

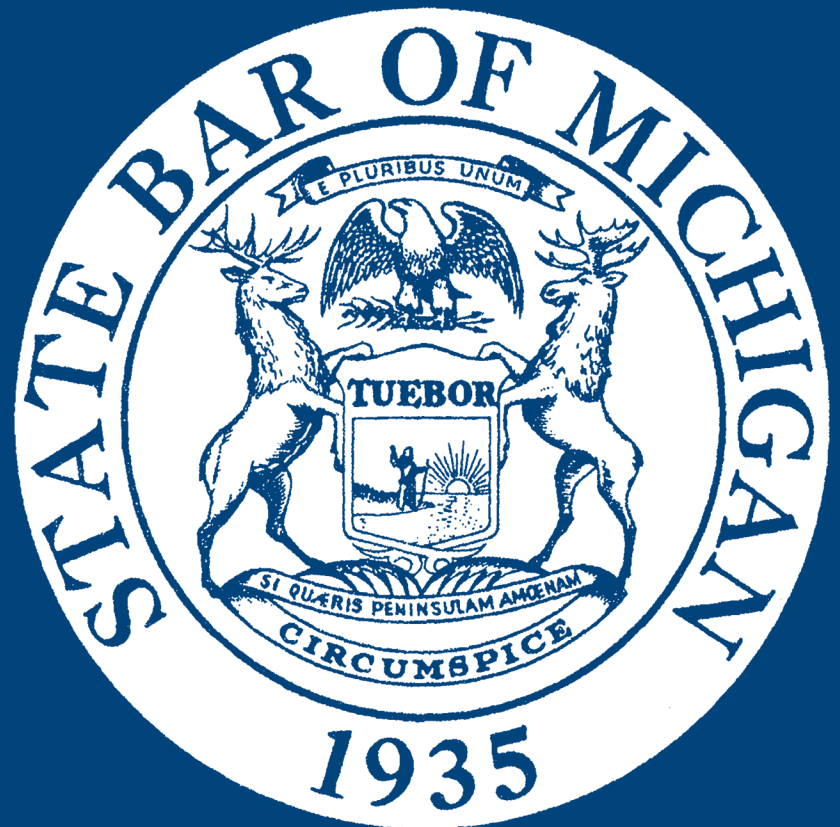
MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

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The *Michigan Probate and Estate Planning Journal* is published three times a year by the Probate and Estate Planning Section of the State Bar of Michigan, with the cooperation of the Institute of Continuing Legal Education, and is sent electronically to all members of the Section. Lawyers newly admitted to the State Bar automatically become members of the Section for two years following their date of admission. Members of the State Bar, as well as law school students, may become members of the Section by paying annual dues of \$35. Institutions and individuals not eligible to become members of the State Bar may subscribe to the *Journal* by paying an annual \$25 subscription. The subscription year begins on October 1 and is not prorated for partial years. Subscription information is available from the State Bar of Michigan, Journal Subscription Service, 306 Townsend Street, Lansing, MI 48933-2012, (517) 372-9030. A limited number of copies of prior issues of the *Journal* are available beginning with Fall 1988, Volume 8, Number 1, for \$6 each, plus \$2 for postage and handling. Copies of articles from back issues cost \$7 per article. Prior issues and copies of articles from back issues may be obtained by contacting the Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI, (734) 764-0533. Additionally, copies of the *Journal* beginning with Fall 1995, Volume 15, Number 1, are available online at <http://www.michbar.org/probate/journal.cfm>.

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The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

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Citation Form

Issues through Volume 4, Number 3 may be cited [Vol.] Mich Prob & Tr LJ [Page] [Year]. Subsequent issues may be cited Michigan Prob & Est Plan J, [Issue], at [Page].

Section Web Site

<http://www.michbar.org/probate/>

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Wrongful Death Claims: An Overview for Probate Attorneys

By Nicholas E. Papisifakis

Introduction

Experienced probate attorneys are familiar with the substantive law and procedures governing the administration of a decedent's estate in probate court. In short, the process begins with opening the estate by application or petition, admitting the last will and testament (if there is one), and appointing a personal representative. Once the personal representative has been appointed and letters of authority are issued, the personal representative will publish notice to creditors, identify and gather assets, and present or file an inventory with the probate court. The personal representative is then charged with the tasks of settling any creditor claims, filing and paying taxes, accounting to the heirs or devisees, and ultimately distributing the remaining property to the devisees or heirs before closing the estate. While this description of estate administration is oversimplified, experienced probate attorneys are familiar with the process. It is the probate attorney's responsibility to provide guidance to the personal representative throughout the course of the estate administration.

