

**WRONGFUL DEATH ISSUES
IN MINNESOTA**

By

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WRONGFUL DEATH ISSUES IN MINNESOTA

I. **WRONGFUL DEATH CASES IN GENERAL.**

A. **Wrongful Death Cause Of Action.**

A wrongful death cause of action arises when a person is killed due to the negligence or misconduct of another person, company or entity. A civil cause of action for such a death belongs to the decedent's relatives as provided by Minnesota's civil wrongful death statute, and must be commenced by a court appointed trustee. Damages in a wrongful death action are the amount a jury deems just and fair for the pecuniary loss sustained by the heirs and next of kin (as represented by the trustee) for the death of the decedent. Wrongful death actions are governed by statute and common law in Minnesota.

B. **Minnesota's Wrongful Death Statute.**

Minn. Stat. §573.02 (2013) provides the basis for a wrongful death cause of action:

573.02 ACTION FOR DEATH BY WRONGFUL ACT; SURVIVAL OF ACTIONS.

Subdivision 1. **Death action.** When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission. An action to recover damages for a death caused by the alleged professional negligence of a physician, surgeon, dentist, hospital or sanitarium, or an employee of a physician, surgeon, dentist, hospital or sanitarium shall be commenced within three years of the date of death, but in no event shall be commenced beyond the time set forth in section 541.076. An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent. Any other action under this section may be commenced within three years after the date of death provided that the action must be commenced within six years after the act or omission. The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid. Punitive damages may be awarded as provided in section 549.20. If an action for the injury was commenced by the decedent and not finally determined while living, it may be continued by the trustee for recovery of damages for the exclusive benefit of the

surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court on motion shall make an order allowing the continuance and directing pleadings to be made and issues framed as in actions begun under this section.

Subd. 2. **Injury action.** When injury is caused to a person by the wrongful act or omission of any person or corporation and the person thereafter dies from a cause unrelated to those injuries, the trustee appointed in subdivision 3 may maintain an action for special damages arising out of such injury if the decedent might have maintained an action therefor had the decedent lived.

Subd. 3. **Trustee for action.** Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

Subd. 4. **Applicability.** This section shall not apply to any death or cause of action arising prior to its enactment, nor to any action or proceeding now pending in any court of the state of Minnesota, except, notwithstanding section 645.21, this section shall apply to any death or cause of action arising prior to its enactment which resulted from an intentional act constituting murder, and to any such action or proceeding now pending in any court of the state of Minnesota with respect to issues on which a final judgment has not been entered.

C. Statute of Limitations.

As set forth above, Minn. Stat. §573.02, subd. 1 provides for a three (3) year statute of limitations to commence a wrongful death action in Minnesota. However, in certain types of cases, such as medical malpractice cases, the malpractice may occur but death does not until after the statute expires. In limited circumstances, the action may still be timely if the injury does not occur until a later date, and would not be time barred under Minn. Stat. §541.076 (the discovery rule) which requires the matter be commenced within four years. *See eg. Tuttle v. Lorillard Tobacco Co.*, 118 F.Supp. 2d 954 (D. Minn. 2000)(wrongful death statute precludes revival of actions time barred if the decedent had lived); *D'Amaro v. Joyce*, 297 F.3d 768 (8th Cir. 2002).

D. Survival of Causes of Action.

A cause of action for an injury to a person dies with the person, except those damages that would survive under Minn. Stat. §573.02, including things like past medical expense, and wage loss. Minn. Stat. §573.01 provides:

573.01 SURVIVAL OF CAUSES.

A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter.

E. Appointment Of Trustee.

In order to prosecute a cause of action for wrongful death in Minnesota, a trustee must be appointed. The statute requires the court to be petitioned by the spouse or next of kin to prosecute the action, that a consent and oath be filed to faithfully and justly perform all the duties of the office, and to maintain an action for the death by wrongful act on behalf of the heirs. Unless the heirs consent to waive the bond requirement, a bond must be filed before any money is distributed. The distribution of any funds will also require court approval. Failure to appoint the trustee can result in dismissal of the action. See *Miklas v. Parrott*, 663 N.W.2d 583 (Minn. Ct. App. 2003); *Regie d l'assurance Auto. Du Quebec v. Jensen*, 399 N.W.2d 85 (Minn. 1987). A court cannot retroactively issue an order appointing a trustee. *Miklas*, 663 N.W. 2d 583; *Ortiz v. Gavenda*, 574 N.W.2d 764 (Minn. 1999).

Minn. Stat. §573.02, subd. 3 provides:

Subd. 3. Trustee for action. Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

The trustee has the authority to carry out the duties necessary to prosecute the wrongful death action for the benefit of the heirs and next of kin. See *Hanson v. State Farm Ins. Co.*, 661 N.W.2d 659 (Minn. Ct. App. 2003). Co-trustees may also be appointed to carry out the rights and fiduciary duties, but must agree on the action to be taken. See *In Re Appt. of Trustee for Heirs of Bodeker*, 661 N.W.2d 271 (Minn. Ct. App. 2003).

