

# 22

## **Distribution of Wrongful-Death and Survival Settlements in Probate Court**

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## I. [22.1] INTRODUCTION

At some point, a probate practitioner will have to deal with a personal injury and/or wrongful-death claim in a decedent's estate or guardianship matter. The distribution of the settlements in those types of cases can be tricky due to procedural requirements and general unfamiliarity. This chapter (a) reviews the law and rules governing distribution of wrongful-death and survival proceeds; (b) details the process of obtaining court authority to distribute wrongful-death and survival settlements in probate court with a focus on Cook County's process and requirements; (c) outlines instances in which probate court involvement is not required; (d) sets forth the process of probate court approval of wrongful-death and survival settlements when no lawsuit has been filed; and (e) notes additional requirements for settlement approval and distribution in guardianships.

## II. NATURE OF WRONGFUL-DEATH AND SURVIVAL CLAIMS

### A. Wrongful-Death Claims

#### 1. [22.2] The Wrongful Death Act

Wrongful-death claims arise under the Wrongful Death Act, 740 ILCS 180/0.01, *et seq.*, which provides:

**Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, including punitive damages when applicable, in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, including punitive damages when applicable, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. 740 ILCS 180/1.**

Although statutory, wrongful-death claims are based on an intentional or unintentional tort, which results in the death of the decedent.

The Wrongful Death Act goes on to provide a mechanism for determining the appropriate amounts to distribute to the spouse and next of kin:

**The amount recovered in any such action shall be distributed . . . to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person. 740 ILCS 180/2(b).**

The trial court judge is required to make a finding regarding the next of kin and degree of dependency the spouse and next of kin had on the decedent.

## 2. [22.3] Can a Wrongful-Death Claim Be Settled Without a Court Order?

A preliminary question is whether it is necessary for a court to approve a wrongful-death settlement. Due to the requirement that the trial court determine the degree of dependency of the next of kin on the decedent, it seems that a wrongful-death settlement would have to be approved by a judge since there is no other way for kinship and dependency to be determined. Without a court determination of kinship and dependency, the tortfeasor runs the risk that someone else could come forward after the settlement has been distributed claiming to be next of kin and demanding to be compensated for the loss of the decedent.

## 3. [22.4] The Plaintiff in a Claim Under the Wrongful Death Act

There are two possible plaintiffs in a Wrongful Death Act claim. First, the trial court can name a special administrator to pursue the wrongful-death claim. 740 ILCS 180/2.1. Second, if a representative of the decedent's estate is appointed by the probate court, that representative is the plaintiff. *Id.* If a special administrator has been appointed by the trial judge and a representative is later appointed by the probate court, the probate executor or administrator takes precedence over the special administrator. As a result, the complaint will need to be amended to name the probate representative as the plaintiff in the lawsuit.

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### PRACTICE POINTER

- ✓ If you or your firm is handling the wrongful-death claim, the best practice is to open an estate and have an administrator or executor appointed to eliminate the possibility of a surprise petition to open a probate estate being filed by another heir.
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## 4. [22.5] Wrongful-Death Claims Are Not Probate Assets

Wrongful-death claims are not probate assets because the claim belongs to the decedent's "spouse and next of kin." 740 ILCS 180/2(a); *Carter v. SSC Odin Operating Company, LLC*, 2012 IL 113204, ¶¶38 – 39, 976 N.E.2d 344, 364 Ill.Dec. 66. Consequently, the claim is not subject to probate claims or the expenses of administration. 740 ILCS 180/2(a). It also is not subject to subrogation liens with the exception of a workers' compensation lien. *See Liberty Mutual Insurance Co. v. Lloyd Schoenheit Truck & Tractor Service, Inc.*, 191 Ill.App.3d 578, 547 N.E.2d 1272, 1274, 138 Ill.Dec. 651 (5th Dist. 1989).

## 5. [22.6] Identifying Next of Kin

The Wrongful Death Act does not define "next of kin," but Illinois courts have held that the term means intestate heirs under the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.* *See Johnson v. Provena St. Therese Medical Center*, 334 Ill.App.3d 581, 778 N.E.2d 298, 268 Ill.Dec. 312 (2d Dist. 2002). As a result, in an intestate estate, the heirs and next of kin will be the same. Conversely, in a testate estate, the takers on a wrongful-death claim could be different from the legatees named in the decedent's will.

