Equitable Apportionment Of Proceeds From The Wrongful Death Of A Child

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Introduction

In 1987, the Georgia Legislature amended O.C.G.A. Section 19-7-1, which deals generally with parental rights upon the death of a child who was unmarried or childless.[1] Subsection (c)(6) of the amended statute addresses the division of wrongful death proceeds between parents who were divorced, separated, or living apart when the child died. The statute does not require the usual fifty percent split of proceeds between the two parents, but instead allows either parent to petition the court upon receipt of a judgment or settlement for a more equitable share of the wrongful death proceeds, depending on the relationship between the parents and the deceased child.

The Statute And How it Works

The apportionment statute provides, in part, that when "the parents of a deceased child are divorced, separated, or living apart, a motion may be filed by either parent prior to trial requesting the judge to apportion fairly any judgment amounts awarded in the case."[2] The fundamental requirements, therefore, are the requisite marital status, a deceased child who left no spouse or children, and a timely motion. If the apportionment motion is not filed, then the parents divide the judgement equally.[3] The filing of the apportionment motion, however, automatically prevents an equal division.[4]

After a judgment is awarded in the wrongful death action (or if the case is settled, although the statute does not specifically mention settlement) the judge is required to conduct a hearing.[5] At the hearing, each "parent shall have the opportunity to be heard and to produce evidence regarding that parent's relationship with the deceased child."[6] The focus of the statute, of course, is each parent's relationship with the deceased child. That relationship, or lack of it, will determine whether an apportionment motion is proper in the first place and will be the standard from which all the evidence derives and is measured.

After hearing both parties and listening to the evidence, the judge "shall fairly determine the percentage of the judgment to be awarded to each parent."[7] Factors relevant to the judge's assessment of the parent-child relationship include "permanent custody, control, and support, as well as *any other factors found to be pertinent.*"[8] Thus, the statute permits a broad evidentiary inquiry into the parent-child relationship. Significantly, the judge's final determination "shall not be disturbed absent an abuse of discretion."[9] There is no reason to believe that the usual rules that apply to "abuse of discretion" standards will not apply to the apportionment statute as well.

The apportionment statute expressly applies to judgments. However, since most cases settle before or during trial, there is no reason to exclude settlements from the ambit of the statute. Any distinction between a settlement and judgement, under these circumstances, would be unreasonable and arbitrary, if not unwise, since it would conflict with the general policy of promoting settlement in lieu of continued litigation. The one apportionment motion these authors have been involved in was a post-settlement motion and no one, including the judge or opposing party, raised the "settlement versus judgment" distinction. It is not likely that any court would conclude that the statute does not apply to settlements as well as judgments.

Potential Conflict Problems Created by the Statute

In the typical case involving the wrongful death of a child of divorced or separated parents, your client will be one of the surviving parents and you will file suit under that person's name. Of course, under the law you also represent the interests of the other parent. So long as you zealously represent the client parent, you also zealously represent the absent parent. Thus, there is no conflict between a lawyer's representation of the two parents: Their interests in maximizing any recovery are identical during the litigation. However, once a settlement or a judgment is reached and an apportionment motion is filed, a conflict of interest immediately develops since the parents' legal and economic interests change drastically.

The question, of course, is how does the advocate handle the relationship with the absent and often unrepresented parent, against whom it is contemplated to take legal action to lessen his or her share of the wrongful death proceeds? One suggested approach is to send a certified letter to the absent parent as soon as the lawyer negotiates a settlement or obtains a verdict, notifying that parent that you intend to file an apportionment motion on behalf of the other parent. Since you will not be filing the motion until *after* a verdict or settlement is obtained, there is no conflict. In your letter, explain what the motion is and advise the non-client parent of the apportionment statute *and* strongly advise him or her to obtain separate counsel. State in no uncertain terms that you do not represent him or her and that he or she should obtain a lawyer to do so. One should also consider indicating that failure to secure counsel and prepare for the apportionment hearing may potentially result in adverse consequences to the non-represented parent.

