

# Subtleties, Subrogation and Stumbles with Wrongful Death and Minor's Claim Settlements

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# Wrongful Death and Survival Claims

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- They are two separate causes of action-  
The Probate Court is involved with Both


# A Survival Claim

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- Injury by wrongful act of another = CA for the benefit of the injured party until the time of death.
  - If recovery not made prior to death, the claim passes to the estate as a **survival claim**.
  - For the benefit of estate creditors and residue to heirs (testate or intestate).
  - Damages only include the decedent's losses to the date of death.
  - Commenced by the estate fiduciary.
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# A Wrongful Death Claim

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- The death cuts off the accumulation of further damages for the benefit of the estate (i.e. the survival claim).
  - If the wrongful act contributed to the death, a new CA arises for the **wrongful death (“WD”)**.
  - WD is for the benefit of specifically named statutory beneficiaries (the surviving spouse, the children, the parents and other next of kin).
  - Their losses resulting from the death are compensable to them.
  - Action filed by the estate fiduciary. RC 2125.02(A)(1); on an unjustified refusal to file, removal is an option. RC 2113.18(B)
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# Wrongful Death and Survival Claims

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- WD and Survivorship claims are different causes of action that have different:
  - measures of damage,
  - statutes of limitations, and
  - beneficiaries.
- The WD Plaintiff must show these elements:
  - Death of decedent;

# Wrongful Death Claims- Elements

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- Commencement of WD action within two years of wrongful death (even if decedent's negligence claim is barred by 1 year S/L; special rules for prod. liab. claims);
  - Wrongful act, neglect or default of defendant, proximately causing the death, for which the decedent could have recovered, but for the death;
  - Decedent was survived by a spouse, child, parent, or other next of kin; and
  - A survivor suffered damages as a result of the WD.
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# Wrongful Death

## RC Chapter 2125

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- All WD claims must be commenced within 2 years after the decedent's death (no exception for disabilities; such as minority of decedent); the time specified is an element of the CA. RC 2125.02(D)(1) (see product liability exception)
- WD compensable damages are very broad: loss of support; loss of services; loss of society; loss of prospective inheritance to heirs at law; compensation for mental anguish incurred. RC 2125.01(B)
- A viable fetus (capable of independently surviving), that is negligently injured and dies inside the womb is considered a person for purposes of WD; recognizing the purpose of the action is to compensate the parents for loss of parenthood. Werling v. Sandy, 17 Ohio St.3d 45 (1985).

# Wrongful Death

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- If a WD beneficiary dies before judgment, their WD claim succeeds to their estate as the status is fixed at time of decedent's death. RC 2125.02(A)(3)(a)
- Person conceived by the decedent before the decedent's death, and born after the death, is a beneficiary. RC 2125.02 (A)(3)(a)
- A step-parent is not a "parent" and is not a RC 2125.02 statutory beneficiary. Miller v Boden, 103 Ohio App 3d 73 (Seneca, 1995)
- The Defendant has no standing to participate in the distribution proceedings in the PC. John Shillito Co. v Shanley, 21 Oh App 12 (1<sup>st</sup>, 1926). We permit attendance, but not participation.

# Wrongful Death (Con't.)

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- A parent who has abandoned a child is not a RC 2125.02 statutory WD beneficiary.
- “abandoned” means that by preponderance of evidence it is established that the parent unjustifiably failed to communicate with, care for, and support/maintain the child, as required by a judicial decree for 1 year immediately prior to the death of the minor). RC 2125.02 (A)(1), (E) and (G)(3).

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## The Slayer Statute

A plea of guilty, conviction, or finding not guilty by reason of insanity, for aggravated murder, murder, voluntary manslaughter, or involuntary manslaughter (other than felony aggravated vehicular homicide) while committing or attempting to commit a felony, bars wrongdoer from benefiting from the death he caused; wrongdoer is treated as predeceasing the decedent. RC 2105.19.

**Note:** The trigger is the plea, conviction, finding; n/a to situation of murder/suicide, unless successful with an equitable argument.



# WD/Survivorship Allocation Tip- Presumption of Survivorship Benefit


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**Beware:** Unless there is evidence to the contrary, there is a presumption that settlement proceeds being paid are properly survivorship proceeds for the benefit of the estate, rather than WD proceeds for the benefit of the statutory beneficiaries. (Hooks v Owen, 130 Ohio App 3d 38 (1998))

**Practice Note:** Probate counsel presenting the Application for Distribution must include with the Application a required statement reciting an argument why a different allocation should be made (instant death, full coma from injury to death, character of the offers/negotiations/verdict, etc.); and then be prepared to present supporting evidence at the probate hearing.


