 2d 213 (1966)

⁷ *Schweinfurth v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 60 Ohio St. 215, 54 N.E. 89 (1899)

- iii. Statute of Limitations: The action for wrongful death must be brought within two (2) years of the date of death⁸.
- iv. Approval of fee agreement: Rule 40(H) of the Ohio Rules of Superintendence of the courts of common pleas requires **prior** probate court approval of a contingent fee contract entered into between an attorney and a fiduciary and provides ample authority for a probate court to reject a contingent fee contract which has not received prior court approval⁹.

B. Who are the beneficiaries?

- i. In general: The beneficiaries under the wrongful death statute are separate and apart from those under the laws of intestacy or those who take under the Will. The parties are set forth by ORC §2125.02 and are outlined as follows:
 - i. Spouse, children and parents: The action is brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent¹⁰. They are all rebuttably presumed to have suffered damages¹¹.
 - ii. Other next of kin: Other next of kin are also able to maintain an action, but are not rebuttably presumed to have suffered damages. They must prove their damages¹².
 - iii. Unknown next of kin: Often times, the class of next of kin that are beneficiaries under the statute are unknown. In that circumstance, unknown next of kin are listed and are often served notice by publication.

⁸ ORC 2125.02 (D)

⁹ *In re Estate of Hamrick*, 126 Ohio App. 3d 624

¹⁰ ORC 2125.02

¹¹ *Id*

¹² *In re Estate of Payne*, (Ohio App. 10 Dist., Franklin, 05-17-2005) No. 95 04AP-1176, 2005-Ohio-2391, unreported.

- ii. Criminal exception: An amendment to ORC § 2105.19, effective June 1, 1982, prohibits the distribution of any proceeds of a wrongful death action to a person who has been convicted of, or who has pled guilty to aggravated murder, murder, or voluntary manslaughter. The proceeds shall be distributed as if the guilty person had predeceased the decedent¹³
- iii. Abandonment exception: If a parent abandons a minor child and the child subsequently dies intestate as a minor, the parent cannot receive any benefit in a wrongful death action brought under ORC § 2125.02. This rule is applicable when the child dies as an adult as well.¹⁴

C. How are the damages determined and disbursed?

- i. The proceeds of a wrongful death action are not assets of the decedent's estate and are not subject to distribution as such¹⁵. The creditors of the decedent have no claim upon these assets.
- ii. The jury, or court, may award damages, as it determines in proportion to the injury and loss resulting to the beneficiaries. An award may include damages for the following:
 - 1. Loss of support from the reasonably expected earning capacity of the decedent;
 - 2. Loss of services of the decedent;
 - 3. Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

¹³ Anderson's Ohio Probate Practice and Procedure § 27.10

¹⁴ *In re Estate of Marinelli*, 99 Ohio App. 3d 372, 650 N.E.2d 935 (1994) .

¹⁵ *United States Fidelity & Guaranty Co. v. Decker*, 122 Ohio St. 285, 171 N.E. 333, 8 Ohio L. Abs. 273 (1930)

4. Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;
 5. The mental anguish incurred by the surviving spouse, dependent children, parents or next of kin of the decedent.
- iii. The probate court has sole jurisdiction to determine the distribution of any wrongful death award or settlement.
 - iv. If all beneficiaries are on an equal degree of consanguinity they may decide the manner of distribution among themselves.
 - v. If the parties cannot agree on a proposed distribution, the court that appointed the personal representative adjusts the share of each beneficiary in an equitable manner. The court considers the amount of injury and loss to each beneficiary resulting from the death of the decedent. There is no formula to rely upon for the court to determine the allocation to each beneficiary¹⁶.

D. What is the procedure for approval?

- i. ORC § 2125.02 vests the authority in the probate court making the appointment of the fiduciary to approve a settlement offer with respect to the wrongful death claim. A settlement that has not been submitted to the court for approval is not enforceable¹⁷.
- ii. Application (Form 14.0): This sets forth the amount of the proffered settlement, the attorney fees, the case expenses incurred, the funeral expenses, the fiduciary fees, the medical bills incurred and the net division between the wrongful death and/or the survival claim.
- iii. Proffered Statement in Support should be attached detailing the nature of the claim¹⁸. This statement to the Court details the facts surrounding the incident, the insurance coverage available, the settlement offer, including the amount to be allocated to the

¹⁶ *In re Molitor*, (Ohio App. 12 Dist., Brown, 02-19-2013) No. CA2012-06-013, 2013-Ohio-525

¹⁷ *Fosnight v. Esquivel*, 106 Ohio App. 3d 372

¹⁸ SupR. 70

wrongful death settlement of the claim and the amount, if any, to be allocated to the settlement of the survival claim.

iv. Notices/ Consents (Form 14.1)

1. Waivers and Consent to wrongful death and survival claims should be served upon those who are presumed to have suffered a loss (ie: the spouse, children and parents). Additional notice should be given to those who are other next of kin who have suffered damages¹⁹. (*Probate courts differ on who should receive the additional notices*). Notice should include a copy of the Application as submitted to the Court for approval and the date, time and location of the hearing on the matter. Notice can be waived by filing of Form 14.1.

v. Hearing: Most courts will set a formal hearing on the matter to consider approval of the proffered settlement. Some courts will agree to waive the hearing if all of the interested parties have executed a waiver and consent to the settlement.

vi. Unless otherwise ordered by the court, the fiduciary of the estate shall file a Report of Distribution (Form 14.3) within 30 days of the filing of the Entry Approving Settlement. Extensions can be granted for just cause.