## 6. [22.7] Determining Dependency on the Decedent

Before discussing how the court goes about determining the degree of dependency, it is important to understand the meaning of “dependency” as used in the Wrongful Death Act. “Dependency” in the context of the Wrongful Death Act is much broader than it appears on its face. As a general matter, the term “dependency” in the context of family relationships would suggest that an independent adult child without a disability would have zero-percent dependency on a deceased parent or sibling. In family law, support ends for a child at 18 or graduation from high school, whichever is later. 750 ILCS 5/505(a). The presumption here is that the child is now old enough to care for himself or herself and no longer needs financial support from the parents. In other words, the child is no longer dependent on the parents. Wrongful death differs from family law on this point. Illinois appellate courts have held that adult children without a disability can have dependency on the decedent. *See, e.g., Williams v. Rush-Presbyterian St. Luke’s Medical Center*, 387 Ill.App.3d 77, 899 N.E.2d 1241, 1246, 326 Ill.Dec. 590 (1st Dist. 2008). This type of nonfinancial dependency is akin to a loss of society. *See Johnson v. Provena St. Therese Medical Center*, 334 Ill.App.3d 581, 778 N.E.2d 298, 307, 268 Ill.Dec. 312 (2d Dist. 2002). Therefore, adults with no disabilities who were not financially dependent on the decedent can still be found to have dependency on the decedent under the Wrongful Death Act.

As noted in §§22.2 – 22.3 above, the trial court judge is required to make a finding regarding the degree of dependency the spouse and next of kin had on the decedent. 740 ILCS 180/2(b). Determining the degree of dependency typically does not involve an evidentiary hearing because the next of kin usually reach an agreement on each person’s percentage. However, it is possible that the next of kin are unable to reach an agreement or one of the next of kin is a minor or person with a disability who lacks the capacity to agree. When there is no agreement, the judge must determine those percentages. To do so, the judge will need to conduct an evidentiary hearing at which each next of kin can testify and present evidence regarding dependency on the decedent. Each next of kin is entitled to be represented by an attorney at the hearing. Although dependency hearings are typically not lengthy, it is conceivable such a hearing could last for days depending on the number of next of kin and the circumstances of the case.

Although judges should make an individualized determination of dependency based on the evidence presented, the judge may be inclined to find that the spouse and children of the decedent are dependent in the same percentage as their intestate share of the decedent’s estate. For example, assuming the decedent is survived by a spouse and two adult children without disability, the spouse would be found to have a 50-percent dependency and the children 25 percent each using the intestate succession approach. This approach may be appropriate in some instances but cannot and should not be used in every case. If the spouse and/or one or more of the next of kin require 24-hour medical care, are completely disabled, or are wholly reliant on the decedent for maintenance and welfare, intestate succession would not lead to a reasonable determination of dependency.

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### PRACTICE POINTER

- ✓ Do all you can to get the family to agree on dependency.
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## B. Survival Statute Claims

### 1. [22.8] The Survival Statute Allows the Decedent's Estate To Pursue Certain Claims

Under the common law, a person's legal claims died with the person. *Wilcox v. Bierd*, 330 Ill. 571, 162 N.E. 170 (1928), *overruled on other grounds by McDaniel v. Bullard*, 34 Ill.2d 487, 216 N.E.2d 140 (1966). Eventually, state legislatures, including that of Illinois, passed survival acts, which allowed a variety of claims to "survive" the death of the decedent. Illinois' survival statute can be found in §27-6 of the Probate Act, 755 ILCS 5/27-6, which states:

**In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages, including punitive damages when applicable, for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 6-21 of the Liquor Control Act of 1934 [235 ILCS 5/6-21].**

The survival statute applies to both pending litigation and potential claims arising out of a decedent's death or otherwise. Due to the survival statute, nearly all potential claims a decedent had at death survive, including, of course, personal injury. All survival claims are probate assets. *In re Estate of Zorn*, 118 Ill.App.3d 988, 455 N.E.2d 864, 74 Ill.Dec. 435 (4th Dist. 1983).

### 2. [22.9] Probate Estate Needed To Pursue Survival Claims

To pursue survival claims, an estate generally must be opened. Without an estate, there is no "plaintiff" to pursue the claim. Having said that, the decedent's heirs or legatees can settle with the tortfeasor without opening an estate or filing a lawsuit. However, potentially liable parties and their insurers may be unwilling to agree to a nonjudicial settlement due to the possibility that additional persons claiming to be heirs may later appear claiming that they have the right to pursue the claim.

### 3. [22.10] Special Representatives

It should also be noted that, when there is only a survival claim, the trial court can appoint a "special representative" under 735 ILCS 5/13-209(a)(2) if the plaintiff has died during the course of litigation. Because "[t]he proceeds of any judgment or settlement shall be distributed under the provisions of the Probate Act of 1975," the special representative will likely have to turn the litigation or its proceeds over to a representative appointed by the probate court at some point. *Id.* Given that, the heirs and legatees would be well served to open an estate immediately and allow the probate representative to be the plaintiff in the lawsuit. This would also serve the purpose of avoiding a party trying to make an end run around the special representative by filing a petition in probate seeking to name someone else the representative.