# Distribution of WD allocation among Beneficiaries – RC 2125.03

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- If all WD benef. are adults and of the same degree of consanguinity (blood relationship) to the decedent, they may agree on the allocation of the WD distribution;
  - If they do not agree, the Court will adjust the shares on same basis as done for other beneficiaries; and
  - In all other cases, the Court shall adjust the share of each in a manner that is “equitable, having due regard for the injury or loss to each individual”.
  - Prob. Ct. retains jurisdiction over settlement despite an agreement. Sup.R. 70(B).
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## Allocation (Con't.)

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- Most cases come to the Court with the interested parties having consented to the distribution, and the Court generally approves them. Often, litigation counsel will have mediated the allocations and distributive shares before bringing matters to the Prob. Ct.
  - If a minor is a potential beneficiary and there is no guardian of the minor's estate, we will require service on the minor (for age 16 or older) and we will appoint a GAL – no waivers permitted for minors.
  - If the distribution is contested, the Court may order mediation as a pre-requisite to a hearing.
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# Gathering the Medical Information (A New Procedure)

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- Traditionally, the appointed estate fiduciary (Executor or Administrator) has authority to obtain the medical records.
- Now, without an Estate being first opened, eff. 3/22/2019, RC 2113.032 (**Appendix A**) a person eligible to be appointed as a personal representative (admin.) under Ohio law or is named executor in will is permitted to apply to Prob. Ct. to obtain a release of medical and medical billing records for use in evaluating a potential WD, PI or Survival action on behalf of a decedent.  
**Appendix B and C**
- Uncomplicated procedure; a discussion and the forms are on our website under a separate tab “Medical Records of Decedent”


# Approval of Settlement and Distribution

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- The Probate Court becomes involved in WD when, in the estate case, the estate fiduciary files the Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims (Form 14.0) **Appendix D**
- Review our discussion and checklist of our requirements on the “Wrongful Death Cases” subpage, under the Estates” tab on our website.
- Review Sup. Rule 70, that is directly applicable to WD/Survival cases. **Appendix E**
- The Approval, Allocation, and Distribution are made by the Court that appointed the personal representative(s) of the estate; regardless of where the WD civil case was filed. This includes disputes about fee divisions.
- Our Court requires both a Narrative Summary of the wrongful act and claim, as well as a Statement addressing the WD/Survival allocation.

# Issues of Concern - Unique for Probate Counsel

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1. Proper identification of the WD statutory beneficiaries requiring notice of the Application/or waivers?
  2. Are there minor children, or other next of kin with need for GAL representation when establishing the WD/Survival allocation, or dividing the proceeds among the statutory beneficiaries?
  3. Should there be Notices in Insolvent Estates, Medicaid Recovery Cases?
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# Determination of WD Statutory Beneficiary - (Critically Important)


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- Notice of the Hearing on the Application to Approve is required to be given to the spouse, parent and children who are presumed to have suffered a loss, as well as “other next of kin” of the decedent.
- This is without a doubt, the most frequent issue in any WD settlement case. It causes pause when we query about “other next of kin”.
- PI lawyers are not concerned about as it doesn’t directly factor into the presentation of the civil case; and Probate lawyers are used to thinking in terms of heirship. Both interested when it delays payout.
- Failure of the settling attorney to give proper notice may give rise to prof. liab. claim. Brinkman v Doughty, 2000-Ohio-2677 (2<sup>nd</sup>).

# Statutory Beneficiaries (Con't.)

## We Need to Know

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- There are the presumed loss beneficiaries (referred to in case law as “1st Tier Beneficiaries”),
  - as well as the “other next of kin” (referred to in case law as 2nd Tier) w/ recovery for provable loss, and if no one, only then 3<sup>rd</sup> Tier.
  - Other next of kin is not defined by statute; but by case law.
  - It is unusual for a member of the “other next of kin” category to assert a loss, although must be given notice; but notice does open the door for the favorite grandchild, etc. to make an argument for a distributive portion of the proceeds allocated to the WD claim.
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# Statutory Beneficiaries (Con't.)

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We need the **1<sup>st</sup> Tier** beneficiaries – spouse, children & parents;

We also need this info to determining whether there are “other next of kin” ( **2<sup>nd</sup> tier** beneficiaries, if any – grandparents, grandchildren and siblings) entitled to notice who may offer evidence to prove a loss, and if none of them, only then, the **3<sup>rd</sup> tier** beneficiaries (aunts, uncles, great-grandparents, great-grandchildren, nieces, nephews,) who are then entitled to notice and the opportunity to prove a loss.


