

PROBATE PAINS IN THE PI CASE: TIPS FOR THE PRACTITIONER

Probate Administration Basics, Avoiding Probate Traps, Minimizing Probate Expenses & Using The Probate Code To Add Case Value

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I. OPENING THE ESTATE FOR WRONGFUL DEATH/LITIGATION MATTERS

A. Plaintiff as Decedent

1. Who Is A Proper Applicant?

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- a. Will –who is nominated Executor? Is bond waived?
 - b. No Will—qualifications/priority set by statute
 - i. Ohio residency required
 - ii. Surviving Spouse has priority (**CAUTION**--can be issue in marriages where SS is not the natural father of decedent's children. Who is your client?)
 - iii. Bond typically required
 - aa. **CAUTION**--means Applicant must be bondable—no negative credit history/no felonies
 - bb. **SAVE \$\$\$**--some courts will waive bond

2. Other Considerations/Timing:

- a. Is this a Wrongful Death (WD) claim, Survival Claim (S/C) only, or both? (**CAUTION**: There are two separate governing code sections and potentially different beneficiaries for each type of claim)
- b. Are there other assets to administer? How will that be charged?
- c. **CAUTION** Are there potential claims against the estate?
 - i. Creditors get access to S/C proceeds
 - ii. **QUERY**--Should you wait 6 months before opening to expire the claims period for creditors?
- d. **CAUTION**—does Medicaid Estate Recovery apply?
- e. Does case value merit expense? (**CAUTION**—you cannot limit estate to PI case only—once estate is open, all potential issues are exposed)

B. Defendant as Decedent

1. New lawsuit—must have Estate representative appointed in order to serve Complaint. (**CAUTION**--leave ample time to find/ notify next of kin or to run publication—4 weeks minimum)
2. Death of Defendant in existing lawsuit—Substitution of party Civil Rule 25 (must have estate open to substitute the estate for the deceased party within 90 days of Suggestion of Death) (see above re: leave ample time)
****CAUTION if not substituted timely potential for Motion to Dismiss!**
3. **SAVE \$\$\$**--Probate Expense can be billed as proper case expense

II. ESTATE ADMINISTRATION/MANAGEMENT

- A. Administering the assets according to terms of Will or Statute of Descent & Distribution
- B. Prepare appropriate forms for Inventory/Account of assets (**SAVE \$\$\$** by knowing local county rules can minimize expense of these filings)
- C. Claims on Behalf of the Estate
 1. Authority to Enter Contingency Fee Agreement
 2. Authority to Compromise Claim/Settle Wrongful Death (see below)

III. APPLICATION TO COMPROMISE CLAIM/SETTLE WRONGFUL DEATH CLAIM

- A. For Survival Claim only (personal injury NOT related to death)—file Application for Authority to Compromise Claim
 1. Net proceeds of settlement come into estate and are available for creditors before beneficiaries receive any proceeds
 2. Beneficiaries are per the terms of Will or per Statute of Descent & Distribution if no Will
 3. Surviving Spouse has additional election rights for allowance up to \$40,000 and other rights that may impact the bottom line
 4. Are there claims against estate--special rules/priorities for insolvent estates
 5. Does case value merit expense?
 6. The Last Will & Testament may give authority to settle claims, but check with insurance company (ORC 2117.05)
 7. **QUERY**—use of Release from Administration for small value settlements instead of full estate (**CAUTION**—authority to settle/sign Release)
 8. **QUERY**—if case was already settled/released, but not disbursed, proceeds can be payable to estate?

B. For Wrongful Death claim—R.C. 2125 et seq.

1. File Application for Authority to Settle Wrongful Death Claim (Form 14.0 series)—must allocate between WD and Survival Claim (**CAUTION**--if there was ANY amount of survival time before the death, court may require allocation to the S/C, especially if there are creditors or Medicaid Estate Recovery)
2. Wrongful Death Beneficiaries are set forth by Code (may NOT be same as probate Next of Kin). The Estate representative brings claim on behalf of all potential beneficiaries. **CAUTION**—have you “represented” and requested participation from all potential beneficiaries?
 - a. **ENHANCE CASE VALUE \$\$\$**--Use beneficiaries listed in Code to enhance case value—
 - i. **SUGGESTION**--make contact at start of case with each potential beneficiary contemplated under the Code and request evidence of damages/loss and present to insurance company as part of total damages
 - ii. **CAUTION**—it will be difficult to request a Waiver and Consent to the settlement or to send Notice of Hearing to potential beneficiaries at the time of settlement if there has been no prior communication and no participation
3. **CAUTION**—note trend toward expanding the idea of “other Next of Kin” under the Code to those beyond immediate family members. Note Franklin County Payne case, Summit County Harrison case and other Local Rules re: notice/waivers of other interested persons
4. Must have Waivers from all interested parties or provide Notice of Hearing with proof of service prior to hearing.
5. Typically proceeds allocated to Wrongful Death are NOT available for creditors (but see above note about allocation to Survival Claim)

IV. QUESTIONS? **CALL SUSAN RICHLAK 440-255-4838**