



PROPER PLANNING MAY CREATE PEACE OF MIND



January 2007

Florida's Wrongful Death Statute—Part 1

While it may be thought that the opening of an estate is a mere formality necessary to file an action for wrongful death nothing could be further from the truth. This article debunks the fallacies and clarifies the procedural requirements that must be fulfilled in the inter-relationship between Florida's Wrongful Death Statute and the Florida Probate Code.

The Personal Representative's Role: A Personal Representative (PR) must be appointed in an estate in order to bring a cause of action for wrongful death. Fla. Stat. 768.20. The PR's fiduciary duty is owed to both the survivors and the estate. Fla. Stat. 768.20. The purpose of requiring the PR to bring the action is to eliminate the possibility of a multiplicity of suits and a race to judgment with preferential treatment of the disposition of one or more beneficiaries' claims. Funchess v. Gulf Stream Apartments, 611 So.2d 43(Fla. 4th CDA 1992).

Even when the wrongful death action may be the only asset of an estate the PR and the PR's attorney are still required to fulfill all statutory requirements for probating an estate.

"If the estate recovers then any valid creditors' claims must first be satisfied before distribution to beneficiaries."

Keeping The Estate Open: Probate law requires a non-taxable estate to be closed within twelve months. In order for the estate to remain open past one year and the PR to have continuing authority in the lawsuit a request for extension must be filed before the year is concluded. Many probate judges require a status report from the trial attorney as to the procedural status of the wrongful death action.

In addition, the PR is required by Florida Probate Rule 5.065 to file a notice that a civil action has been instituted by the PR. It must include the names of the parties, the style of the court and case number, county and state where the proceeding is pending, the date commenced, and a brief statement of the cause of action.

Damages: Florida Statute 768.21(1)-(5) delineates the type of damages that may be recovered by survivors, a spouse, minor children and adult children. Subsection (6) sets forth the estate's entitlement to recover for loss of earnings, prospective net accumulations, medical or funeral expenses of the decedent. If the estate recovers, then any valid creditors' claims must first be satisfied before distribution to beneficiaries. Creditors'

claims will not attach to the proceeds allocated to the survivors for their loss. Estate of Barton, 631 So.2d 315 (Fla.2d DCA 1994).

Practice Areas

Estate & Incapacity Planning

- ◆ Last Will & Testament
- ◆ Probate & Trust Administration
- ◆ Revocable Trust
- ◆ Durable Power of Attorney
- ◆ Designation of Healthcare Surrogate
- ◆ Quit Claim Deed
- ◆ Living Will

Emergency & Advocacy Services

- ◆ Emergency & Standard Guardianships
- ◆ Long Term Care Facility Residents' Rights
- ◆ Medicaid Applications & Appeals

Government Assistance

- ◆ Special Needs Trusts
- ◆ Representation of Special Needs Trust's Trustees
- ◆ Protecting Lawsuit Proceeds and Inheritances While Preserving Medicaid and SSI Eligibility
- ◆ Exceptions to Medicaid Lien Recovery