While estate administration is usually a significant part of a probate attorney's practice, most probate attorneys steer clear of estates with wrongful death claims, as the court rules and statutes applicable for general civil litigation overlap with those of the probate court. Pursuing a wrongful death claim is usually a collaborative effort between the probate attorney and the civil litigation attorney. Probate attorneys typically do not litigate the claims themselves, but rather, they are brought into the fold to represent the personal representative for the probate-related matters. In doing so, probate attorneys must be familiar with MCL 600.2922, MCL 700.3924, and MCR 2.420 as these statutes and court rule govern the procedural requirements of wrongful death claims, identify who may recover damag-

es, and prescribe how proceeds of a judgment or settlement are to be distributed. This article provides a basic overview of what probate attorneys need to know about wrongful death claims when representing the personal representative of the estate.

Initial Intake and Opening the Estate

When pursuing a wrongful death claim, the estate of the decedent will need to be opened and a personal representative appointed irrespective of whether a formal complaint is filed in district or circuit court. MCL 600.2992(2) clearly prescribes that only the personal representative of the estate has authority to bring a wrongful death action in a civil court.¹ Similarly, the personal representative is the only party with the authority to settle a wrongful death claim "pre-suit" and to distribute the proceeds of a pre-suit settlement.² Thus, action cannot be taken to settle the claim or initiate the action without the appointment of a personal representative.

In some instances, the probate attorney will receive the referral from the civil litigation attorney and will represent the person seeking appointment as the personal representative. In other instances, a loved one or family member of the decedent will reach out to the probate attorney first, who then refers the wrongful death claim to the civil litigation attorney. In either event, the initial intake is critical. In addition to obtaining information pertinent to opening and administering a decedent's estate (i.e. the existence of a last will and testament, obtaining a copy of the death certificate, determining the correct person to serve as the personal representative, identifying the heirs, etc.), the probate attorney must also identify all the information relevant to the wrongful death claim, including the facts pertinent to establish a wrongful death claim and the facts necessary to identify all potential wrongful

death claimants.

Once the initial information is obtained, the probate attorney will assist in the preparation of probate documents necessary to open the estate and appoint a personal representative. The appointment can be accomplished by application or by petition. If there are potential statute of limitations issues related to the wrongful death claim, the appointment of a special personal representative for the sole purpose of accepting service of the complaint is an option.³ Once the estate is opened and a personal representative is appointed, the civil litigation attorney pursuing the wrongful death claim will either settle the claim pre-suit or commence an action in district or circuit court.

Wrongful Death Claimants and Notice Requirements

If the wrongful death claim settles pre-suit or an action is filed in a civil court, the personal representative will need to provide notice to the persons who may be entitled to damages resulting from the wrongful death claim. These persons are commonly referred to as the wrongful death claimants. Under MCL 600.2922(3):

the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

- (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
- (b) The children of the deceased's spouse.
- (c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living

trust of the deceased if there is a devise to that trust in the will of the deceased.

Not only are the decedent's spouse and children wrongful death claimants, but grandchildren, great grandchildren, parents, grandparents, siblings, devisees under the will, and even stepchildren⁴ are also persons who may be entitled to damages under the wrongful death statute. Therefore, it is critically important that all familial relationships are identified to ensure that the personal representative notifies each wrongful death claimant under MCL 600.2922.

In the event the wrongful death claim is settled pre-suit, the personal representative will need to serve notice of a petition to approve the settlement on the heirs, wrongful death claimants, and claimants whose interests are affected.⁵ In addition, after the personal representative files a petition for authority to distribute the proceeds of a wrongful death claim, unless waived, notice of hearing and a copy of the petition must be served on the heirs, wrongful death claimants, and claimants whose interests are affected.⁶ The notice of hearing for the petition for authority to distribute the proceeds of a wrongful death claim must also contain the following:

- (i) The name and address of the personal representative and of the personal representative's attorney.
- (ii) A statement that, to recover damages under this section, the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the petition for distribution of the proceeds, and that failure to present a claim for damages within the time provided bars the person from making a claim to any of the proceeds.⁷

If the wrongful death claim is unable to be resolved in a pre-suit setting, requiring the filing of a complaint in a civil court, the personal representative must serve a copy of the complaint and the notice on all the wrongful death claimants within 30 days after the commencement of the action.⁸ Under MCL 600.2922(4), the notice sent to the

wrongful death claimants shall contain the following:

(a) The name and address of the personal representative and the personal representative's attorney.

