

## ***WRONGFUL DEATH PROCEEDINGS IN OHIO PROBATE COURT***

### **HISTORY OF WRONGFUL DEATH CAUSES OF ACTION**

As a general rule in the early years of this country under common law a person's tort claim died with them. See Prosser, *Torts* (4th Ed.1967) 898-905, §§ 126-127. This rule followed the English custom.

However, traditionally in England there were penalties for causing the death of another. In the earliest days of civil society sanctions were imposed by the leader of a clan or tribe, or later by the king, for any wrongful death caused by a member or subject. See Raby, *Ohio's New Wrongful Death Statute: an Expanded Scope of Recoverable Damages*, 53 U. Cin. L. Rev. 1083 (1984).

What we would today call civil damages consisted of requiring the wrongdoer to pay *wer* (or *wera*) to the family of the decedent to compensate them for their loss. Discouraging blood feuds by buying off vengeance with money was considered beneficial to society. The amount to be paid to the bereaved family was fixed according to the status or rank of the deceased and was distributed to the deceased's kin. In addition, the wrongdoer was ordered to pay *wite*, which was a reparation to the chief or king for breach of the peace. As the king's power increased the payment to the crown was emphasized and the family of the victim was often left with little or no financial relief. *Id.*

Nonetheless, during the industrial revolution English courts determined there could be no civil cause of action for wrongful death. *Id.* Like many other laws and policies, American courts followed English common law regarding wrongful death claims, at least for a while.

Various state legislatures eventually began to recognize the inequities of denying damages to the families of wrongful death victims. The Ohio legislature passed its first wrongful death statute in 1851 (see 49 Ohio Laws 117). The law conferred a civil right of action on those next of kin who may have suffered a pecuniary loss due to the wrongful death of the decedent. See *Sabol v. Pekoc* (1947) 148 Ohio St. 545, 549-551.

The basic substance of Ohio's first wrongful death statute was carried down through the years until the present day code provision for wrongful death. Although the wrongful death statute has been amended several times over the years, the right of action has not substantially changed and probate court still has jurisdiction over the approval and distribution of any wrongful death settlement or recovery.

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### **PROBATE COURT MUST APPROVE ALL WRONGFUL DEATH SETTLEMENTS**

Under Ohio Rev. Code Ann. § 2125.02(C), the probate court which appoints the fiduciary is required to give its consent to any settlement agreement.

In *Fosnight v. Esquivel* (1995) 106 Ohio App. 3d 372, the court found that, because there was no such probate court approval in the record, the settlement failed to comply with the statutory requirements, and consequently found that the trial court erred in finding the settlement enforceable.

Although it would appear the statutes and procedures anticipate prior approval, settlements can be approved after the fact (and as a practical matter often are). See *In re Estate of Alexander* (8<sup>th</sup> Dist. 1993) 92 Ohio App. 3d 190, wherein the appellant sought to vacate the settlement on the wrongful death medical malpractice action because the estate's own attorney had embezzled the settlement funds. Appellant argued this perpetuated a fraud upon the probate court. The court of appeals found that the probate court's subsequent approval of the settlement did not warrant Civil Rule 60(B) relief. The fact that the wrongful death case was actually settled by the estate's attorney prior to probate court approval and that the funds were then misappropriated by the attorney did not alter the fact that the settlement was fair, equitable, and resulted from the consent of all the beneficiaries.

### **AUTHORITY TO PURSUE/SETTLE WRONGFUL DEATH CLAIMS**

A cause of action in wrongful death arising under Revised Code Chapter 2125 must be brought in the name of a person appointed by a court to be the administrator, executor, or personal representative of the decedent's estate. See *Ramsey v. Neiman*, 69 Ohio St. 3d 508, 1994 Ohio 359, 634 N.E.2d 211, 1994 Ohio LEXIS 1326. The term personal representative, as used in the wrongful death statutes, is generally considered broad enough to include a temporary, special or ancillary administrator or executor. *Kyes v. Pennsylvania R. Co.* (1952), 158 Ohio St. 362, 365.