#### 4. [22.11] Survival Claims as Estate Assets

As noted in §22.8 above, a survival claim is a probate asset just like any other kind of probate asset. Thus, a survival claim is subject to claims in the decedent's estate. As with any decedent's estate, it is possible that the decedent had significant unsecured debts such as credit card bills or medical bills. As a result, those claims may eat up some or all of the proceeds from the survival claim.

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#### PRACTICE POINTER

- ✓ Discuss the possibility that the estate's liabilities may exceed the potential value of the survival claim with the personal representative early on. If it looks likely that the estate is insolvent, the representative and the heirs and legatees may not want to pursue the survival claim. At a minimum, such a discussion will help manage their expectations going forward.
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### III. [22.12] OBTAINING COURT APPROVAL OF WRONGFUL-DEATH AND SURVIVAL SETTLEMENTS

Cook County's local rules and procedures concerning the settlement and distribution of wrongful-death claims, survival claims, and the personal injury claims of minors and persons with disabilities are highly developed. Sections 22.13 – 22.30 below illustrate how to obtain settlement approval and authority to distribute those claims. The presiding judges of the Cook County Circuit Court's Probate Division, Law Division, and Municipal Division have issued a detailed memorandum, *Final Procedures Concerning Disposition of Minors' and Disabled Persons' Personal Injury Cases, Survival Actions, and Wrongful Death Cases with Sample Petitions and Orders* (Mar. 2023), [https://ocj-web-files.s3.us-east-2.amazonaws.com/orders/Final\\_Procedures\\_Disposition\\_Law\\_Probate\\_D1\\_March\\_2023.pdf?VersionId=xtilDk93vLbrY8hDcRLJznu2s.4haW2S](https://ocj-web-files.s3.us-east-2.amazonaws.com/orders/Final_Procedures_Disposition_Law_Probate_D1_March_2023.pdf?VersionId=xtilDk93vLbrY8hDcRLJznu2s.4haW2S) (case sensitive) (Cook County Memo), which addresses this topic in depth.

#### A. [22.13] Wrongful-Death Settlement Approval

Wrongful-death claims can be settled pre-suit or after a lawsuit has been filed. How to proceed in probate court will vary depending on whether a suit has been filed.

##### 1. [22.14] Lawsuit Filed

The trial court and probate court perform distinct functions in the settlement and distribution process when a lawsuit has been filed. Cook County Circuit Court Rules 6.4, 6.5, 12.15; Cook County Memo, pp. 2 – 7.

##### a. [22.15] Trial Court's Role

If a lawsuit has been filed, most of the heavy lifting occurs in the trial court. It will be up to the trial judge to determine who the spouse and next of kin are and to determine dependency. 740 ILCS 180/2(b); Cook County Circuit Court Rule 6.5(1)(a); Cook County Memo, pp. 3 – 4.

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**PRACTICE POINTER**

- ✓ Review the court's local rules and the standing order of the judge regarding petitions to settle.
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As the reader is no doubt aware, local rules vary and the specific requirements of each judge can vary even more. Nonetheless, the petition to settle typically sets forth

- the settlement amount
- a statement that the settlement is fair and reasonable
- the allocation of the gross settlement between wrongful-death and survival claims (if a survival claim has also been filed)
- the attorneys' fees
- the litigation expenses
- the probate expenses
- liens to be adjudicated
- the names of the spouse and next of kin and their ages
- the proposed percentages of dependency of the next of kin on the decedent (assuming an agreement has been reached)
- whether any next of kin is a minor or a person with a disability
  - (1) Percentage of dependency
    - (a) [22.16] Next of kin have reached agreement on dependency

The key issue at this point is whether the spouse and next of kin can reach an agreement on their degree of dependency on the decedent. If they can, the settlement process should move along with no major obstacles.

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**PRACTICE POINTER**

- ✓ If the spouse and next of kin have reached an agreement, prepare attestations or affidavits for the spouse and next of kin that set forth the specifics of the agreement, including the following:

- the fairness and reasonableness of the settlement
- the allocation between wrongful-death and survival claims (if applicable)
- approval of attorneys' fees
- approval of litigation expenses
- who constitutes the spouse and next of kin
- percentages of dependency of each
- waiver of a hearing on the petition

Attach the signed attestations or affidavits to the petition to settle.

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In the author's experience, proceeding by agreement is typical and makes the process relatively quick and smooth. Of course, not every case is easy.

(b) [22.17] Judge must determine dependency

If the family cannot agree on the degree of dependency, the settlement process will become cumbersome and the timeline will become protracted. The trial court will have no choice but to set a hearing to gather evidence to allow the court to make those findings. The author was involved in a contested hearing in which the decedent was the only child of two only children who were each from two large families. The affidavit of heirship in the intestate estate was six pages long and identified 36 heirs. The next of kin were not able to reach an agreement on dependency, so an evidentiary hearing was held. That hearing lasted about four hours, and approximately 15 heirs testified.