1. Caveat in Naming the Trustee.

While Minn. Stat. §573.02, subd. 3 allows the surviving spouse or one of the next of kin to be appointed as the trustee, cases brought under the Civil Damages Act (Dram Shop Act) MUST be prosecuted by the injured party in the injury party's own name, which arguably requires that you name each and every heir and next of kin. See *Haugland v. Mapleview Lounge Bottleshop*, 643 N.W.2d 618 (Minn. Ct. App. 2002); *Beck v. Groe*, 245 Minn. 28, 70 N.W.2d 886 (1955). However, [t]he failure to name the next of kin in a petition required by 3A MNPrac.R. 144.01, or

the failure to notify or obtain a waiver from the next of kin shall have no effect on the validity or timeliness of an action commenced by the trustee.” *See Stroud v. Hennepin County Med. Ctr.*, 544 N.W.2d 42 (Minn. Ct. App. 1996)(trustees’ original complaint was effective despite improper appointment).

2. Notice is Required.

A petition for appointment of a trustee in Minnesota requires that notice of the hearing be given to the heirs and next of kin, unless they consent in writing to waive the notice requirements. 3A MNPrac.R. 144.02. The advisory comments to the rule acknowledge that there are no requirements under Minn. Stat. §573.02 as to who must receive notice of the petition for appointment of trustees or for orders of distribution, but report the longstanding practice under Rules 144.01, 144.02, and 144.05 to “name and notify only the decedent’s surviving spouse and close relatives, not ‘all next of kin’.” 3A MNPrac.R. 144.01, *et. seq.* (2014). However, every application must be made by a verified petition of the surviving spouse of one of the decedent’s next of kin, and must include the decedent’s dates of birth, death, address at time of death, name, age and address of decedent’s surviving spouse, children, parents, grandparents, and siblings, and the name, age, occupation and address of the proposed trustee, and whether there was a previous application made.

F. Next of Kin.

The term “next of kin” has been defined to include the call of individuals considers as beneficiaries under Minnesota’s intestate succession statute, found at Minn. Stat. §524.2-103, *et. seq.* (2013). Next of kin includes the decedent’s spouse, children, parents, siblings, and has been expanded to include grandparents and cousins of the decedent. *See Advisory Comments to 3A MNPrac.R. 144.01, et. seq.* (2014).

524.2-103 SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.

Any part of the intestate estate not passing to the decedent's surviving spouse under section 524.2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

- (1) to the decedent's descendants by representation;
- (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- (3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
- (4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives

in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half;

(5) if there is no surviving descendant, parent, descendant of a parent, grandparent, or descendant of a grandparent, to the next of kin in equal degree, except that when there are two or more collateral kindred in equal degree claiming through different ancestors, those who claim through the nearest ancestor shall take to the exclusion of those claiming through an ancestor more remote.

The wrongful death statute has been interpreted so as to follow the intestacy statute, but is designed not be exclusive, but rather to be inclusive, of all members of the class from which beneficiaries are chosen. *Wynkoop v. Carpenter*, 574 N.W.2d 422 (Minn. 1998)(siblings can recover along with father); *Martz v. Revier*, 284 Minn. 166, 170 N.W.2d 83 (1969). This means one beneficiary may not necessarily take a share at the exclusion of another member, simply because that beneficiary may have a higher standing in the class.

G. Damages.

Recovery of damages in Minnesota for wrongful death are generally determined by a jury, and governed by Minn. Stat. § 573.02, subd. 1, as follows:

. . . . The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid.

1. Pecuniary Loss.

Pecuniary loss generally means the reasonable value of the counsel, guidance, advice assistance and protection which the decedent would have provided to the next of kin. *See Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (Minn. 1961). As the statute provides, recovery in an action for wrongful death is the amount the jury deems fair and just for the pecuniary loss resulting from the death of the decedent. Minn. Stat. §573.02, subd. 1 (2013). Pecuniary loss includes both economic loss, such as funeral, burial and medical expense; and noneconomic loss, such as the loss of counsel, guidance, aid, advice, comfort, assistance and protection. An award for pecuniary loss contemplates a monetary value being placed by the jury on the loss of advice, comfort and protection. Minn. Stat. §573.02 (1984) allows for damages in a wrongful death action in an amount "the jury deems fair and just in reference to the pecuniary loss resulting from the death." Loss of support is not equivalent to pecuniary loss. *See Jones v. Fisher*, 309 N.W.2d 730 (Minn.1981); *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1962)(in claim by parents

for wrongful death of child, the supreme court held that limiting the measure of recovery to loss of earnings, contributions and services was unduly restrictive because it excluded the loss of aid, comfort and society).

2. Damages Allowed.

Damages under Minnesota's wrongful death statute are limited to those items expressly set forth in the statute. *See* Minn. Stat. §573.02; *Range v. Van Buskirk Const. Co.*, 281 Minn. 312, 161 N.W.2d 645 (1968). Damages as defined by statute include medical expenses, funeral expenses (which get paid first), pecuniary loss (as set forth above), and punitive damages, if ordered. Minn. Stat. §573.02, subd. 1 states:

. . . The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid.