The administrator or executor is a mere nominal party to the action, and has no interest in the wrongful death claim as a result of being named as the fiduciary of the estate. The action is for the sole benefit of such next of kin. If the fiduciary is among the next of kin, as is often the case, then they may receive their appropriate share of the proceeds as next of kin.

Although each surviving member of a decedent's immediate family may be entitled to receive damages, there is only one cause of action for the recovery of those damages under Ohio's wrongful death statute. See RC § 2125.02 and *Dick v. Allstate Ins. Co.* (1986), 34 Ohio App. 3d 28, 516 N.E.2d 1266.

The beneficiaries of a wrongful death suit do not have the right to participate in the litigation through counsel separate from that retained by the personal representative. However, the

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representative's discretion in choosing the attorney and directing the course of the litigation is not unlimited. The beneficiaries can initiate a proceeding in probate court under RC § 2109.24 to remove the fiduciary if his or her conduct is not in the best interests of the beneficiaries. See *In re Estate of Ross* (1989), 65 Ohio App. 3d 395, 583 N.E.2d 1379; and see *In re Estate of DeCarlo*, Mahoning County Dec. 8, 2005, 2005 Ohio 6598, ¶22 (probate court abused its discretion in ordering fiduciary to enter into agreement with new litigation counsel).

RC § 2113.18 authorizes a probate court to remove the administrator of decedent's estate when the administrator refuses to bring a wrongful death action and a *prima-facie* case for wrongful death exists. See *Toledo Bar Ass'n v. Rust*, 124 Ohio St. 3d 305, 2010 Ohio 170.

If a wrongful death suit is to be pursued, best practice would be to have the executor or administrator appointed prior to filing suit. If they are appointed after filing suit at least one case holds that if the statute of limitations has run before the appointment is made the suit may fail. See *Gottke v. Diebold, Inc.*, Licking County Case No. CA-3484, 1990 Ohio App. LEXIS 3564, (statute of limitations ran where personal representative was not appointed until after filing). But see *contra Renner v. Pennsylvania R. Co.* (App 1951), 61 Ohio L. Ab. 298, 103 N.E.2d 832; and *Douglas v. D.B. Coal Co.* (1990), 135 Ohio St. 641, 22 N.E.2d 195, 123 A.L.R. 761 (relation back).

The Ohio Supreme Court has stated that the requirement in the wrongful death statute that the prosecution of the action be in the name of the personal representative relates merely to the right of action or remedy. The wrongful death statute does not require that the personal representative bring the action, but merely provides that the action, if brought, shall be brought in the name of the personal representative. *Toledo Bar Ass'n v. Rust*, 2010 Ohio 170, 124 Ohio St. 3d 305.

### **RC § 2125.03(A)(1) – DISTRIBUTIONS TO BENEFICIARIES**

RC § 2125.03(A)(1) provides that the probate court shall adjust the share of each beneficiary in a manner that is equitable, have due regard for the injury and loss to each beneficiary resulting from the death and for the age and condition of the beneficiaries.

The Probate Court is guided by RC § 2125.02(B) regarding the types of damages to be considered, including loss of support and services, society, and mental anguish suffered. See *In Re Cochran*, 12th Dist. Court of Appeals No. CA2000-05-030, 2001 WL 273644.

The following factors are to be considered by the probate court under RC § 2125.02 (B):

- (1) Loss of support from the reasonably expected earning capacity of the decedent;
- (2) Loss of services of the decedent;

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- (3) Loss of Society of the Decedent, including loss of:
- companionship;
  - consortium;
  - care;
  - assistance;
  - attention;
  - protection;
  - advice;
  - guidance;
  - counsel;
  - instruction;
  - training; and
  - education
- (4) Loss of prospective inheritance to decedent's heirs at law at the time of death;
- (5) Mental anguish incurred by the next of kin

The probate court has broad discretion in apportioning the proceeds among the beneficiaries. *In re Estate of Kline* (1964), 1 Ohio Misc. 28, 30. Absent a showing of an abuse of that discretion, a reviewing court should not substitute its judgment for that of the lower court's. To constitute an abuse of discretion, appellant must show that the court's decision was "unreasonable, arbitrary, or unconscionable." *Burriss v. Estate of Burriss*, (6<sup>th</sup> Dist. Apr. 15, 1988) 1988 Ohio App. LEXIS 1345 citing *Calderon v. Sharkey* (1982), 70 Ohio St. 2d 218, 219.