In re Estate of Payne, 2005-Ohio-2391 (10<sup>th</sup> Dist); In re Estate of Harrison, 2012-Ohio-2169 (9<sup>th</sup> Dist ); DCPC Loc.R. 70.1



# Statutory Beneficiaries (Con't.)


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Therefore :

- It is imperative in every case, that you file with the Application a Supplemental List of all interested persons with addresses, relationships, and if under age 25, the birthdates.
  - If you do not file it, we will order it be done and that will delay setting a hearing. While the list may include the persons on the front of the Form 1.0, there are usually others as well!
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# GAL for a Minor Beneficiary

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- Who represents the interests of the minor (under age 18) as a beneficiary to the estate (the WD/Survival allocation), or as a statutory beneficiary (1<sup>st</sup> or 2<sup>nd</sup> Tier) to the distributive share?
  - The minor's parent has a legal conflict; therefore often no one, then a GAL may be required.
  - Plaintiff's counsel, Probate Counsel, the Court, and the beneficiaries only want to deal with the case one time; so no "do overs" please.
  - Be proactive; request a GAL when appropriate.
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# Subrogation Issues

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- When the award or settlement has been allocated, the subrogated medical claims will be ordered paid from the funds allocated to the survival claim (paid out of the estates proceeds since they are claims arising prior to death); but, if no survival claim, WD Plaintiffs may have agreed to pay subrogation claims through protections letters.
- Medicaid seeks recovery from the estate survival claim, not WD
- Did Claimant, widow or child receive Workers Comp payments? If so, WC has subrogation claim and if it, and Atty. Gen., not notified of settlement, then it has a J/S claim against the claimant/payees and the insurers? RC 4123.931(G).

# Interests of Creditors in Allocation of WD/Survival proceeds


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- If estate is insolvent, notice of the hearing is given to creditors by counsel;
  - If a creditor filed a timely claim with the Court, and no proof of payment or settlement. then Court will require notice be given to the claimant;
  - The Court has the authority to require an Affidavit of Solvency from the Estate to establish that there are no creditors having an interest in the allocation of the proceeds between the Estate survival claim and the WD claim;
  - If period for filing of a Medicaid recovery claim has not expired (i.e. less than one year since the fiduciary notified the Medicaid Recovery Office of the death – Form 7.0A), then the Court may require notice of the Application to Medicaid Recovery/Ohio Attorney General to permit argument of allocation.
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# Ancillary Matters

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Prob. Ct. may create a WD trust to age 25 for a person under 25 who is found to be a beneficiary of the WD proceeds:

- The Court creates the WD Trust and establishes its terms;
  - The Trustee must be approved by the adult beneficiary; and by the guardian of each minor trust beneficiary. RC 2125.03(A)(2)
  - A WD Trust to 25 is not required when there are facts justifying direct payment to an adult under 25 beneficiary (i.e. demonstrated work and savings history, level of maturity, amount of proceeds). In re Estate of Svetichan, 2003-Ohio-7044 (7<sup>th</sup> Dist.)
  - A WD Trust to age 25 should not have more than one beneficiary.
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## Ancillary Matters (Con't.)

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- Unless 100% structured settlement, Probate Counsel will need to have a separate case filed for appointment of a Guardian of the Estate of the minor, if the net proceeds exceed \$25,000 (and Court not requiring WD Trust);
- Probate Counsel may be able to apply to PC to dispense with guardianship of estate, if net proceeds for the minor is \$25,000 or less, using a restricted deposit account to age 18 under RC 2111.05 (as in settlement of minor's claims in the next topic of discussion – Minor's Claims)

# Attorney Fees

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- Sup.R. 40(H) requires probate court prior approval of a contingent fee contract between an attorney and the fiduciary. In every WD case counsel knows at the outset that there will be a PC claim approval proceeding (can't resolve claim without one).
  - Sup.R. 70 (C) fees must be disclosed and are subject to PC okay.
  - Ergo: Per Loc.R. 70.1 attorney fees for the probate aspect of WD claim shall be paid from the allowed contingent fee. **Appendix F** Ct. will not approve a fee agreement, if it provides otherwise, or is silent.
  - Fee Agreement by Exec/Admin is to be approved by PC before signing.
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# MINOR'S CLAIM

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SUP.R. 67, SUP.R.68, AND DCPC LOC.R. 68.1-68.5 -  
SPF 22.0-22.7



# Scope - All RC 2111.18


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- The Guardian of the Estate of the Ward may sue, adjust and settle the claim for damage to tangible or intangible property, or damages or loss for wrongful act or neglect, with advise, approval and consent of the Probate Court.
- Only if the net claim proceeds are \$25,000 or less, may an application for settlement be made by someone other than a guardian of the estate; to wit, a suitable person, who the court may authorize to receive and receipt for the proceeds (or otherwise direct payment).
  - In the \$25,000 or less case, the Court, accordingly, may dispense with the Appointment of a Guardian; and
  - In such case, if the proceeds are \$10,000 - \$25,000, a separate Application to Dispense with Guardianship case must be filed.
  - Sup.R. 67 **Appendix G** & DCPC Loc.R. 67.1.