3. Damages Not Allowed.

There is no provision in the statute for damages for grief or pain and suffering of the heirs and next of kin. Minnesota Courts hold that the next of kin in a wrongful death action may not recover for emotional distress, pain or suffering. *See* *Fussner v. Anders*, 261 Minn. 347, 113 N.W.2d 355 (1961); and *Lundman v. McKown*, 530 N.W.2d 807, 829 (Minn. Ct. App. 1995). Similarly, there can be no award of damages for the decedent's pre-death pain and suffering. *See* *Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11 (Minn. 1994).

4. Measure of Damages.

The Minnesota Jury Instruction Guide provides the basis for the measure of damages that the jury will be instructed in when asked to render an award of damages. The decedent's death will be evaluated by a jury on the loss of counsel, guidance and aid to each of the heirs and next of kin. The jury will be instructed to use the decedent's life as the measuring life, which means the award for each of the heirs and next of kin will not be based on the life expectancy of the heirs, but rather that of the heirs to the decedent, thus, the damages evaluation is the shorter life expectancy of the decedent's survivors as compared to the decedent.

a. Minnesota Jury Instruction Guides.

CIVJIG 91.75 Measure of Damages—Wrongful Death. The jury will be instructed in the measure of damages as follows:

Money value of damages

When you consider damages for the Heirs and Next of Kin of the decedent, determine an amount of money that will fairly and adequately compensate them for the losses they suffered as the result of this death.

You should consider what the decedent would have provided to his/her family if he/she had lived.

Factors to consider

You should consider:

1. Decedent's contributions in the past
2. Decedent's life expectancy at the time of the death
3. Decedent's health, age, habits, talents, and success
4. Decedent's occupation
5. Decedent's past earnings
6. Decedent's likely future earning capacity and prospects of bettering hem/herself had he/she lived
7. Decedent's personal living expenses (cost of supporting a child)
8. Decedent's legal obligation to support the (surviving spouse) (next of kin) and the likelihood that he/she would have fulfilled that obligation
9. All reasonable expenses incurred for a funeral and burial (etc.), and all reasonable expenses for support due to decedent's last sickness, including necessary medical and hospital expenses incurred after and as a result of the injuries causing death
10. The counsel, guidance, and aid decedent would have given to his/her family
11. The advice, comfort, assistance, and protection that the decedent would have given if he/she had lived.

Lost time together

Decide the length of time those related might be expected to survive together. You should compare the life expectancy of the decedent with the life expectancy of each claimant.

Take into account only the amount of time the two being compared would be expected to survive together.

Base your money damages for each claimant on the shorter life expectancy of the two being compared.

Items to exclude

Do not include amounts for:

- 1. Punishing the defendants
- 2. Grief or emotional distress of the surviving spouse and the next of kin, or
- 3. For the pain and suffering of the decedent before the death.

Factors to exclude

Do not be influenced by the fact that:

- 1. The surviving spouse or next of kin may have received or may get money or other property from the decedent’s estate, or
- 2. The surviving spouse or next of kin may collect or has collected insurance or workers' compensation benefits because of the decedent ‘s death, or
- 3. There is no legal obligation to support the next of kin.

You must determine the total amount of money that will fairly and adequately compensate the family for the damages suffered as the result of this death.

The judge will divide the damages among the claimants.

Note that the jury instruction does not use the term “pecuniary loss”. However, the Court of Appeals determined these instructions properly inform the jury to ascertain the money value of losses resulting from the death, and to limit the damages to “lost time together” by using the measuring life as the shorter of that between the heir/next of kin and the decedent. *Muehlhauser v. Erickson*, 621 N.W.2d 24 (Minn. Ct. App. 2000). However, even though the jury instruction does not use the term “pecuniary loss”, it is still the law under Minn. Stat. §573.02.

CIVJIG 91.85 Life Expectancy Tables provides the means by which the jury is instructed to calculate life expectancy in a Minnesota wrongful death case as follows:

According to life expectancy tables, the future life expectancy of a _____ year-old male/female is _____ years. This means he/she is expected to live to age _____.

Use this figure to help you determine the probable life expectancy of the decedent. It is not conclusive proof of her life expectancy, and you are not bound by it. It is only an estimate based on average experience.

You may find that the decedent would have lived a longer or shorter

period than that given in these tables.

Consider this figure along with evidence of the health, physical condition, habits, occupation, and surroundings of the decedent and other circumstances that might affect his/her life expectancy.

Evaluation of damages in a wrongful death case is always difficult. In Minnesota, there are a wide range of jury verdicts and settlement reports on these types of cases. *See eg. Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974); *Ferguson v. Orr*, 427 N.W.2d 732 (1988); *Jones v. Fisher*, 309 N.W.2d 726 (Minn.1981)(Minn. Stat. §573.02 allows for damages in a wrongful death action in an amount "the jury deems fair and just in reference to the pecuniary loss resulting from the death."); and *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1962). Much obviously depends on the likeability of the extended family, heirs, and next of kin, and the prognostication of what the decedent contributed in emotional and financial terms. A jury will be asked to consider damages for the decedent's family that will fairly and adequately compensate them for the losses they suffered as a result of death. The jury will be specifically told they should consider what the decedent would have provided to his/her family, and specifically each heir and next of kin, had the decedent lived. The jury is also told that they should consider reasonable expenses incurred for a funeral, burial, support, medical or hospital expenses incurred as a result of the death or injuries suffered prior to death. The jury will also be told to consider the counsel, guidance and aid the decedent would have given each heir and next of kin, along with the advice, comfort, assistance and protection. The jury is told they are to decide the length of time those related might be expected to survive together and the jury will be asked to compare the life expectancy of the decedent with the life expectancy of each next of kin, and will be told to assess damages based on the shorter life expectancy.