### **PERSONS ENTITLED TO RECOVER – THE NEXT OF KIN**

Surviving spouse, parents and children of decedent are rebuttably presumed to have suffered damages. In addition "other next of kin" although not presumed to have sustained damages, may recover damages upon proper proof thereof, even though there is a surviving parent, spouse, or minor children. See *Ramage v. Central Ohio Emergency Services, Inc.*, 64 Ohio St. 3d 97, 592 N.E.2d 828, 1992 Ohio LEXIS 1356, 1992 Ohio 109, (1992).

Revised Code § 2125.02 permits siblings of a decedent to recover for mental anguish. See *Shoemaker v. Crawford*, 78 Ohio App. 3d 53, 603 N.E.2d 1114. A sister of a decedent is legally entitled to collect damages under the wrongful death statute even though the decedent is also survived by a spouse, minor child or parent under RC § 2125.02(B). See *Smith v. State Farm Mut. Auto. Ins. Co.*(1992) 1992 Ohio App. LEXIS 3625.

Black's Law Dictionary (6<sup>th</sup> Ed.1990) 1044, defines the term, in part, to mean "nearest blood relations according to law of consanguinity." Ohio courts have generally held that "next of kin"

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under RC § 2125.02(A)(1) means the nearest surviving relatives after accounting for the parents, children, or spouse. *In re Estate of Payne*, 2005 Ohio 2391, 2005 Ohio App. LEXIS 2266 (10<sup>th</sup> Dist. 2005).

At least one Ohio court has limited next of kin to only the nearest level or degree of next of kin. The Tenth District Court of Appeals held that decedent's grandmother was entitled to recover all the proceeds under a wrongful death settlement, and the probate court's judgment requiring the division of the proceeds between the grandmother, related to the decedent in the second degree, and the decedent's aunt, related to the decedent in the third degree, was improper, because, under RC § 2125.02(A)(1), the grandmother was the "next of kin," in that she was the nearest surviving relative to the decedent after accounting for parents, children, or spouse, of which none existed. *In re Estate of Payne*, 2005 Ohio App. LEXIS 2266, 2005 Ohio 2391, (10<sup>th</sup> Dist. 2005).

In a wrongful death class action, the federal district court, which turned to RC § 2125.02(A)(1), to address concerns about the amorphous definition of family member that existed in the class definition, decided to permit recovery by the surviving spouse, the children, the parents, and other next of kin who suffered severe emotional distress. *Chesher v. Neyer*, 2005 U.S. Dist. LEXIS 33345 (S.D. Ohio Sept. 29, 2005).

A convent where a deceased nun lived cannot qualify as "other next of kin" of the decedent. See *Buchert v. Newman*, 90 Ohio App. 3d 382, 629 N.E.2d 489, 1993 Ohio App. LEXIS 4966 (1993).

When listing the next of kin on the standard probate forms the probate courts do not require all blood relatives to be listed. It depends on the situation who has to be listed. Of course the surviving spouse, parents, and children of the decedent must always be listed on the wrongful death application.

Adopted children are included under the wrongful death statute. See *Brookbank v. Gray* (1996), 74 Ohio St. 3d 279, syl. 1 (The term "children," as used in R.C. 2125.02(A)(1), includes all natural or adopted children, whether legitimate, legitimated, acknowledged or illegitimate). But step children who are not adopted are not listed for wrongful death purposes.

If there is a surviving spouse, children, or parents listed, then normally you do not have to go any further. If the decedent had a deceased child who left issue, then those issue should be listed. The issue generally step into the shoes of the deceased child for these purposes. If there are none of the above categories then you must look to the next degree of kin.

