

IN THE COURT OF COMMON PLEAS, PROBATE DIVISION, GEauga COUNTY, OHIO
Judge Timothy J. Grendell

Information Sheet
Survival and Wrongful Death Claims

WARNING

This Information Sheet is intended to provide you with a brief overview of the subject matter. It may not provide you with all information that you require to be fully informed of the law that is applicable to your case. Additionally, the information may not accurately describe the pertinent sections of the Ohio Revised Code that are referenced in the footnotes. You should read those sections that are referenced. The Ohio Revised Code has a link on the Court's website. Additionally, you should consider reading those sections that are footnoted using "Page's Ohio Revised Code Annotated," which can be found at the Geauga County Law Library in the basement of the Courthouse at 100 Short Ct. Street, Chardon, Ohio 44024. Page's Ohio Revised Code Annotated also will provide you a summary of applicable court decisions (known as "case law"). While the Help Center can provide you with a limited amount of information, the Help Center staff cannot provide you with legal advice, and this Information Sheet is not intended to provide you with legal advice that is applicable to your case. You must decide how to best use the information provided. In the footnotes you will see a reference such as "R.C. 2125.02." That refers to Ohio Revised Code Section 2125.02, which is found in R.C. Title 21, and in R.C. Chapter 2125.

Background

Ohio law provides that if the Decedent dies as the result of a wrongful act, then the Estate Representative¹ has the authority to file a lawsuit against the wrongdoer for two different legal claims, known as a "Survival Claim" and a "Wrongful Death Claim." Those legal claims have different purposes, and the Estate Representative may elect to file either claim or both claims. Because of the complexity of both claims, the Help Center highly recommends that the Estate Representative obtain legal advice from an attorney who specializes in survival claims and wrong death claims, and perhaps another attorney who specializes in probate matters that involve such claims. There are a variety of issues to be considered including the determination of beneficiaries, the subrogation rights of insurance companies,² creditor rights, the timing for filing the claim, and the appropriate court.

The Survival Claim

If a person is injured by a wrongful act, then that person has a legal claim against the wrongdoer for damages suffered. Such incidents can result from a car accident, faulty products or services, medical mistakes, etc. Historically, if the injured person dies before making the claim or after the claim is asserted but before final resolution, then that claim expired and the Estate Representative could not proceed with the claim. However, in 1953, the Ohio legislature

¹ "Estate Representative" is the person appointed by the probate court to handle the probate estate.

² See, for example, *Estate of Shackelford*, 2016-Ohio-1431 [12th App. Dist.].

enacted a statute that allows such claims to be brought despite the death of the injured person.³ Such a claim is known as a “Survival Claim.”

- Damages. The Survival Claim focuses upon the loss suffered by the Decedent during lifetime. Typically, the longer the Decedent lives following the injury, the greater the damages suffered. The types of damages that the Estate Representative can pursue when filing a Survival Claim include:
 - Medical Expenses. One issue to be considered is whether an insurance company that pays the medical expenses as a right to a portion of a settlement or judgment by what is called the “right of subrogation.” An attorney can assist the Estate Representative with that issue.
 - Lost Income. Typically, this involves lost wages. If the Decedent dies immediately, then the damages for lost income would be negligible.
 - Pain and Suffering. Again, the time between injury and death, and the severity of the injury, will affect the amount of the award for pain and suffering.
- Probate Property. Any proceeds from a Survival Claim, whether following a trial and judgment or a settlement, are a probate asset of the probate estate. As a result, those proceeds are subject to the rights of a surviving spouse (see probate information sheet titled “Rights of Surviving Spouse”), the Decedent’s creditors (see probate information sheet titled “Creditor Rights”) and ultimately are distributed in the same manner as other Probate Property – i.e. to beneficiaries in accordance with a Will admitted to probate, otherwise by the Statute of Descent and Distribution.⁴

Wrongful Death Claim⁵

Likewise, a Wrongful Death Claim arises upon a person’s death when the death was caused by a wrongful act. However, unlike the Survival Claim, which is a claim of the Decedent, the Wrongful Death Claim belongs to the closest relatives of the Decedent – e.g. spouse, children, parents, and other relatives, for the loss that they suffer resulting from the death. However, although the Wrongful Death Claim is NOT Probate Property, a Wrongful Death Claim may only be filed by the Estate Representative.⁶