5. Punitive Damages.

Punitive damages were not always available under the wrongful death act. *See Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982). Following *Eisert*, punitive damages were legislatively added in 1983.

Minn. Stat. §573.02, subd. 1 provides for punitive damages as follows:

...Punitive damages may be awarded as provided in section 549.20.

Minn. Stat. §573.20, subd. 1, as to punitive damages provides for punitive damages in civil cases *only* by leave of court, and *only* upon a showing of clear and convincing evidence that the defendant acted with deliberate disregard:

549.20 PUNITIVE DAMAGES.

Subdivision 1. Standard.

- (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.(b) A defendant has acted with deliberate disregard for the rights or safety of others if the

defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Punitive damages are not recoverable in a personal injury action when the plaintiff dies from an unrelated cause. Minn. Stat. §573.02, subd. 2 provides that if the person who was injured dies from unrelated injuries or causes, a suit to recover damages can proceed only to recover “special damages”, such as medical expenses. See *Deal v. Northwood Children’s Home Society, Inc.*, 608 N.W.2d 922 (Minn. Ct. App. 2000); *Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11 (Minn. 1994).

II. APPOINTMENT OF REPRESENTATIVES IN DEATH AND INJURY CASES.

The Minnesota District Courts have special rules governing actions by representatives in many different capacities. Notably, the Rules of Practice for the District Courts mandate “[i]n actions for personal injury or death by wrongful act, brought by persons acting in a representative capacity, contracts for attorney’s fees shall not be regarded as determinative of fees to be allowed by the court.” 3A MNPrac.R. 143 (2014).

A. When To Use A Trustee.

As set forth above, Minn. Stat. §573.02, subd. 3 requires a trustee be appointed to prosecute an action for the heirs and next of kin in a wrongful death proceeding.

Subd. 3. Trustee for action. Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

In an action for wrongful death, the procedures governing trustee appointment, notice and distribution of funds are found under Rule 144, as follows:

Rule 144.01 Application for Appointment of Trustee

Every application for the appointment of a trustee of a claim for death by wrongful act under Minn. Stat. Ann. § 573.02, shall be made by the verified petition of the surviving spouse or one of the next of kin of the decedent. The petition shall show the dates and places of the decedent's birth and death; the decedent's address at the time of death; the name, age and address of the decedent's surviving spouse, children, parents, grandparents, and

siblings; and the name, age, occupation and address of the proposed trustee. The petition shall also show whether or not any previous application has been made in any court for the appointment of a trustee for such claim, and if a previous application has been made, the facts with reference thereto and its disposition shall also be stated. The written consent of the proposed trustee to act as such shall be endorsed on or filed with such petition. The application for appointment shall not be considered filing of a paper in the case for the purpose of any requirement for filing a certificate of representation or informational statement.

3A MNPrac.R. 144.01 (2014).

Rule 144.02 Notice and Hearing

The petition for appointment of trustee will be heard upon such notice, given in such form and in such manner and upon such persons as may be determined by the court, unless waived by the next of kin listed in the petition or unless the court determines that such notice is not required.

3A MNPrac.R. 144.02 (2014).

Rule 144.03 Caption

The petition, any order entered thereon, and the trustee's oath, will be entitled: "In the matter of the appointment of a trustee for the next of kin of _____, Decedent."

3A MNPrac.R. 144.03 (2014).

Rule 144.04 Transfer of Action

If the trustee, after appointment and qualification, commences an action for death by wrongful act in a county other than that in which the trustee was appointed, a certified copy of the petition, the order entered thereon and the oath shall be filed in the court where such action be commenced, at the time the summons and complaint are filed therein, and the court file and jurisdiction over the trust will thereupon be transferred to such court.

3A MNPrac.R. 144.04 (2014).

Rule 144.05 Distribution of Proceeds

Application for the distribution of money recovered under Minn. Stat. Ann. § 573.02 shall be by verified petition of the trustee. Such petition shall show the amount which has been received upon action or settlement; a detailed statement of disbursements paid or incurred, if any; the amount, if any,

claimed for services of the trustee and of the trustee's lawyer; the amount of the funeral expenses and of demands for the support of the decedent; the name, age and address of the surviving spouse and each next of kin required to be listed in the petition for appointment of trustee and all other next of kin who have notified the trustee in writing of a claim for pecuniary loss, and the share to which each is entitled.