III. SUBROGATION AND PROBATE COURT

A. Generally: Subrogation is the substitution of one creditor for another creditor. In personal injury cases, a medical insurer that has paid an injured party's medical bills may have subrogation rights.

B. Private Health Care liens: They have subrogation rights contained in their insurance contracts. These should not be ignored. *If a notice is not received, it is good practice to put the carrier on notice to protect the client's future benefits.* Private health insurance carriers and medical payment carriers are

¹⁹ ORC 2125.02 (A)(1)

generally able to make their subrogation claims within a couple of weeks. If a claim is made, they will generally negotiate with the attorney for a reduction.

C. Medicare: Medicare is health insurance for the elderly and disabled. Medicare can “stand in your shoes” and request reimbursement for medical bills paid for the injury sustained as a result of the tortfeasor. Medicare can recover those payments from the tortfeasor’s insurance company²⁰. No-fault or Liability Insurance pays primary for accident or other situation related health care services claimed or released, Medicare pays secondary²¹.

- i. Procedure: When the Benefits Coordination & Recovery Center (BCRC) is notified of a settlement, judgment, award, or other payment on a case, the BCRC will perform a final search of Medicare paid claims history. When the final search is completed and related claims identified, the BCRC will issue a formal demand letter advising the beneficiary of their primary payment responsibility. Medicare will take the beneficiary’s reasonable procurement costs (e.g. attorney fees and expenses) into consideration when determining its recovery claim amount. The formula used to decide how much the amount of reduction should be may be found at 42 C.F.R., Sub-Section 411.37²².
- ii. Notice timeline: Initial notice should be given once it is determined that a client is a Medicare recipient. Upon putting them on notice, you will receive a Rights & Responsibilities letter. This is reflective of a case pending with Medicare. Within 65 days, you should receive the initial conditional payment letter. When a client is finished treating, Medicare can be contacted for another condition lien number. The conditional number takes approximately 45 days.

²⁰ 42 CFR § 411.37

²¹ www.cms.gov

²² www.cms.gov

It can be accepted and a final can be requested, taking about 35 days. However, if the conditional lien contains unrelated charges, it can be disputed, taking another 45 days. Once the conditional is believed to be reflective of the true treatment received, a final can be requested and usually obtained within 35 days.

- iii. Sanctions: Commencing in 2010, Medicare has set forth regulations that impose significant sanctions, including a \$1000 per day fine for failure to honor its statutory subrogation rights. This fine can apply to the injured party, the attorney and/or the insurance company of the at-fault party. Protecting Medicare's right of subrogation can be costly if not done right.
- iv. Final liens: Medicare sanctions are so costly that most insurance companies will not agree to settle the claims until they are assured that Medicare's liens have been or are secured to be paid.

D. Medicaid (Ohio Tort Recovery): Medicaid is health insurance for the indigent. Section 1902(a)(25) of the Social Security Act, 42 CFR 433.135, requires that States take all reasonable measures to ascertain the legal liability of third parties to pay for medical services furnished to a Medicaid recipient. The Department of Medicaid (ODM) has a statutory right of recovery against the liability of any third party for the cost of medical services and care arising out of the injury, disease, or disability of a Medicaid recipient²³. The Ohio Department of Jobs and Family Services (ODJFS) has an agreement with the Ohio Tort Recovery Unit to handle these matters. The Ohio Tort Recovery Unit can be contacted for a final lien once the treatment is finalized. Approximately 3 weeks after the Subrogation/Recovery letter is received, a claims printout will be sent of claims that ODM paid and are believed to be related to the accident/incident. This printout will represent either an Interim or a Final

²³ ORC §5160.37

statement of the aid paid by ODM. This printout will be the official subrogated interest of the State of Ohio.

E. Medicaid Estate Recovery (MER): Estate recovery seeks to obtain repayment for the cost of Medicaid benefits once a Medicaid recipient is deceased. This happens after the death of a Medicaid recipient who was either permanently institutionalized or age 55 and older. Notice to the MER unit is required under ORC§ 2117.061 and ORC §5162.21. Often times, the MER will seek reimbursement from a claim of wrongful death when there is the potential for a survival period, even if the settlement was not negotiated as a survival claim.

F. Worker's Compensation: The Bureau of Worker's Compensation has a right to recover from any third party, notwithstanding any limitations by the third party concerning its responsibility to make payments in cases involving workers' compensation claims²⁴.

- i. Upon a work related injury, anyone can file a claim with the BWC for compensation
- ii. The BWC will send a claim letter demanding repayment for any recovery from a third party
- iii. The lien can be negotiated prior to the settlement of the personal injury claim.
- iv. For a deceased claim, the dependent spouse, minor children and children in college up to age 22 can collect 2/3 of the employee's last year's income. This benefit is for life.

²⁴ ORC §4123.93