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### **THE NEXT OF KIN MAY ADJUST THE SHARE OF DISTRIBUTION AMONG THEMSELVES**

RC § 2125.03 provides that if “all of the beneficiaries are on an equal degree of consanguinity to the deceased person,” the beneficiaries may adjust the share of wrongful death proceeds for each beneficiary among themselves.

Thus the fiduciary submits the application to the probate court with consents signed by the next of kin and the court will approve the distribution requested. As a practical matter this is how most wrongful death distributions are handled.

Probate courts generally will approve any distribution that is consented to by all the next of kin. Thus it ordinarily greatly benefits the next of kin if they can agree on an allocation and sharing of any settlement proceeds. Otherwise substantial additional attorney fees and costs are likely to be incurred, and further time will be lost litigating the issue.

### **DISTINCTION BETWEEN WRONGFUL DEATH AND SURVIVORSHIP**

Revised Code § 2305.21 provides that causes of action for injuries to person or property survive notwithstanding the death of the person entitled to make the claim. Survival actions, in contrast to wrongful death actions, are not concerned with damages to the next of kin, but with the injuries suffered by the deceased person during his lifetime. Thus these claims survive and may be brought on behalf of the estate by the fiduciary appointed by the probate court.

A survival action brought to recover for a decedent's own injuries suffered before his or her death is independent from a wrongful death action seeking damages for the injuries that the decedent's next of kin suffer as a result of the death, even though the same nominal party prosecutes both actions. See *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 2007 Ohio 4787.

The same act may provide a basis for an action in tort saved by the survival statute and also an action for wrongful death if the injuries sustained resulted in a person's premature death. See e.g., *Jones v. Wittenberg University* (6th Cir. Ohio 1976), 534 F.2d 1203, 1207-1208; and *Hillard v. Western & Southern Life Ins. Co.* (1941), 68 Ohio App. 426, 34 N.E. 2d 75.

Thus the beneficiaries of the wrongful death proceeds could be completely different than those who are entitled to take as heirs in the survivorship action. When this happens it tends to lead to some serious conflict between the parties.

The probate court standard forms provide for an allocation between the two types of damages where a division is appropriate. The survival claim funds are part of the estate and must be accounted for just like any other estate asset. They are also subject to estate tax where the exemptions are exceeded.

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The wrongful death proceeds are not part of the estate and are distributed directly to the next of kin as set forth in the probate court's entry regarding the fiduciary's application for approval of the distribution. Thus no accounting need be filed and the proceeds are not subject to the estate tax.

The wrongful death proceeds also may not be used to satisfy the decedent's debts or subrogation liabilities. See *Fogt v. United Ohio Ins. Co.* (3<sup>rd</sup> Dist. 1991), 76 Ohio App. 3d 24; 600 N.E.2d 1109; also see *State ex rel Goldberg v Mahoning Probate* (2001) 93 Ohio St.3d 160. This includes Medicare subrogation claims, but Medicare rules ignore any allocation between wrongful death and survivorship that is not made by a jury or trial court and which does not bear a reasonable relationship to the nature and extent of injuries and the beneficiaries' damages.

### **DUTY OF COUNSEL TOWARDS BENEFICIARIES/CONFLICT OF INTEREST**

Representing the estate involved in a wrongful death claim can be challenging where there is a conflict between the next of kin. What duty does an attorney have to the next of kin who are not the fiduciary?

At least one court of appeals has found that there is genuine issue of material fact as to whether an attorney owed the siblings and parent of a decedent a professional duty as attorneys when representing the estate and the surviving children of the decedent. *Brinkman v. Dougherty* (2<sup>nd</sup> Dist. 2000) 140 Ohio App. 3d 494. The siblings and parent of the decedent filed a malpractice action against the attorneys. Defendant attorneys negotiated settlements that were distributed to the decedent's children. Although the defendants knew that plaintiffs survived the decedent, they were not given the opportunity to approve the partial wrongful death settlement. Plaintiffs brought suit claiming the defendants refused and failed to fulfill their professional duty to adequately represent all beneficiaries and next of kin. The trial court granted defendants' motion for summary judgment, stating that legal malpractice liability to third parties arose only where the third party was in privity with the attorney's client or where the attorney acted maliciously. On appeal, the court reversed the order, as the tort that gave rise to the wrongful death claim had already occurred and the interest of the decedent's statutory beneficiaries was vested. Accordingly, the court found a genuine issue of material fact as to whether defendants owed plaintiffs a professional duty to adequately represent them in settlement negotiations.