If an action was commenced, such petition shall be heard by the court in which the action was tried, or in the case of a settlement, by the court in which the action was pending at the time of settlement. If an action was not commenced, the petition shall be heard by the court in which the trustee was appointed. The court hearing the petition shall approve, modify, or disapprove the proposed disposition and shall specify the persons to whom the proceeds are to be paid.

The petition for distribution will be heard upon notice, given in form and manner and upon such persons as may be determined by the court, unless waived by all next of kin listed in the petition for distribution or unless the court determines that such notice is not required. The court by order, or by decree of distribution, will direct distribution of the money to the persons entitled thereto by law. Upon the filing of a receipt from each distributee for the amount assigned to that distributee, the trustee shall be discharged.

3A MNPrac.R. 144.05 (2014).

Rule 144.06 Validity and Timeliness of Action

The failure to name the next of kin in a petition required by Rule 144.01 or the failure to notify or obtain a waiver from the next of kin shall have no effect on the validity or timeliness of an action commenced by the trustee.

3A MNPrac.R. 144.06 (2014).

Under the rules, application must be made to the court to appoint the trustee. The application must include a petition that states the names, address and vital statistic information for all of the heirs and next of kin, and for the decedent. Notice of the petition to appoint the trustee must also be given to all of the heirs and next of kin, unless waived by way of properly filed consent forms. The same will be true to be able to distribute any funds in connection with the wrongful death proceeding.

B. When To Use A Special Administrator.

When a defendant dies prior to the commencement of an action, service of process may be made on either the personal representative of the estate, if one has been appointed, or by petitioning the court to appoint a special administrator for purposes of effecting service. *See Artishon v. Estate of Swedberg*, 2009 WL 1047327 (Minn. Ct. App. 2009). In a Minnesota State

District Court action, service of process must be done in accordance with Minn.R.Civ.P. 3.01. If a defendant dies prior to a lawsuit being commenced, the claim against the deceased individual also dies, but a claim against a deceased defendant may then be brought against the personal representative of the decedent's estate, and if there is none, by appointing a special administrator for purposes of effecting service on the estate. *See eg. Zahler v. Manning*, 295 N.W.2d 511 (Minn.1980); *Chan v. Katzenmeyer*, 391 N.W.2d 907 (Minn. Ct. App. 1986); *Wood v. Martin*, 328 N.W.2d 723 (Minn.1983)(the supreme court concluded that "service upon a dead person is a nullity.")

Minn. Stat. §573 .01 allows for the survival of actions, in certain circumstances, which would include revival against the personal representative. Minn. Stat. §524.3-104 (2013); Minn. Stat. §524.3-601 (2013). In the case of a personal representative, by accepting the appointment, the personal representative submits to the personal "jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person." Minn. Stat. §524.3-602 (2013). "Having the capacity to be sued, the personal representative becomes the proper defendant for claims against a decedent's estate." *Van Slooten v. Estate of Schneider-Janzen*, 623 N.W.2d 269 (Minn. Ct. App. 2001); *see also Poepping v. Lindemann*, 268 Minn. 30, 127 N.W.2d 512 (1964).

524.3-103 NECESSITY OF APPOINTMENT FOR ADMINISTRATION.

Except as otherwise provided in article 4, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

524.3-104 CLAIMS AGAINST DECEDENT; NECESSITY OF ADMINISTRATION

No proceeding to enforce a claim against the estate of a decedent or the decedent's successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by this article. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 524.3-1004 or from a former personal representative individually liable as provided in section 524.3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce the creditor's right to the security except as to any deficiency judgment which might be sought therein.

C. When To Use A Guardian Ad Litem.

It is often advisable to use a guardian ad litem in cases involving minors or incompetent persons when the parent or legal guardian may have interests that conflict with that of the minor child or incompetent person. It is often advisable, and indeed recommended, by the rules and the

courts to remove any potential conflict the representing lawyer may have. The Rules of Practice for the District Courts in Minnesota are very specific when it comes to minors and incompetent persons, and just as in wrongful death cases, will require court approval of any settlements or distributions. Minnesota Rules of Practice for the District Courts govern the Role of a Guardian Ad Litem. Rule 108.01 provides:

Rule 108.01. Role of Guardian Ad Litem

Whenever the court appoints a guardian ad litem, the guardian ad litem shall be furnished copies of all pleadings, documents and reports by the party or agency which served or submitted them. A party or agency submitting, providing or serving reports and documents to or on a party or the court, shall provide copies promptly thereafter to the guardian ad litem.

Upon motion, the court may extend the guardian ad litem's powers as it deems necessary. Except upon a showing of exigent circumstances, the guardian ad litem shall submit any recommendations, in writing, to the parties and the court at least 10 days prior to any hearing at which such recommendations shall be made. For purposed of all oral communication between a guardian ad litem and the court, the guardian ad litem shall be treated as a party.

3A MNPrac.R. 108.02 (2014).

Rule 108.02. Guardian Ad Litem Not Lawyer for Any Party

The guardian ad litem shall not be a lawyer for any party to the action.

3A MNPrac.R. 108.02 (2014).

The advisory comments to the rules provide “[i]n personal injury actions, neither the lawyer nor any member of the lawyer’s firm should be guardian. . . .[f]or the same reason such a lawyer should not accept a referral fee with respect to the guardianship.”