Another common scenario is where both

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parties agree to representation by a single law firm for handling of the wrongful death case in chief, and then raise the issue of apportionment after a settlement agreement is reached or a judgment is obtained. Appropriate ethical considerations would suggest that the lawyer who has handled the wrongful death action, hold the proceeds due the surviving parents in a separate trust account during the pendency of the apportionment proceeding or alternatively pay those proceeds to be apportioned into the registry of the court where the wrongful death action was prosecuted. At the earliest indication by either parent that they intend to seek apportionment, the lawyer handling the wrongful death case should promptly advise both surviving parents to each obtain independent counsel for handling of the apportionment motion. Counsel handling the wrongful death action must exercise the utmost discretion to avoid even the appearance of taking the side of either parent once the question of apportionment is raised, since that lawyer's duty throughout the case was to vigorously represent the interests of both parents.

Apportioning Proceeds Between Estate and Death Claims

If the case included an estate claim in addition to the wrongful death claim and the case settles, the advocate will have to decide how much of the settlement to apportion between the estate claim and the wrongful death claim. The estate proceeds will be divided according to the decedent's will, if there was one, or according to the laws of intestacy in the absence of the will. Takers may include, for example, the decedent's parents, his brothers and sisters and any half brothers and sisters. You should consider the intangible and tangible aspects of the decedent's life, the strength of the evidence supporting the estate claim, and whether any portion of the settlement was "driven" by the threat of punitive damages, which typically derives from the estate claim.

Handling Apportionment in a Not-So Hypothetical Case

A recent case involved a settlement in an estate and wrongful death claim arising from the death of a teenager. Although the decedent was killed in an automobile collision, the primary cause of action was under Georgia's dram shop statute. The decedent's parents had been divorced before their son's death. Interviews with the client parent revealed that the circumstances of the divorce had caused the decedent to suffer extreme embarrassment and humiliation in the community and that the absent (or "non-moving") parent's relationship (who did not join in the wrongful death action) with the deceased child had deteriorated steadily before the child died. Indeed, one witness recalled the decedent exclaiming that if the non-moving parent divorced his father, then she divorced him as well. Because of the age of the decent, the primary focus at the apportionment hearing was on the personal relationship of the child and the absent parent, and not so much on tangibles, such as child support and visitation, although those elements are factored into the totality of the circumstances.

Gather Your Evidence. The statute focuses on "each parent's relationship with the deceased child, including permanent custody, control, and support, as well as any other factors found to be pertinent." Consider having your client prepare a narrative of his or her relationship with his ex-spouse, describing all events and circumstances which would have affected the decedent and his relationship with the non-moving parent. Those things which would not have affected the decedent should be minimized, since the focus of the hearing is not to retry the divorce, if there was one. Rather, the focus of the hearing is entirely on the relationship of the decedent with his parents. Obviously, you should get the narrative before filing the apportionment motion so that you have sufficient factual bases to make the motion to apportion. Have your client identify any person who might have information about the relationship of the decedent to the non-moving parent. Prospective witnesses include, among others, the decedent's boyfriend or girlfriend, babysitters, friends, co-workers, adult friends of his parents, preachers, and teachers.

In the above referenced case, the decedent had talked to many of his friends and told them the things his mother had done to humiliate and embarrass him, and which eventually even caused him to change his behavior, (i.e. refusing to go to church because of the shame the parent brought on him). A former girlfriend was able to testify about negative comments the decedent made about his mother. You might discover during the course of examining your witnesses that some of the witnesses will be cumulative. However, others will be more cooperative and articulate and, therefore, more helpful. Obviously, the client is going to provide substantial information about the relationship.

As soon as you have gathered your evidence and made a good faith determination that there are sufficient legal and factual grounds to seek an increased apportionment, file the motion. The statute sets out only one express requirement: That the parents be divorced, separated or living apart at the time of the death of their death. However, the statute implicitly requires that one parent have had a better relationship with the child than the other parent, or that one parent had contributed more to the economic upbringing of the child.

Prepare Your Motion and Supporting Brief Your motion and brief need not be lengthy. Under general rules of notice pleading, however, they should contain enough information to put the non-moving parent on notice of the general bases for the motion. The motion should include allegations that the parents were divorced, separated or living apart. It should include allegations about the death of the child, and should cite the apportionment statute. It should include a general description of the non-moving parent's relationship with the deceased child, so that the court can get some idea about that relationship.

At the hearing in our case, the non-moving parent alleged that our motion was inadequate because it lacked affidavits, and moved the court to dismiss it. The judge ruled that, since the statutorily-prescribed hearing was to give each parent an opportunity to be heard and to present evidence, there was no need to attach affidavits in advance of the hearing.