(b) A statement that the attorney for the personal representative shall be advised within 60 days after the mailing of the notice of any material fact that may constitute evidence of any claim for damages and that failure to do so may adversely affect his or her recovery of damages and could bar his or her right to any claim at a hearing to distribute proceeds.

(c) A statement that he or she will be notified of a hearing to determine the distribution of the proceeds after the adjudication or settlement of the claim for damages.

(d) A statement that to recover damages under this section the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6) and that failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

It is particularly worth noting that the aforementioned notice to the wrongful death claimants, both for pre-suit settlements and for actions filed in a civil court, places the burden on the wrongful death claimants to present a claim for damages to the personal representative within the time provided under either MCL 700.3924(2)(f)⁹ or MCL 600.2922(7).¹⁰ If the wrongful death claimant fails to do so, he or she will be barred from making a claim to any of the wrongful death proceeds. Therefore, it is imperative that the probate attorney ensures that the proper notice is given to avoid any complications in distributing the proceeds of a judgment or settlement.

Pre-Suit Settlements in Probate Court

The procedure for handling the settlement of a wrongful death claim and the distribution of the proceeds depends on whether the claim is set-

tled pre-suit or after the commencement of an action in a civil court. In both instances, the civil litigation attorney will likely turn to the probate attorney to assist with the approval of the settlement and distribution of the wrongful death proceeds. Therefore, it is important for the probate attorney to be intimately familiar with the procedures for approving the settlement and distributing the proceeds in both the pre-suit and civil court contexts.

If the claim is being settled pre-suit, the Estates and Protected Individuals Code ("EPIC") will govern the settlement and distribution of the wrongful death proceeds. MCL 600.2922(9) provides, "[i]f a claim under this section is to be settled and a civil action for wrongful death is not pending under this section, the procedures prescribed in . . . MCL 700.3924, shall be applicable to the distribution of the proceeds." Accordingly, if an action is not pending in a civil court, the approval of the settlement and distribution of the settlement proceeds will be handled by the probate court. In most instances, given the benefit of familiarity with the probate court and its procedures, the civil litigation attorney will turn over the reins to the probate attorney.

The first step is to determine whether the personal representative will need to obtain court approval of the settlement. Pursuant to MCL 700.3924(1), "[i]f a personal representative petitions the court in writing asking leave to settle the claim and after notice to all persons who may be entitled to damages as provided in [MCL 600.2922], the court may conduct a hearing and approve or reject the settlement." The language of MCL 700.3924(1) does not require the personal representative to obtain court approval of a settlement.¹¹ However, even if court approval is not required under MCL 700.3924(1), in many instances the letters of authority will contain a restriction related to the settlement of wrongful death claims, such as "Fiduciary cannot enter into a wrongful death settlement without Court authority." If the probate court imposes a restriction of this nature, the personal representative

will need to file a petition asking leave to settle the claim. Thus, it is imperative that the probate attorney reviews the letters of authority for any restrictions, so as to avoid any breach of fiduciary duty claims against the personal representative.

Next, the personal representative will need to seek authority from the probate court to distribute the settlement proceeds. MCL 700.3924(2) provides, “the personal representative *shall* file with the court a petition for authority to distribute the proceeds” and “[u]nless waived, notice of hearing must be given to all persons who may be entitled to damages as provided in [MCL 600.2922].”¹² Although MCL 700.3924(1) does not appear to mandate court approval of all wrongful death settlements, the language of MCL 700.3924(2) clearly requires court approval of the distribution of the settlement proceeds in all instances. If the settlement proceeds may be distributed to a minor, disappeared person, or legally incapacitated individual, for whom a fiduciary is not already appointed, the court will appoint a fiduciary or guardian ad litem to represent them.¹³ If, however, none of the persons who may be entitled to the settlement proceeds are minors, disappeared persons, or legally incapacitated individuals, a hearing is not required if all of the wrongful death claimants stipulate to the distribution of the settlement proceeds.¹⁴ In that case, the court will enter an order of distribution in accordance with the stipulation or agreement.¹⁵

From a practical standpoint, if there is no disagreement between the wrongful death claimants concerning the allocation of the settlement proceeds among the wrongful death claimants, the probate attorney should advise the personal representative to file a petition requesting approval of the settlement and the distribution of the proceeds at the same time. If there appears to be some contention concerning the allocation of the proceeds among the wrongful death claimants, it is advisable to obtain court approval of the settlement first and then later handle the approval of the distributions.