(2) [22.18] Other determinations to be made by trial judge

The trial court also will determine whether the settlement is fair and reasonable, approve attorneys' fees and litigation expenses, and adjudicate any liens. Cook County Circuit Court Rule 6.5(1)(a); Cook County Memo, pp. 2 – 7.

(3) [22.19] Additional items to be included in Cook County settlement order

In Cook County, the probate fees and expenses are to be determined by the probate court, so the trial court's settlement order must state as follows: "The Probate expense(s) claimed herein appear reasonable, however, reimbursement of the same must be obtained from the Probate estate." Cook County Memo, p. 6.

Another Cook County requirement is that the order state: "[T]he amount distributable, based on dependency, shall be accounted for and administered in the Probate Division." Cook County Memo, p. 3.

(4) [22.20] Vouchers

After the settlement has been approved and distributed, vouchers must be presented to the trial court showing that the settlement proceeds have been distributed in accordance with the settlement order. Cook County Memo, p. 6. “Voucher” is a term of art meaning, in essence, a receipt. *See Voucher*, BLACK’S LAW DICTIONARY (12th ed. 2024). Like a receipt, vouchers evidence that the representative has distributed all the settlement proceeds in accordance with the trial court’s settlement order. Consequently, everyone receiving funds from the settlement will need to sign a voucher.

b. [22.21] Probate Court’s Role

The probate court will have a part to play regarding wrongful-death settlements only if an estate was opened for the decedent. Assuming an estate has been opened, the distributable amount of the settlement shall be “accounted for and administered” in probate court. Cook County Circuit Court Rule 6.5(1)(b). The first steps in that process are granting the representative authority to receive the distributable proceeds and setting bond. Cook County Circuit Court Rule 6.5(1)(e). Following the entry of the settlement order in the trial court, the estate’s representative will file a petition for authority to receive proceeds from the wrongful-death settlement. Cook County Circuit Court Rule 6.5(1)(f). It is important to note that this petition is not seeking court approval for the settlement because the trial court has already approved the settlement amount, attorneys’ fees, expenses, etc.

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**PRACTICE POINTER**

- ✓ As every probate practitioner is aware, probate judges vary greatly in the degree of scrutiny they give to petitions and motions brought before them. On several occasions, the author has had a probate judge question the reasonableness of litigation expenses. Although those expenses had already been approved by the trial judge, the probate judge’s concerns had to be addressed, which delayed the settlement process. Therefore, it is best if the petition for authority is focused on receiving the wrongful-death proceeds and merely restates the pertinent portions of the trial court’s settlement order. By keeping the focus on the probate court’s role of setting bond and approving probate fees and expenses, you can reduce the chance the probate judge will take issue with other aspects of the settlement.

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After the settlement has been approved and distributed, vouchers are presented to the probate court showing the trial and probate attorneys’ fees and expenses have been paid and the spouse and next of kin have received their shares in accordance with the settlement order. Cook County Memo, p. 6.

**2. [22.22] No Lawsuit Filed**

If no lawsuit was filed, the probate court will be responsible for all aspects of approving and distributing the settlement. Cook County Circuit Court Rule 12.15(b). It is unclear whether receipts are required in addition to vouchers when the estate had no probate assets and was only

administering the wrongful-death claim. Although it may not be technically required, the author's practice has been to have the spouse, next of kin, and/or legatees sign receipts indicating they have received what they are entitled to from the estate and approving any fees of the representative and probate attorney.

## **B. Survival Claim Approval**

### **1. [22.23] Lawsuit Filed**

In terms of a survival claim, the trial court must approve the settlement. Cook County Circuit Court Rule 6.5(1)(a). The only difference between the standard personal injury case and one concerning a decedent is that the representative of the estate is the plaintiff and the representative petitions the court for approval and signs any releases. The court must make a determination that the settlement is fair and reasonable, approve the attorneys' fees and litigation expenses, and adjudicate any liens. The trial court will not need to determine who the next of kin are or the degree of dependency of the spouse and next of kin as in a wrongful-death case because the survival claim is a probate asset and the decedent's will or intestate succession will determine the shares of the takers.

As with wrongful-death settlements, vouchers are presented to the trial court and probate court showing that all sums have been distributed pursuant to the settlement order. Cook County Memo, p. 6. Since the survival claim is an asset of the estate, the representative signs a voucher showing the estate has received the proceeds. The heirs and legatees then sign receipts as per usual indicating they have received their share of the estate.