Rules 901 to 904 of the Rules of Practice for the District Courts also govern the role of a guardian ad litem, what qualifications the guardian must possess in order to serve, and explain how a guardian ad litem is appointed. These rules generally pertain to proceedings in family and juvenile court, but can be a useful guide to what role the guardian should serve in a civil case. 3A MNPrac.R. 901-904 (2014).

D. When To Use A Special Needs Trust.

Special Needs Trusts are most often used in cases involving persons with disabilities to allow that person to hold assets, including the proceeds of a settlement, in trust for his or her benefit, while still maintaining eligibility for certain government benefits, such as Supplemental Security Income (SSI), Social Security Disability Income (SSDI), Medicaid, and subsidized

housing. The recognition of Supplemental Needs Trusts can be found under the amendments to the Omnibus Budget and Reconciliation Act (OBRA-93) which specifically authorized the use of Supplemental Needs Trusts for the benefit of individuals who are under the age of 65 years and disabled according to Social Security standards. The purpose of Supplemental Needs Trusts is to hold non-countable assets (those not deemed to be counted as assets by the Social Security Administrative Rules). Because of the unique nature and special requirements of Special Needs Trusts, there are attorneys certified in this area who can assist, usually for a reasonable fee, in setting up a Special Needs Trust.

Generally speaking, a Supplemental Needs Trust will have its own Federal IRS Identification Number, and will not be listed under either the payor or beneficiary's social security number. One of the key provisions of a Supplemental Needs Trust is that it must be irrevocable. A Special Needs Trust may contain provisions for the trust to dissolve or terminate, or to be amended should the need arise.

Because these trusts serve such a unique purpose, and involve a vast array of ever changing federal and state regulations, we always recommend consulting with an expert with experience in setting up Special Needs Trusts to be sure the Trust is compliant with state and federal regulations. Special Needs Trusts serve an even greater role now in light of the recent changes to the Medicare Secondary Payer Act, found at 42 U.S.C. §1395y(b)(2)A(ii). The Act was intended to allow the federal government to seek the recovery of Medicare benefits from primary payor sources (generally liability insurers paying out on settlements) who would benefit financially if not required to repay payments made by Medicare that are attributable to a compensable cause, such as workers's compensation, personal injury and wrongful death cases. The Act also holds parties accountable for the payment of future medical care benefits that may be related to a compensable accident or injury. Hence, the necessity of a Special Needs Trust. Many articles have already been written on the Medicare Secondary Payer Act, and the new enforcement provisions, and it would be wise to consult those articles when confronted with a situation involving a recipient of government benefits who may be coming into money from a claim or suit.

III. USE OF STRUCTURED SETTLEMENTS.

In the wake of abuses and predatory practices in the settlement arena, courts have become ever more vigilant in their efforts to protect settlements from being prayed on by individuals and companies looking to turn a quick buck by offering up front cash to buy out lump sum settlements, or to offer to loan money for lawsuits. This is an area that could easily lend itself to its own seminar, but through the hard work and efforts of many, has led to legislative and court involvement that attempts to provide some protection of settlements.

Structured settlements are appropriate in certain cases, and should not be overlooked as an effective tool that many courts like to see utilized as a measure of protecting settlements, particularly those involving minors or incompetent persons. Minn. Stat. § 540.08 (2013) provides that a parent or guardian may bring an action for a minor child as follows:

540.08 INJURY TO CHILD OR WARD; SUIT BY PARENT OR GUARDIAN.

A parent may maintain an action for the injury of a minor son or daughter. A general guardian may maintain an action for an injury to the ward. A guardian of a dependent, neglected, or delinquent child, appointed by a court having jurisdiction, may maintain an action for the injury of the child. If no action is brought by the father or mother, an action for the injury may be brought by a guardian ad litem, either before or after the death of the parent. Before a parent receives property as a result of the action, the parent shall file a bond as the court prescribes and approves as security therefor. In lieu of this bond, upon petition of the parent, the court may order that the property received be invested in securities issued by the United States, which shall be deposited pursuant to the order of the court, or that the property be invested in a savings account, savings certificate, certificate of deposit, or share certificate, in a bank, savings association, trust company, credit union in which either the depositor or beneficiary is a member, or an annuity or other form of structured settlement, subject to the order of the court. A copy of the court's order and the evidence of the deposit shall be filed with the court administrator. Money or assets in an account established by the court under this section are not available to the minor child or the child's parent or guardian until released by the court to the child or the child's parent or guardian. No settlement or compromise of the action is valid unless it is approved by a judge of the court in which the action is pending.

Minn. Stat. §540.08 (2013).

Rule 145 of the Minnesota Rules of Practice, entitled “Actions on Behalf of Minors and Incompetent Persons”, sets forth a whole slew of rules and procedures to follow in cases involving minors and incompetents, and settlements. 3A MNPrac.R. 145, *et. seq.* (2014). Specifically Rule 145.06 governs the provisions for structured settlements and how they are to be presented to the court. 3A MNPrac.R. 145.06 (2014).