The personal representative’s petition for authority to distribute the settlement proceeds must contain the following information: (i) the identity of the wrongful death claimants and other interested persons; (ii) the decedent’s reasonable medical, hospital, funeral and burial expenses for which the estate is liable; (iii) the damages passing directly to the wrongful death claimants, such as loss of financial support or loss of society and companionship of the decedent, and how the proceeds will be allocated amongst the wrongful death claimants; (iv) the damages for conscious pain and suffering and the amount passing to the decedent’s estate; and (v) attorney fees and costs.¹⁶ After a hearing on the personal representative’s petition, the court will enter an order for the payment of the decedent’s reasonable medical, hospital, funeral and burial expenses for which the estate is liable and for the distribution of the settlement proceeds to the wrongful death claimants and/or to the estate depending on the types of damages.¹⁷

In the event that no damages are awarded for conscious pain and suffering,¹⁸ after payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the entire settlement will pass outside of the estate directly to the wrongful death claimants.¹⁹ In reviewing the allocation of the settlement proceeds, the court will consider the amount that is fair and equitable considering the relative damages sustain by each wrongful death claimant.²⁰ For settlements involving the distribution of wrongful death proceeds to minors or incapacitated individuals, the personal representative will need to deliver the proceeds for the minor or incapacitated individual to his or her fiduciary. If a minor conservatorship has not been established and the amount being distributed to the minor in each year is less than \$5,000, then the personal representative may distribute the proceeds to (i) the minor if he or she is married, (ii) an individual having the care and custody of the minor with whom the minor resides, (iii) a guard-

ian for the minor, or (iv) a financial institution incident to a deposit in a state or federally insured savings account in the sole name of the minor.²¹

Wrongful Death Claims in Civil Court

If the wrongful death claim is settled while an action is pending in a civil court or a judgment is entered awarding damages, MCL 600.2922 governs the procedures for approving a settlement and distributing the wrongful death proceeds.²² In many instances, the civil litigation attorney will again rely on the probate attorney to provide guidance in the settlement and distribution phase of the lawsuit, especially if the settlement and distributions involve minors or legally incapacitated individuals.

Analogous to pre-suit settlements, the first step is to determine whether the personal representative will need to seek court authority to settle the wrongful death action. Pursuant to MCL 600.2922(5), “[i]f, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.” Similar to MCL 700.3924(1), MCL 600.2922(5) does not require that a settlement be approved by the civil court, but only requires that the court hold a hearing and accept or reject the settlement if the personal representative files a motion seeking approval of the proposed settlement.²³ As discussed above, the letters of authority may require court approval of the wrongful death settlement, which would necessitate a motion to approve the settlement. Furthermore, if a minor or legally incapacitated individual will share in the proceeds of the settlement, court approval of the settlement is necessary under MCR 2.420.

If the case settles or a judgment awarding damages is entered, the personal representative will need to seek authority from the court to distribute the proceeds. Pursuant to MCL 600.2922(6)

(a), “[t]he personal representative shall file with the court a motion for authority to distribute the proceeds.” Similar to MCL 700.3924(2), MCL 600.2922(6) requires court approval of the distribution of the wrongful death proceeds in all instances, and the procedures and requirements mirror those of MCL 700.3924(2). For example, if any interested person is a minor, a disappeared person, or a legally incapacitated individual for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be appointed.²⁴ Similarly, if none of the persons who may be entitled to the settlement proceeds are minors, disappeared persons or legally incapacitated individuals, a hearing is not required if all of the wrongful death claimants stipulate to the distribution of the settlement proceeds.²⁵ The motion filed by the personal representative for authority to distribute the proceeds must also contain the same information required under MCL 700.3924(2), and the civil court will also enter an order addressing the same issues.²⁶ Additional steps will need to be taken for settlements and judgments involving minors and legally incapacitated individuals, which are discussed in detail below.