### **2. [22.24] No Lawsuit Filed**

If no lawsuit has been filed, the probate court will determine whether the settlement is fair and reasonable, approve attorneys' fees and litigation expenses, and adjudicate liens. Cook County Circuit Court Rule 12.15(b). The probate court will also need to set bond, if bond has not been waived by the decedent's will and the current bond is not sufficient to cover 150 percent of the distributable amount of the settlement plus the other estate assets. Otherwise, the distributable amount of the survival claim is like any other probate asset. It will, of course, be distributed to the legatees and heirs pursuant to the terms of the will or intestate succession after payment of all claims and administrative expenses. If there is a will, it is possible the decedent could have provided for the distribution of this claim as a specific bequest, but more likely it will be part of the residuary. The legatees and heirs will sign receipts as per usual indicating they have received their share of the estate.

### **3. [22.25] Small Estate Affidavit**

As noted in §§22.8 and 22.11 above, the survival claim is a probate asset. Like other personal property, the proceeds from the survival settlement can be distributed to the legatees and heirs via a small estate affidavit (SEA), 755 ILCS 5/25-1(a), 5/25-1(b). For decedent's who died after August 15, 2025, the SEA limit has been increased from \$100,000 to \$150,000. However, as of the time of this writing, Cook County Rule 6.5(4) has not been amended to reflect this change. Until such time that Rule 6.5(4) is amended, the trial court judge may be unwilling to accept an SEA for a net

settlement between \$100,000 and \$150,000. The practitioner should advise the trial court of the SEA amendment, which should resolve that issue. In those cases in which there is a survival claim only, settlement is reached pre-suit, and the personal estate is worth less than \$100,000 or \$150,000, depending on when the decedent died, the SEA can provide a quicker and cheaper method for distributing the settlement proceeds. However, the use of SEAs here has all the benefits and potential drawbacks of using SEAs in other situations. Consequently, depending on the totality of the circumstances, use of an SEA may or may not be appropriate.

### C. [22.26] Wrongful-Death and Survival Claim Approval

It is not uncommon for a lawsuit to include both wrongful-death and survival claims. When the decedent was injured, lived for some time after the injury, and later died, both claims under the Wrongful Death Act and the survival statute may lie. This is sometimes seen in a motor vehicle accident case when the decedent was injured and died days, hours, or even minutes after the accident. The injuries sustained by the decedent and the pain experienced prior to death are the survival claim, and, of course, death is the wrongful-death claim. Given the nature of those claims, they are almost always brought by the representative of the decedent's estate. The settlement approval process and distribution of the proceeds of wrongful-death and survival claims can be complicated.

#### 1. The Trial Court

##### a. [22.27] Allocation Between Wrongful-Death and Survival Claims

Wrongful-death and survival claims are invariably settled at the same time. The parties will reach agreement on a gross figure to settle all claims and typically do not delineate how much will go to the wrongful-death claim and how much to the survival claim. The defendants are keen to wrap up the litigation and thus are usually not concerned with what the breakdown is since it does not affect their bottom lines. The representative of the estate, who is the plaintiff, is concerned because that allocation can have a significant impact on the heirs or legatees and the next of kin.

In the petition to settle, the plaintiff proposes an allocation to the trial judge. *See Readell v. Towne*, 302 Ill.App.3d 714, 706 N.E.2d 99, 102 – 103, 235 Ill.Dec. 839 (2d Dist. 1999). The trial court judge will require that this allocation bear some relationship to the injuries sustained, the amount of time the decedent lived after being injured, whether the decedent was conscious after the injury, and other considerations along those lines. 706 N.E.2d at 103. Given the inherent fluidity of this allocation, there have been instances in which a plaintiff has attempted to manipulate the allocation to favor the next of kin (wrongful death) over creditors (survival claims). For example, if the estate was insolvent and the claims far exceeded the value of the probate assets, the plaintiff may be inclined to put all of the settlement into the wrongful-death category, which is not subject to probate claims. If the decedent lived for weeks in agony after the injury, the trial judge is likely to question that allocation. Therefore, the allocation must bear some relationship to the specifics of the case and the plaintiff should set forth in the petition to settle the factual basis for the proposed allocation.

*b. [22.28] Who Is the Attorney's Client and to Whom Does the Attorney Owe a Duty?*

The question of who is — and is not — a client comes up frequently when doing probate work. Regarding the survival claim, this analysis is the same as in any estate. As a result, the client is the administrator or executor of the estate and not any of the heirs or legatees.