The Eighth District Court of Appeals has found no conflict of interest of an attorney with beneficiaries of the wrongful death action simply because the attorney advised the administratrix of law and facts indicating that certain beneficiaries, who only appeared after the wrongful death action was settled and who had no close relationship with decedent, were not entitled to distribution. *In re Estate of Mason*, 184 Ohio App. 3d 544, 2009 Ohio 5494.

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### **PROCEDURE AND DIFFERENCES BETWEEN COUNTIES**

Each probate court handles wrongful death claims differently. But all courts require the filing of the form titled Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims (SPF 14.0). Some counties have their own version of this form (check the court website, if available).

Separate forms for waivers signed by the next of kin can also be used (SPF 14.1) This form can be modified to include waiver and consent to future settlement distributions.

With the Wrongful Death Application the court's will require a proposed Entry Approving Application (SPF 14.2). Some counties want it with the filing, others at the hearing.

It often helps to provide an itemization of fees and expenses in spreadsheet form detailing case expenses and attorneys fees. Some counties also require an attached narrative statement in support of the settlement.

Most counties will require a motion and/or a proposed entry approving litigation counsel's contingency fee agreement by the time of the first application. A copy of the contingency fee agreement must be submitted with the motion/entry.

Most counties require payment of any costs due at the time of filing the application (others send bills after the fact).

Some counties also require certain supplemental forms by local rule. For example Stark County requires Form 14.0C - Supplement to Application to Approve Settlement.

In most counties once you file the application the matter is set for a hearing, at least on the first application. If you have consent forms signed by all the next of kin subsequent hearings may not be necessary if the consent includes waiver of notice of future settlements (as is common in asbestos-related cases).

After you receive the entry approving the application most counties require a Report of Distribution (SPF 14.3) within 30 days of the entry. Attached vouchers for the distribution are required in some counties (for example in Ashtabula, Mahoning and Portage counties). Some counties will accept a copy of the disbursal letter in lieu of the report.



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### **ASBESTOS WRONGFUL DEATH CASES**

Asbestos litigation presents unique problems for the handling of wrongful death claims in probate court. The makers of the statutes and procedure for wrongful death cases never contemplated the manner in which asbestos litigation has developed. Most asbestos cases involve multiple settlements spread out over a period of years. This means filing multiple applications to the probate court over time. Often the original beneficiaries and/or fiduciary die before the asbestos claim is completed.

If all the next of kin agree it is much easier to handle these cases purely as wrongful death claims. This avoids the requirement of filing periodic accountings and maintaining an estate checking account. It also keeps costs down.

Most counties will waive the need for accountings where there are no assets and will only require an annual status report on the asbestos litigation (although some counties such as Cuyahoga require the filing of an annual zero account). Generally the settling parties do not specify or care about the allocation of the payment, but simply want released from any and all claims.

When one or more of the next of kin die after decedent but before the claim is resolved it can make matters more difficult. RC § 2125.02(A)(3)(a) provides that the decedent's date of death fixes the status of all beneficiaries of an action for wrongful death for purposes of determining the damages suffered. In this respect, wrongful death cases are like actions involving the contents of wills, i.e., the legal right to recovery arises or is fixed at the time of death. See *Brinkman v. Doughty* (2<sup>nd</sup> Dist. 2000) 140 Ohio App. 3d 494, 501. However, as a practical matter it is much easier to handle these situations if the living next of kin (of the deceased plaintiff, as well as of the deceased original beneficiaries) consent to a distribution directly to the living next of kin of the original decedent, rather than passing the proceeds through multiple estates.

Multiple settlements can be included on one application in most counties. An itemization with details about the settlement breakdown should be attached to the SPF 14.0, making clear the attorney fees and costs being requested for each settlement.