Wrongful Death Claims Involving Minors and Legally Incapacitated Individuals

MCR 2.420 governs the procedure to be followed for the entry of a consent judgment, a settlement, or dismissal pursuant to settlement where a minor or a legally incapacitated individual is to receive a distribution from a wrongful death claim. MCR 2.420 provides, “[b]efore an action is commenced, the settlement of a claim on behalf of a minor or a legally incapacitated individual is governed by the Estates and Protected Individuals Code.” In other words, if no action has been commenced in a civil court, then the settlement and distribution are governed by EPIC and not by MCR 2.420.

When a wrongful death action has been filed in a civil court in which a minor or legally incapacitated individual is to receive a distribution from a wrongful death claim, the consent judg-

ment, settlement, or dismissal pursuant to a settlement must be brought before the judge to whom the action is assigned and the judge shall pass on the fairness of the settlement.²⁷ The court will appoint a guardian ad litem for the minor or legally incapacitated individual if the next of friend, guardian, or conservator of the minor or legally incapacitated individual will share in the settlement or judgment.²⁸ If a next of friend, guardian or conservator for the minor or legally incapacitated individual has been appointed by a probate court, the terms of the proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the allocation of the wrongful death proceeds and payment arrangement is in the best interest of the minor or legally incapacitated individual.²⁹ However, no judgment or dismissal may be entered until the court receives written verification from the probate court that it has passed on the sufficiency of the bond, and the bond, if any, has been filed with the probate court.³⁰

In order to aid in this endeavor, the State Court Administrative Office has approved Form MC-95, a Request for Approval of Bond and Notice of Wrongful Death Settlement.³¹ Form MC-95 ensures compliance with MCR 2.420 when handling the settlement or distribution of proceeds of a wrongful death claim filed in a civil court. The probate attorney will need to ensure that the personal representative submits the Form MC-95 to the civil court with the motion to approve the settlement and for authority to distribute the proceeds. The circuit or district court judge will note that he or she has conducted a hearing in accordance with MCR 2.420(B) approving the proposed settlement, and in accordance with MCL 600.2922(6) approving the distribution of proceeds. After Form MC-95 is signed by the circuit or district court judge, the probate attorney will need to ensure that it is submitted to the probate court to pass on the sufficiency of the bond. Unless this procedure is followed, no judgment or dismissal may be entered by the circuit court.³²

Additional requirements must be met for set-

tlements or judgments involving minors. If the settlement or judgment requires payment of more than \$5000 to a minor either immediately, or if the settlement or judgment is payable in installments that exceed \$5000 in any single year during minority, a conservator must be appointment by the probate court before the entry of the judgment or dismissal.³³ The judgment or dismissal must also require that the payment to the minor be made payable to the minor's conservator.³⁴ If the settlement or judgment does not require payment of more than \$5000 to the minor in any single year, the personal representative may pay the money in accordance with MCL 700.5102.

Conclusion

Representing the personal representative of an estate when a wrongful death claim exists involves knowledge and expertise outside the realm of normal estate administration. The civil litigation attorney will often lean on the probate attorney for the probate-related matters and for the approval of the settlement or distribution of the proceeds. Accordingly, the probate attorney representing the personal representative must be familiar with the procedural requirements and substantive law pertaining to wrongful death claims. This includes an intimate knowledge of MCL 600.2922, MCL 700.3924, and MCR 2.420, and the interplay between the civil court and probate court when settling wrongful death claims and distributing the proceeds of a judgment or settlement.

Notes

1. MCL 600.2922(2) provides, "[e]very action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased" (emphasis added.)

2. MCL 600.2922(9) provides, "[i]f a claim under this section is to be settled and a civil action for wrongful death is not pending under this section, the procedures prescribed in section 3924 of the estates and protected individuals code . . . shall be applicable to the distribution

of the proceeds.” Under MCL 700.3924, the personal representative has the authority to settle the wrongful death claim and distribute the settlement proceeds if an action is not pending in a civil court.

3. MCL 700.3614 allows for the appointment of a special personal representative if necessary to protect the estate of the decedent before the appointment of a general personal representative.