Who the client is and to whom the attorney owes a duty is more nuanced when there is a wrongful-death claim. This is the case whether or not there is also a survival claim. Regarding the wrongful-death claim, the attorney handling the litigation and the probate attorney (assuming an estate has been opened) owe a duty to the spouse and next of kin as well as whoever signed the retainer agreement. See *In re Estate of Powell*, 2014 IL 115997, ¶ 20, 12 N.E.3d 14, 382 Ill.Dec. 14. This means that when evaluating degrees of dependency on the decedent, the attorney cannot simply assume that (1) the “client” (the person who signed the retainer agreement) gets 100 percent; (2) intestate succession should be followed; or (3) everyone should get an equal amount. If the decedent was married, the surviving spouse has never worked outside the home and has limited means, and the decedent and surviving spouse’s two children are both billionaires, awarding 100 percent to the surviving spouse may be appropriate. On the other hand, if there is no surviving spouse, and one of the two children of the decedent has a disability, will never be able to work, and requires 24-hour medical care, that disabled child probably should receive a much greater percentage than the other child. As discussed in §22.16 above, it is optimal if the spouse and next of kin can reach agreement to avoid putting this determination into the hands of the trial judge. However, the point is that the attorney cannot advocate for one family member over another in determining degrees of dependency. Doing so would likely be a breach of duty and an ethical violation.

If the next of kin cannot reach agreement on dependency percentages and the judge must hold an evidentiary hearing, the role of the estate’s attorney is once again complicated. First, everyone involved — including the person who signed the retainer agreement — can and probably should retain their own attorney. If everyone does so, that takes the attorney for the representative off the hook. The probate attorney is essentially just a neutral observer at the evidentiary hearing. Complications arise if any of the next of kin are pro se. In the example referenced in §22.17 above of the estate with 36 heirs, no one retained their own counsel. To avoid ethical pitfalls and potential breaches of duty, the author could not advocate for anyone, including the representative. Instead, the author prepared a list of questions to be asked of each testifying heir. At the hearing, the author asked every witness those same questions in the same order. To avoid any perception that the author was favoring one person over the other, the author asked only a few follow up questions that were limited to clarifying the witnesses’ testimony. After the author completed the questioning, the judge asked the witnesses additional questions including some pointed ones that in effect served the purpose of cross-examination. It bears repeating that it is best if the family can reach an agreement.

*c. [22.29] Remainder of Process Is Similar to Sole Claims for Wrongful Death or Survival*

Other than the allocation between the wrongful-death and survival claims, the trial court’s role is the same as noted in §22.24 above concerning the determination of the reasonableness of the settlement, the dependency of the spouse and next of kin, the approval of attorneys’ fees and expenses, and the adjudication of any liens. Vouchers must be presented showing that the settlement has been distributed in accordance with the court’s settlement order. Cook County Memo, p. 6.

## 2. [22.30] Probate Court

The probate court's role is to set a bond, oversee the distribution the wrongful-death portion of the settlement, and administer the survival proceeds like any other probate asset. As noted in §22.21 above, it is also the province of the probate court — not the trial court — to approve probate attorneys' fees and expenses.

After distribution, vouchers must be presented to the probate court showing that all sums have been distributed pursuant to the settlement order. Since the survival claim is an asset of the estate, the representative signs a voucher showing the estate has received the proceeds. Upon final distribution of the estate, the heirs and legatees sign receipts just as they would in any other estate indicating they have received their share of the estate.

## IV. [22.31] MINORS AND PERSONS WITH DISABILITIES

Minors are, of course, legally incompetent due to their age, while persons with disabilities have been declared incompetent under 755 ILCS 5/11a-2. For purposes of this chapter, both minors and persons with disabilities are referred to as “wards.” A ward can become involved in the distribution of wrongful-death, survival, or other personal injury proceeds in two ways: (a) the ward is receiving a share of the wrongful-death claim as next of kin or is inheriting funds from the survival claim; or (b) the ward was injured. All of these scenarios will typically require that a guardianship be opened.

### A. [22.32] Ward Receiving Distribution of Wrongful-Death or Survival Claim Proceeds

A key determination about what will be needed in probate court turns on whether a lawsuit has been filed and the trial court has approved the settlement.

#### 1. Lawsuit Filed

##### a. [22.33] Trial Court

Whether a wrongful-death and/or survival claim, the trial court's role will be as set forth in §§22.13 – 22.25 above. The existence of a taker who is a minor or person with a disability can or will lead to additional considerations for the trial judge. See §§22.34 – 22.39 below.

- (1) Appointment of guardian ad litem
  - (a) [22.34] Purpose of guardian ad litem

The trial judge may appoint a guardian ad litem (GAL) to make a recommendation about whether the settlement is in the best interests of the ward. Any time a legal matter involves a ward, the judge may appoint a GAL to be the judge's eyes and ears. This is an inherent judicial power. *See Nichols v. Fahrenkamp*, 2019 IL 123990, ¶19, 160 N.E.3d 17, 442 Ill.Dec. 444. As with other aspects of probate practice, the likelihood of a GAL being appointed varies greatly from county to county and judge to judge. In some counties, it is almost automatic, and in other counties, rare.