Rule 145.01. When Petition and Order Are Required

No part of the proceeds of any action or claim for personal injuries on behalf of any minor or incompetent person shall be paid to any person except under written petition to the court and written order of the court as hereinafter provided. This rule governs a claim or action brought by a parent of a minor, by a guardian ad litem or general guardian of a minor or incompetent person, or by the guardian of a dependent, neglected or delinquent child, and applies whether the proceeds of the claim or action have become fixed in amount by a settlement agreement, jury verdict or court findings, and even though the proceeds have been reduced to judgment.

3A MNPrac.R. 145.01 (2014).

Rule 145.02. Contents and Filing of Petition

The petition shall be verified by the parent or guardian, shall be filed before the court makes its order, and shall include the following:

- (a) The name and birth date of the minor or other incompetent person.
- (b) A brief description of the nature of the claim if a complaint has not been filed.
- (c) An attached affidavit, letter or records of a health care provider showing the nature of the injuries, the extent of recovery, and the prognosis if the court has not already heard testimony covering these matters.
- (d) Whether the parent, or the minor or incompetent person, has collateral sources covering any part of the principal and derivative claims, including expenses and attorneys fees, and whether subrogation rights have been asserted by any collateral source.
- (e) In cases involving proposed structured settlements, a statement from the parties disclosing the cost of the annuity or structured settlement to the tortfeasor.

3A MNPrac.R. 145.02 (2014).

Rule 145.03. Representation

- (a) If the lawyer who presents the petition has been retained by the tortfeasor or its insurer, the lawyer shall disclose to the court and to the petitioner the nature of the representation, how he or she is being paid, the frequency with which the lawyer has been retained by the tortfeasor or insurer, and whether the lawyer is giving legal advice to the petitioner. The petition shall not be denied by the court solely because of the petitioner's representation.
- (b) The court may, at its discretion, refer the petitioner to a lawyer selected by the petitioner (or by the court if petitioner requests or declines to select a lawyer), to evaluate the proposed settlement and advise the court whether the settlement is reasonable considering all relevant facts. The opinion shall be in writing, and the court shall provide a copy to the petitioner and all tortfeasors or their representative, regardless of whether a filing fee has been paid by the tortfeasor. This appointment shall be made pursuant to Minn. R. Evid. 706.
- (c) The lawyer accepting the referral must agree not to represent the petitioner or the minor or accept a referral fee in the event that the petition is denied by the court.
- (d) For the legal opinion thus rendered to the court, the tortfeasor or the insurer shall pay a reasonable sum ordered by the court; however, the insurer or tortfeasor may be reimbursed from settlement proceeds up to one

half of the sum so ordered, also upon order of the court. An order for attorney's fees payment in excess of \$300.00 can issue only upon a court hearing with notice to the insurer or tortfeasor and the petitioner.

(e) The opinion of the referred-to lawyer shall not be binding upon the court.

3A MNPrac.R. 145.03 (2014).

Rule 145.04. Hearing on the Petition

The minor or incompetent person and the petitioner shall personally appear before the court at the hearing on the petition unless their appearance is specifically waived by the court because the action has been fully or partially tried or for other good cause. The reporter shall, when ordered by the court, keep a record of the hearing. The hearing shall be ex parte unless otherwise ordered.

3A MNPrac.R. 145.04 (2014).

Rule 145.05. Terms of the Order The court's order shall:

(a) Approve, modify or disapprove the proposed settlement or disposition and specify the persons to whom the proceeds are to be paid.

(b) State the reason or reasons why the proposed disposition is approved if the court is approving a settlement for an amount which it feels is less than what the injuries and expenses, might seem to call for, e.g., limited insurance coverage, dubious liability, comparative fault or other similar considerations.

(c) Determine what expenses may be paid from the proceeds of any recovery by action or settlement, including the attorney's fee. Attorney's fees will not be allowed in any amount in excess of one-third of the recovery, except on a showing that:

(1) an appeal to an appellate court has been perfected and a brief by the plaintiff's lawyer has been printed therein and;

(2) there has been an expenditure of time and effort throughout the proceeding which is substantially disproportionate to a one-third fee. No sum will be allowed, in addition to attorney fees, to reimburse any expense incurred in paying an investigator for services and mileage, except in those circumstances where the attorney's fee is not fully compensatory or where the investigation must be conducted in any area so distant from the principal offices of the lawyer so employed that expense of travel and related expense would be substantially equal to, or in excess of, usual investigating expenses.

(d) Specify what disposition shall be made of the balance of the proceeds of any recovery after payment of the expenses authorized by the court.

(1) The court may authorize investment of all or part of such balance of the proceeds in securities of the United States, or in an annuity or other form of structured settlement, including a medical assurance agreement, but otherwise shall order the balance of the proceeds deposited in one or more banks, savings and loan associations or trust companies where the deposits will be fully covered by Federal deposit insurance.

(2) In lieu of such disposition of the proceeds, the order may provide for the filing by the petitioner of a surety bond approved by the court conditioned for payment to the ward in a manner therein to be specified of such moneys as the ward is entitled to receive, including interest which would be earned if the proceeds were invested.