4. If the deceased’s spouse predeceased the decedent, then step-children are not entitled to the proceeds of a wrongful death claim. *Hamilton v Elser (In re Combs)*, 257 Mich App 622, 625, 669 NW2d 313 (2003). The Michigan Supreme Court has recently heard arguments in a case addressing this very issue. See *Carter v Persinger (In re Estate of Cliffman)*, 499 Mich 874, 876 NW2d 243 (2016) (“The parties shall file supplemental briefs . . . addressing whether MCL 600.2922(3)(b) allows stepchildren of a decedent to make a claim for damages where the natural parent predeceased the decedent, and if so, whether this Court should overrule *Hamilton v Elser (In re Combs . . .)*”).

5. MCL 700.3924(1) provides, “[i]f a personal representative petitions the court in writing asking leave to settle the claim and after notice to all persons who may be entitled to damages as provided in [MCL 600.2922], the court may conduct a hearing and approve or reject the settlement.” MCR 5.125(C)(13) provides that the persons interested in a petition for settlement of a wrongful death action are the heirs of the decedent, wrongful death claimants and claimants whose interests are affected.

6. MCL 700.3924(2)(b) provides “[u]nless waived, notice of hearing must be given to all persons who may be entitled to damages as provided in section 2922. . . .” MCR 5.125(C)(13) provides that the persons interested in a petition for the authority to distribute the wrongful death proceeds are the heirs of the decedent, wrongful death claimants and claimants whose interests are affected.

7. MCL 700.3924(2)(b)(i) and (ii).

8. MCL 600.2922(2) provides, “[w]ithin 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.”

9. MCL 700.3924(2)(f) provides “[a] person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date for hearing on the petition for distribution of the proceeds. Failure to present a claim for damages within the time provided by this section bars the person from making a claim to any of the proceeds.”

10. MCL 600.2922(7) provides “[a] person who may be entitled to damages under this section must present a

claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.”

11. The Court of Appeals, in an unpublished decision, held that the permissive terms “if” and “may” in the phrases “if a personal representative petitions” and “the court may conduct a hearing” indicates that the personal representative is not required to petition the court for leave to settle a wrongful death claim. *In re Estate of Felix*, No 254751, 2005 Mich App LEXIS 1696 at *6 (July 14, 2005) (unpublished).

12. Emphasis added.

13. MCL 700.3924(2)(c).

14. MCL 700.3924(2)(e).

15. *Id.*

16. MCL 700.3924(2)(d) identifies the factors the court must address when ordering the distribution of the wrongful death settlement proceeds., which are incorporated into the petition for the authority to distribute the settlement proceeds.

17. *Id.*; see also MCL 600.2922(6)(d) (“The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased.”).

18. MCL 700.3924(2)(d) provides that the proceeds of the settlement for conscious pain and suffering are distributed to the estate; see also MCL 600.2922(6)(d) (“The court shall then enter an order distributing the proceeds . . . to the estate of the deceased for compensation for conscious pain and suffering. . . .”).

19. MCL 700.3924(2)(d) provides that the damages suffered by the wrongful death claimants will be distributed to those wrongful death claimants; see also MCL 600.2922(6)(d) (“The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages. . . .”).

20. MCL 700.3924(2)(d).

21. MCL 700.5102(1)(a) through (d).

22. MCL 600.2922(5) and (6) grants the court where the action is pending the authority to approve the settlement and distribution of settlement proceeds in a wrongful death action.

23. *Samuel v Moran Mitsubishi*, No 229464, 2002 Mich App LEXIS 3731 at *2 (May 24, 2002)(unpublished) (“We also reject plaintiff’s contention that MCL 600.2922 dictates that the release was invalid. MCL 600.2922(5) does not require that a settlement be approved by the circuit court, but only requires that the court hold a hearing and

accept or reject the settlement if the personal representative files a motion seeking approval of the proposed settlement.”).

24. MCL 600.2922(6)(c).

25. MCL 600.2922(6)(e).

26. MCL 600.2922(6)(d).

27. MCR 2.420(B).

28. MCR 2.420(B)(2).

29. MCR 2.420(B)(3).

30. *Id.*

31. This form can be found at <http://courts.mi.gov/Administration/SCAO/Forms/courtforms/mc95.pdf>.

32. MCR 2.420(B)(3).

33. MCR 2.420(B)(4)(a).

34. *Id.*



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