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**PRACTICE POINTER**

- ✓ You should ask around in the county where the case is pending to find out what your judge typically does.
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(b) [22.35] Guardians ad litem in wrongful-death matters

Wrongful-death claims create a situation in which the appointment of a GAL may be needed. If a minor or a person with a disability is included in the next of kin and no guardian has been appointed at the time the wrongful-death claim is being settled, the judge may be inclined appoint a GAL to make sure someone is looking out for the interests of the minor or person with a disability concerning the dependency determination. Cook County Circuit Court Rule 12.15(b)(vi); Cook County Memo, p. 3. The GAL also can help talk sense to a difficult representative who either wants more money in the settlement (to an unwarranted degree) or is willing to settle for too little given the strength of the case.

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**PRACTICE POINTER**

- ✓ To avoid the additional expense of a GAL, a guardian should be appointed for the ward early in the litigation process. After all, it will likely be necessary for a guardian to be appointed eventually if the ward will be receiving more than \$10,000 from the settlement.
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(c) [22.36] Payment of guardian ad litem fees and expenses

In the trial court, the GAL's fees and expenses may be taken from the gross settlement. Cook County Memo, p. 3. However, local practice may vary on this point.

(2) [22.37] Opening of guardianship in probate court required

If the settlement is in excess of \$10,000, the trial court will require that a guardianship be opened for the ward so that the guardian can receive the ward's share of the settlement.

*b. [22.38] Probate Court*

If a guardian has not previously been appointed, one must be appointed in order to receive the ward's share of the settlement or of the decedent's estate. Because the settlement was already approved by the trial court, the probate court's role in a guardianship is limited to authorizing the guardian to receive the settlement, setting the bond, and overseeing the distribution of the asset to the estate.

## 2. [22.39] No Lawsuit Filed

Wrongful-death claims are not typically settled without a lawsuit being filed. It is possible that the settlement of the wrongful-death claim could be approved by a probate judge in the decedent's estate. The author is unaware of any instance when a guardianship judge has approved a wrongful-death settlement, so this section focuses on survival claims being settled prior to suit.

Because this is a survival claim, which is a probate asset, the ward's share of the settlement will be determined by either the distribution plan set forth in decedent's will or intestate succession. Obviously, the larger the settlement, the more the ward would receive. Consequently, the only issue the judge might be concerned about is whether the gross settlement amount was adequate under the circumstances.

### B. Ward's Personal Injury Claim

#### 1. [22.40] Lawsuit Filed

In a situation in which the ward has been injured, the guardian is the plaintiff in the case.

##### a. [22.41] Trial Court

The role of the trial court and the items to be included in a settlement are much the same as a decedent's estate pursuing a claim. One obvious difference is that the guardian will receive the settlement proceeds. Thus, in Cook County, the settlement order must state:

**The settlement amount approved herein shall be paid only to a guardian appointed by the probate division where the minor or disabled person resides and this order shall be effective only after the entry in the probate division or circuit court of an order approving the bond or other security required to administer the settlement and distribution provided for in this order.** Cook County Memo, pp. 2 – 3.

See also Cook County Circuit Court Rule 6.4(c).

##### b. [22.42] Probate Court

If a guardian has not previously been appointed, one must be appointed in order to receive the settlement. The guardianship court's role is limited to authorizing the guardian to receive the settlement, setting the bond, and overseeing the distribution of the asset to the estate as a result of the settlement already having been approved by the trial court.

#### 2. No Lawsuit Filed

##### a. [22.43] Fair and Reasonable Finding

As with a survival claim in probate court, the guardianship court must make a finding that the settlement is fair and reasonable. Cook County Circuit Court Rule 12.15(b); Cook County Memo,

p. 2. The court must have information and documentation before it in order to make this determination. “Factors that are considered include, but are not limited to: (1) the severity of the injury; (2) an analysis of liability against the defendant(s); [and] (3) whether the case was settled pursuant to arbitration, mediation or pre-trial proceedings.” Cook County Memo, p. 2. Consequently, the guardianship judge may require that the guardian to provide (1) details of the occurrence, (2) a description of the ward’s injuries, (3) the names of the ward’s treating physicians, (4) medical records, (5) a letter from the treating physician concerning the prognosis for the ward, (6) and the tortfeasor’s insurance policy or policies and declaration pages. Although the quoted language above is from the Cook County Memo (see §22.12 above), it has been the author’s experience that most if not all of this information is required in each county. However, what is required can vary greatly from one county to the next.

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### PRACTICE POINTER

- ✓ Make enquiries about what is usually required in the county where you will be presenting a petition to settle a ward’s personal injury claim.
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#### *b. [22.44] Other Determinations To Be Made by the Guardianship Judge*

In addition to making the fair and reasonable finding, the guardianship judge must also approve attorneys’ fees and expenses, adjudicate liens, set a bond, etc. Cook County Circuit Court Rule 12.15(b).