- Commencement of Claim. With one exception regarding certain claims resulting from defective products, the Estate Representative must file a Wrongful Death Claim within two years after the Decedent’s date of death.⁷
- Elements of the Wrongful Death Claim. In order to prevail, the Estate Representative must prove (1) the Decedent’s death; (2) the action was filed within two years of the date of death; (3) the wrongful act that caused the death would have entitled the Decedent to file a claim if the Decedent had not died; (4) the Decedent was survived by a spouse,

³ R.C. 2305.21

⁴ R.C. 2105.06

⁵ R.C. Chapter 2125

⁶ See *Ramsey v. Neiman*, 69 Ohio St.3d 508 (1994) and *In re Estate of Ross*, 65 Ohio App. 3d 395 (1989).

⁷ R.C. 2125.02(D)(1). See the exception described in R.C. 2125.02(D)(2)

child, parent, or other next of kin; and (5) those survivors suffered damages as a result of the death.⁸

- Beneficiaries. Again, the wrongful death proceeds are NOT Probate Property. The proceeds exclusively belong to a surviving spouse,⁹ children, and parents, who are presumed to have suffered damages.¹⁰ If there are no such survivors, then the proceeds belong to Decedent's "other next of kin," which phrase has a broader meaning than as provided for in the Statute of Descent and Distribution.¹¹ There is no presumption that "other next of kin" suffer damages.
- Damages. The Ohio Wrongful Death Act broadly defines the damages that are recoverable.¹² Recoverable damages include:
 - Loss of support from the reasonably expected earning capacity of the Decedent;
 - Loss of services of the Decedent;
 - 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;
 - Loss of prospective inheritance; and
 - The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the Decedent.
- Distribution of Proceeds.
 - Survival Claim. Again, to the extent that any judgment or settlement allocates proceeds to the Survival Claim, those proceeds are Probate Property and subject to the rights of a surviving spouse (and minor children) and creditors. After rights of a surviving spouse (and minor children) and creditor claims are satisfied, the remaining proceeds are distributed to the beneficiaries, like any other Probate Property.
 - Wrongful Death Claim. To the extent that any judgment allocates proceeds to the Wrongful Death Claim, or to the extent that a settlement is offered and allocates proceeds to the Wrongful Death Claim, those proceeds are distributed in accordance with a probate court order.

Probate Court Procedure¹³ For more information regarding the probate court procedure, please review (i) the Supreme Court of Ohio Probate Bench Card titled "Wrongful Death Claims"¹⁴ and (ii) Geauga Probate Local Rules 70.1, 70.2, and 70.3.

⁸ The spouse, children, and parents are presumed to have suffered damages - see R.C. 2125.02(A)(1).

⁹ The remarriage of the surviving spouse may affect the rights of that spouse – see R.C. 2125.02(A)(3)(b)(iii).

¹⁰ R.C. 2125.02(A)(1). If the Decedent's parent abandoned the Decedent, then that parent may not qualify for a share of the proceeds. See R.C. 2125.02(A)(1)

¹¹ R.C. 2105.06. See McCormac, *Wrongful Death in Ohio*, § 2.07 for a discussion of next of kin.

¹² R.C. 2125.02(B).

- Application. Regardless of whether a judgment is rendered or a settlement is offered for either a Survival Claim or a Wrongful Death Claim, the Personal Representative must prepare and file with the Court an “Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims” (Probate Form 14.0).
 - Statement of Facts. The attorney handling the claims shall prepare a (i) Statement of Facts that explains to the judge all relevant facts pertaining to the claims and proposed settlement, which must be attached to that Application and (ii) a detailed fee statement.¹⁵
 - Fee Statement. Additionally, that attorney will prepare a detailed fee statement, which must be attached to the Application.