(e) If part or all of the balance of the proceeds is ordered deposited in one or more financial institutions, the court's order shall direct:

(1) that the defendant pay the sum to be deposited directly to the financial institution;

(2) that the account be opened in the name of the minor or incompetent person and that any deposit document be issued in the name of the minor or incompetent person;

(3) that the petitioner shall, at the time of depositing, supply the financial institution with a tax identification number or a social security number for the minor and a copy of the order approving settlement; and

(4) that the financial institution forthwith acknowledge to the court receipt of the order approving settlement and the sum and that no disbursement of the funds will occur unless the court so orders, using the form substantially equivalent to Form 145.1;

(5) that the financial institution shall not make any disbursement from the deposit except upon order of the court; and

(6) that a copy of the court's order shall be delivered to said financial institution by the petitioner with the remittance for deposit. The financial institution(s) and the type of investment therein shall be as specified in Minn. Stat. § 540.08, as amended. Two or more institutions shall be used if necessary to have full Federal deposit insurance coverage of the proceeds plus future interest; and time deposits shall be established with a maturity date on or before the minor's age of majority. If automatically renewing instruments of deposit are used, the final renewal period shall be limited to the date of the age of majority.

(7) that the petitioner shall be ordered to file or cause to be filed timely state and federal income tax returns on behalf of the minor.

(f) Authorize or direct the investment of proceeds of the recovery in securities of the United States only if practicable means are devised comparable to the provisions of paragraphs (d) and (e) above, to insure that funds so invested will be preserved for the benefit of the minor or

incompetent person, and the original security instrument be deposited with the court administrator consistent with paragraph (e) above.

(g) Provide that applications for release of funds, either before or upon the age of majority may be made using the form substantially similar to Form 145.2.

3A MNPrac.R. 145.05 (2014).

Rule 145.06. Structured Settlements

If the settlement involves the purchase of an annuity or other form of structured settlement, the court shall:

- (a) Determine the cost of the annuity or structured settlement to the tortfeasor by examining the proposal of the annuity company or other generating entity;
- (b) Require that the company issuing the annuity or structured settlement:
 - (1) Be licensed to do business in Minnesota;
 - (2) Have a financial rating equivalent to A.M. Best Co. A+, Class VIII or better;
 - (3) Has complied with the applicable provisions of Minn. Stat. § 549.30 to § 549.34;

or that a trust making periodic payments be funded by United States Government obligations; and

- (4) If the company issuing the proposed annuity or structured settlement is related to either the settling party or its insurer, that the proposed annuity or structured settlement is at least as favorable to the minor or incompetent person as at least one other competitively-offered annuity obtained from an issuer qualified under this rule and not related to the party or its insurer. This additional proposal should be for an annuity with the same terms as to cost and due dates of payments.
- (c) Order that the original annuity policy be deposited with the court administrator, without affecting ownership, and the policy be returned to the owner of the policy when:
 - (1) The minor reaches majority;
 - (2) The terms of the policy have been fully performed; or
 - (3) The minor dies, whichever occurs first.
- (d) In its discretion, permit a “qualified assignment” within the meaning and subject to the conditions of Section 130 (c) of the Internal Revenue Code;
- (e) In its discretion, order the tortfeasor or its insurer, or both of them, to guarantee the payments contracted for in the annuity or other form of structured settlement; and
- (f) Provide that:
 - (1) The person receiving periodic payments is entitled to each periodic payment only when the payment becomes due;

- (2) That the person shall have no rights to the funding source; and
- (3) That the person cannot designate the owner of the annuity nor have any right to control or designate the method of investment of the funding medium; and
- (g) Direct that the appropriate party or parties will be entitled to receive appropriate receipts, releases or a satisfaction of judgment, pursuant to the agreement of the parties.

3A MNPrac.R. 145.07 (2014).

The Advisory Committee comments to the rules on settlements, minors and structured settlements serve as a good guide on what to include. They provide guidance on when to use medical records in lieu of medical reports to support the claim; what information should be contained within the petition, such as collateral source and subrogation information; and mandatory disclosure of costs associated with the purchase of the structure to assist the court in evaluating the propriety of the structure. The comments from the advisory committee also point out the need for full disclosure of any interests the defendant insurer or tortfeasor has in the structure.

The Court Rules on structured settlements are explicit in detailing the types of investments that can be used in managing the settlement proceeds. If the court needs to consult with another attorney to ensure the reasonableness of the settlement, the court may appoint an independent lawyer to do so.

It is recommended that you consider having your own structured settlement consultant who can advise you and your client, and if requested, can participate and may even help to facilitate settlement discussions by providing various options. A qualified structured settlement advisor is aware of the Minnesota court rules governing structures, can provide tax advice, recommendations on options to accommodate the specific needs of the case, and will provide the required notifications and disclosures. They can facilitate price comparisons, assist in drafting release documents, and ensure the annuity (ies) are properly funded. Structured settlements can also be useful in situations where the injured party is also a recipient of government benefits. The advisor will be able to give explanations on issues involving qualified assignments, and whether there is a need for a separate guarantee or a need for more than one annuity.