#### *c. [22.45] Guardians Ad Litem*

The guardianship judge may appoint a GAL to investigate the settlement and make a recommendation about whether it is in the best interests of the ward. It has been the author’s experience that the GAL’s fees and expenses are deducted from the ward’s settlement proceeds. The reason for this is most likely that there are no other funds from which the probate judge can order they be paid, due to the fact the trial court settlement distribution has already occurred.

### **3. [22.46] Potential Issue Regarding the Minor’s Medical Bills**

Regarding a minor’s medical expenses, an argument is sometimes made that those expenses should not be paid from the minor’s settlement because it is the minor’s parents’ duty to pay them under the family expense statute, 750 ILCS 65/15. The minor’s parents then have their own cause of action to recover them. *See, e.g., Graul v. Adrian*, 32 Ill.2d 345, 205 N.E.2d 444, 446 (1965); *In re Estate of Hammond*, 141 Ill.App.3d 963, 491 N.E.2d 84, 86, 96 Ill.Dec. 270 (1st Dist. 1986); *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840, 502 N.E.2d 428, 429 – 430, 104 Ill.Dec. 165 (1st Dist. 1986).

Although that argument is technically correct, it misses the forest for the trees. First, it does not take into account that the amount of medical bills incurred as a result of the minor’s injuries directly impacts the settlement amount. More severe injuries lead to higher medical bills, and higher

medicals lead to a larger settlement. In essence, the amount of the medical bills is included in the settlement amount, and the settlement amount is intended to pay them. Second, it unnecessarily creates a cumbersome process in which the parents must file a separate claim against the tortfeasor or assign their claim to the minor so it can be added to the minor's lawsuit. *See Skaggs v. Junis*, 27 Ill.App.2d 251, 169 N.E.2d 684, 690 (2d Dist. 1960). Using these arguments, the author has prevailed on this point on multiple occasions.

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### PRACTICE POINTER

✓ Be aware of this potential issue and be prepared to address it.

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## C. Small Estate Affidavit for Minor or Person with a Disability

### 1. [22.47] Use of Small Estate Affidavit

In addition to small estate affidavits for decedents' estates, the Illinois Probate Act provides for the distribution of amounts of less than \$10,000 without requiring the opening of a guardianship for the estate of the ward or the person with a disability. 755 ILCS 5/25-2. The affiant for such an affidavit is to be "a parent or a person standing in loco parentis to the minor or is the spouse of the ward or, if there is no spouse of the ward, that affiant is a relative having the responsibility of the support of the person under legal disability or ward." *Id.* It is generally presumed that the affiant is to use these funds for the best interests of the ward, but the statute does not state that or place any other limitation on the affiant's use of the funds. In Cook County, the affiant is required to use the funds for the benefit of the ward or to deposit them into a restricted bank account in the ward's name. Cook County Memo, p. 3.

A question that frequently comes up is whether that \$10,000 is the gross amount or the net amount of the settlement of the ward's claim. 755 ILCS 5/25-2 does not specifically address this point, and there does not appear to be caselaw on point either. Cook County has determined that it is the net amount. Cook County Memo, p. 2.

### 2. [22.48] Opening Guardianship when Settlement Is Less than \$10,000

If the minor has suffered a personal injury and no lawsuit has been filed, the tortfeasor may insist that a guardianship be opened even though the settlement is less than \$10,000. The reason for this is that a minor retains the right to pursue a legal claim for personal injury for a two-year period *after* reaching age 18. 735 ILCS 5/13-211. Consequently, a settlement release signed by the minor's parent without a court order does not release the minor's claims against defendant. *See, e.g., Villalobos v. Cicero School District 99*, 362 Ill.App.3d 704, 841 N.E.2d 87, 94, 298 Ill.Dec. 944 (1st Dist. 2005).

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**PRACTICE POINTER**

- ✓ Given the fees and expenses involved in opening a minor's estate, obtaining court approval of the settlement, and depositing the funds, the attorney for the estate should request that the defendant pay the fees and expenses associated with the guardianship proceeding as part of the settlement. Although this approach is not always successful, defendants sometimes agree to it because they are the ones insisting on court approval.
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**V. [22.49] CONCLUSION**

To streamline the process and avoid pitfalls and delays in distributing the settlement of claims under the Wrongful Death Act and the survival statute, you should determine as soon as possible (a) what claims have been made in the lawsuit (wrongful death, survival, or both); (b) who are the spouse and next of kin; and (c) whether any minors or persons with disabilities are involved. These details are, of course, in addition to the other information and documentation that are needed when opening a decedent's estate or a guardianship. You should then read the local rules and your judge's standing order to determine how the settlement process is handled in that court and whether any additional information or documentation is required. Planning ahead will lead to optimal efficiency and the best outcome. When in doubt, consult with or retain an attorney who is well-versed in this area of the law.