# Commencing the Case(s)

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## **Net Proceeds More than \$25,000:**

1. If Gdn of Estate has not already been appointed, make the Application for Appointment of Guardian of Estate of Minor (Form 16.0 and related filings), before claim is asserted so have authority; Sup.R. 68 **Appendix H**
  2. When settlement reached have the Guardian of Estate, if none yet appointed then a parent, or person by whom the minor is maintained, file the Application to Settle a Minor's Claim (Form 22.0 **Appendix I** and related filings); and
  3. Both can be filed and heard contemporaneously, but upon issuance of Letters of Gdnship, then newly appointed Gdn. of Estate must ratify the parent's Application to Settle Minor's Claim.
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# Commencing the Case(s) –(Con't.)

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## Net proceeds not more than \$25,000

1. A parent, person by whom the minor is maintained, or other suitable person files the Application to Settle Minor's Claim (Form 22.0 and related filings); Applicant to be authorized to sign release;
  2. If \$25,000 to \$10,001 of net proceeds, then the same person files an Application to Dispense with Guardianship (Forms on our website under the Guardianships – Dispensing webpage); **Appendix J**
  3. Clearly identify to whom the Applicant intends the funds to be delivered to.
  4. If not more than \$10,000, Application to Dispense not required
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# Recipient(s) of Proceeds

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## **Guardian of Estate:**

Bonded: Guardian has statutory discretion and control with all statutorily approved investment vehicles; usual court pre-approval for all expenditures.

Restricted Access Deposits (not bonded for value of assets under restriction) – Prior to hearing, identify to Court the bank, or broker, to whom funds to be directly paid by insurer, with address; initial and annual Verification of Receipt/Deposit of Restricted Funds (Forms 22.3A and B). Remove only with Court Order.

A Combination of Bonded and Restricted Access Deposits is permitted.

Title to Guardianship Assets: Held in the name of the Guardian in the fiduciary capacity – i.e. “Joan Black, Guardian of Estate for Sarah Black”.

# Recipient of Proceeds (Con't.)

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## **Dispensed with Guardianship – RC 2111.05**

- Restricted Access Deposits – as previously described, except that the assets are titled in the **sole name of the minor** (not joint, survivorship, POD or TOD designations on the deposit account) payable to minor at age 18; annual verifications required from financial institution in lieu of annual accounts.
- Delivered to Parent, or person who maintains the minor (for the benefit of the minor) – for nominal sums – rarely ordered; not monitored by court.
- Delivered to the Minor – would need to be with consent of the parent, mature minor and nominal sum; not monitored by court.
- Delivered to Exec Dir. of County Children Services if child if appropriate – rare facts.
- Structured Settlement, with no payout until age 18 – comply with Loc.R. 68.5


# Recipient of Proceeds- A New Alternative Minor's Trust to Age 25

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- Effective 3/22/2019, HB 595 establishes new RC 2111.182 permitting the Probate Court to order the creation of a trust to receive all or a portion of amount to be received by a minor to be deposited into a trust f/b/o the minor until beneficiary reaches age 25. **Appendix K**
- The Trustee must be approved by the parent, or guardian of a minor beneficiary, unless Court order's otherwise.
- Trust would be created by the Court, with language similar to the WD trust to age 25.
- Trustee broad investment powers; Bonded or restricted access deposit.

## Minor's Trust to Age 25 (Con't.)

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- Court must have an expressly reserved power to approve all distributions.
  - Annual supervised accountings by the Trustee. (Continuing jurisdiction throughout the period of the Trust)
  - Applicant drafts the trust and files a Motion to Establish Minor's Trust contemporaneously with the Application for Approval of Settlement.
  - Can be funded with some or all of a portion of the claim proceeds, (but, funding must be of size to justify a trust)
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# Appendix

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- A. RC 2113.032 Application for Release of Medical and Billing
  - B. Application for Release of Medical Records and Medical Billing Records
  - C. Judgment Entry (Granting Authority to Obtain Decedent's Med Rec & Med Bill Records)
  - D. App to Approve Settlement and Distrib. Of Wrongful Death & Survival Claims (Form 14.0)
  - E. Sup.R. 70 - Settlement of Wrongful Death and Survival Claims
  - F. Loc.R. 70.1 - Settlement of Claims
  - G. Sup.R. 67 - Estates of Minors of Not More than Twenty-Five Thousand Dollars
  - H. Sup.R. 68 – Settlement of Injury Claims of Minors
  - I. Application to Settle a Minor's Claim (Form 22.0)
  - J. Application to Dispense with Appointment of Guardian for Minor
  - K. RC 2111.182 – Order for Portion of Funds to Minor be Deposited in Trust
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