- Hearing.
 - Waiver and Consent. All persons entitled to a distribution may sign a “Waiver and Consent Wrongful Death and Survival Claims” (Probate Form 14.1), in which case a hearing may not be required. Persons entitled to a distribution is not necessarily limited to those persons to be identified in Probate Form 1.0.¹⁶
 - Notice of Hearing.¹⁷ If not all such persons sign that “Waiver and Consent,” then, as to those persons who have not signed, the Estate Representative must deliver a written notice, using the form titled “Notice of Hearing” (GC PF 4.18) no less than 10 calendar days before the hearing date. Additionally, the applicant shall provide the Court with proof of service of that notice. See probate information sheet titled “Service of Notice” for more details on service of notice and proof of service to the Court. If the address of a person to be served is unknown, or the name is unknown, and service of publication is required, then review Geauga Probate Local Rule 78.14 and probate information sheet titled “Service of Notice” for more details.
 - Guardian Ad Litem. If a beneficiary is a minor, then the Court may appoint a Guardian Ad Litem to represent the minor at the hearing.¹⁸

- Judgment Entry. After the Court renders a decision, the applicant should prepare a judgment entry for the Court. The Court is likely to use the form titled “Entry Approving Settlement and Distribution of Wrongful Death and Survival Claims” (Probate Form 14.2).

- Report of Distribution. After the Estate Representative completes the distribution of proceeds in accordance with the judgment entry, the Estate Representative shall report the completion of that process by completing and filing the form titled “Report of Distribution of Wrongful Death and Survival Claims” (Probate Form 14.3).

¹³ R.C. 2117.05, R.C. 2125.02, R.C. 2125.03, Civ. R. 19.1, and Sup. R. 70

¹⁴ <https://www.supremecourt.ohio.gov/JCS/CFC/resources/probateBenchCards/wrongfulDeath.pdf>

¹⁵ Sup. R. 70 and Geauga Probate Local Rule 70.1(A).

¹⁶ See the Probate Bench Card titled “Wrongful Death Claims.”

¹⁷ See Geauga Probate Local Rule 70.1(D)

¹⁸ See the Probate Bench Card titled “Wrongful Death Claims.”

Special Considerations.

- Abandoned Child.¹⁹ If the deceased person is a minor (under age 18) and the Estate Representative or other interested person has knowledge that the deceased minor's parent abandon that child, then the Estate Representative or other interested person may file a motion with the Court to have the Court determine whether, in fact, the deceased child was abandon by the parent. If that is the case, the parent may not share in the distribution of proceeds from the Survival or Wrongful Death claims.

- Manner of Distribution for a Minor Beneficiary.
 - Guardian. If a guardian has been appointed for the minor beneficiary, then the Court may order that distribution to be paid to the guardian, and thereafter administered as any other asset of that minor (i.e. the Ward).

 - Distribution of \$25,000 (or less). If the amount of the distribution for a minor beneficiary is \$25,000 or less, then the Court may deposit the distribution with a financial institution for the benefit of that minor, as permitted by R.C. 2111.05, without the appointment of a guardian. See probate information sheet titled "Guardianship of a Minor" and Geauga Probate Local Rule 67.1.

 - Trust. If a beneficiary is under age 25, then the Court may create a trust for that beneficiary and distribute the beneficiary's proceeds to the trustee, as permitted by R.C. 2125.03(A)(2), to be held in trust until the beneficiary attains age 25 - see Geauga Probate Local Rules 68.4 and 78.20.

LEGAL PRACTICE IN THE PROBATE COURT IS RESTRICTED BY LAW TO ATTORNEYS WHO ARE LICENSED BY THE SUPREME COURT OF OHIO AND INDIVIDUALS WHO ARE HANDLING THEIR OWN LEGAL MATTERS. IF AN INDIVIDUAL WISHES TO HANDLE HIS OR HER OWN CASE, THAT PERSON MAY ATTEMPT TO DO SO, HOWEVER DUE TO THE COMPLEXITY OF THE LAW AND THE DESIRE TO AVOID COSTLY ERRORS, MANY PERSONS WHO HAVE MATTERS BEFORE THE COURT ARE REPRESENTED BY AN ATTORNEY.

IF YOU CHOOSE TO REPRESENT YOURSELF AND USE THE COURT'S FORMS, BE AWARE THAT STATE LAW PROHIBITS THE JUDGE, MAGISTRATE, AND EMPLOYEES OF THE GEAUGA COUNTY PROBATE COURT, INCLUDING THE HELP CENTER STAFF, FROM PROVIDING YOU WITH LEGAL ADVICE. IF YOU NEED LEGAL ADVICE, THEN YOU SHOULD CONTACT AN ATTORNEY OF YOUR CHOOSING.

¹⁹ R.C. 2125.02(E)