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# ***WRONGFUL DEATH PROCEEDINGS IN OHIO PROBATE COURT***

## **APPENDIX**

The relevant sections of the Ohio Revised Code, in pertinent part:

### **RC § 2125.01. Action for Wrongful Death**

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.

\* \* \* \* \*

### **RC § 2125.02. Persons entitled to recover; determination of damages; limitation of actions**

(A) (1) Except as provided in this division, a civil action for wrongful death shall be 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 decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.

(2) The jury, or the court if the civil action for wrongful death is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries described in division (A)(1) of this section by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3) (a) The date of the decedent's death fixes, subject to division (A)(3)(b)(iii) of this section, the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.

(b) (i) In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

\* \* \* \* \*

(iii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence that the surviving spouse of the decedent is remarried. If that evidence is presented, then, in addition to the factors described in divisions (A)(3)(b)(i) and (ii) of this section, the jury or court may consider that evidence in determining the damages suffered by the surviving spouse by reason of the wrongful death.

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(B) Compensatory damages may be awarded in a civil action for wrongful death and 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;
- (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.

(C) A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of a civil action for wrongful death, may settle with the defendant the amount to be paid.

(D) (1) Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death.

\* \* \* \* \*

(E) (1) If the personal representative of a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from a civil action for wrongful death or if any person listed in division (A)(1) of this section who is permitted to benefit from a civil action for wrongful death commenced in relation to a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from the action, the personal representative or the person may file a motion in the court in which the action is commenced requesting the court to issue an order finding that the parent abandoned the minor and is not entitled to recover damages in the action based on the death of the minor.

(2) The movant who files a motion described in division (E)(1) of this section shall name the parent who abandoned the deceased minor and, whether or not that parent is a resident of this state, the parent shall be served with a summons and a copy of the motion in accordance with the Rules of Civil Procedure. Upon the filing of the motion, the court shall conduct a hearing. In the hearing on the motion, the movant has the burden of proving, by a preponderance of the evidence, that the parent abandoned the minor. If, at the hearing, the court finds that the movant has sustained that burden of proof, the court shall issue an order that includes its findings that the parent abandoned the minor and that, because of the prohibition set forth in division (A)(1) of this section, the parent is not entitled to recover damages in the action based on the death of the minor.

(3) A motion requesting a court to issue an order finding that a specified parent abandoned a minor child and is not entitled to recover damages in a civil action for wrongful death based on the death of the minor may be filed at any time during the pendency of the action.

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### **RC § 2125.03. Distribution to beneficiaries**

(A) (1) The amount received by a personal representative in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code, whether by settlement or otherwise, shall be distributed to the beneficiaries or any one or more of them. The court that appointed the personal representative, except when all of the beneficiaries are on an equal degree of consanguinity to the deceased person, shall adjust the share of each beneficiary in a manner that is equitable, having due regard for the injury and loss to each beneficiary resulting from the death and for the age and condition of the beneficiaries. If all of the beneficiaries are on an equal degree of consanguinity to the deceased person, the beneficiaries may adjust the share of each beneficiary among themselves. If the beneficiaries do not adjust their shares among themselves, the court shall adjust the share of each beneficiary in the same manner as the court adjusts the shares of beneficiaries who are not on an equal degree of consanguinity to the deceased person.

(2) The court may create a trust for any beneficiary who is under twenty-five years of age by ordering that the portion of the amount received by the personal representative for that beneficiary be deposited in trust for the benefit of that beneficiary, until the beneficiary reaches twenty-five years of age, and order the distribution of the amount in accordance with the provisions of the trust. Prior to appointment as a trustee of a trust created pursuant to this section, the person to be appointed shall be approved by each adult beneficiary and by the guardian of each minor beneficiary of the trust.

(3) The personal representative shall not distribute any amount received in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code to any person in relation to whom the court has entered an order pursuant to division (E)(2) of section 2125.02 of the Revised Code.

(B) The court shall distribute the amount of funeral and burial expenses awarded, or received by settlement, by reason of the death to the personal representative of the decedent, to be expended by the personal representative for the payment, or as reimbursement for the payment, of the expenses.

### **§ 2305.21. Survival of actions**

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.