One question you must decide is whether to include in the motion the percentage apportionment your client wishes to receive. Disclosing some exorbitant percentage before the hearing and presentation of the evidence could hurt your case by making your client appear greedy to the judge, who will not know that early what the evidence will show. It is often advisable to not ask for a specific percentage, but to pray instead that:

> "The court to grant [the] Motion For An Increased Apportionment of Wrongful Death Settlement and to use its discretion to apportion to [movant] an amount which is fair and just under the circumstances."

Since the amount of the award is wholly at the discretion of the court, perhaps the best course of action is to not plead any specific percentage apportionment on behalf of your client. Conversely, you might wish to plead it to promote a settlement. In any event, if you do not plead a specific amount, then you can ask your client to name a percentage at the hearing. In the above referenced case, the judge asked the moving parent what he thought would be a fair apportionment of the proceeds. The moving parent pointed out that the non-moving parent *was* the decedent's natural mother and *was* entitled to something, thus indicating to the judge that he merely wanted fairness, and not an unreasonably high percentage of the proceeds.

Regardless of how much or how little about the evidence one discloses in the motion and briefs, be sure not to lose sight of the standard: The relationship of each parent with the deceased child. The standard is not stringent and does not require a showing equivalent to that required to terminate parental rights if the child were alive. You might allege abandonment as a relevant fact, but do not let your opponent convince the court that it must find an abandonment as a matter of law, since that is not the standard. The court does not have to con-

duct a post-mortem termination of parental rights. Rather, it is enough for you to show a spiritually, emotionally, or economically deprived parent-child relationship which the decedent had with the other parent.

File Your Motion

The statute allows the apportionment motion to be filed by either parent *before trial* to ask the judge to apportion fairly any judgment amounts awarded in the case.[19] However, it will often be more practical to file the motion subsequent to settlement or judgement, and no court has declared that the "timing" of the filing of the motion prior to trial is mandatory. Serve it upon the non-moving parent by certified letter, again advising the non-moving parent of the substance and purpose of the motion, and explaining why she should obtain counsel to represent her. Make it clear that you will be asking the court to award your client more than fifty percent of the wrongful death proceeds.

Get a Rule Nisi. If you are the movant, you have some degree of control over the hearing date. While you want to obtain a hearing date soon enough to appease your client and end the case, you must be sure to give the non-moving parent enough time to respond fairly to the motion. If you represent the non-moving parent, make sure the Rule Nisi gives you enough time to conduct discovery from the witnesses about testimony the movant plans to present at the hearing. If not, request an extension.

Try to Settle. After filing the motion, but before the hearing, try to settle. Because the motion follows the death of a child, it necessarily comes on the heels of a family tragedy. There is already enough pain to go around from the death itself. The nature of the hearing is going to open old wounds and, because friends and relatives will give disparaging testimony the parents had not previously heard, is going to open some new and very harsh wounds.

A point to remember in trying to settle the matter is that each parent would be entitled to fifty percent of the proceeds had the relationship between the deceased child and both parents been of the *same* quality and character. Determine how poor the relationship was, if there was one at all, and decide what other factors weigh in favor of the non-moving parent or the client parent and work down from fifty percent. It might be that a sixty/forty percent split is appropriate, it might be that fifty-five/forty-five percent split is appropriate, or it might be that sixty-six/thirty-three percent split is appropriate. In worst case scenarios, however, an even more disproportionate apportionment might be warranted.

Conduct Discovery

Between the time of the motion and before the hearing, the non-moving parent should conduct discovery, either formal or informal. In the above described case, the non-moving parent did not conduct discovery and, therefore, had no clear idea what witnesses the moving parent would put on the stand or what they would say. Discovery would have allowed her to understand the weaknesses of her case and allowed her to prepare some response to the testimony of the movant's witnesses.

If you are the non-moving parent, serve document requests to get copies of any settlement documents so you can verify amounts at issue. Obtain certified copies of the divorce decree and settlement agreement because at the hearing the terms may illustrate various aspects of the relationship of the parents with the child. For example, the non-moving parent might have been ordered to pay a certain amount of child support, but failed to do so. Obtain certified copies of any past contempt actions for failure to pay child support.

Despite counsel's best efforts, some elements of the past divorce action will come up at the hearing. Counsel should not attempt to try the divorce or custody action again, nor should counsel succumb to arguments that she is doing exactly that when attempting to introduce relevant evidence. The judge will prune out the irrelevant evidence.

Meet With the Judge. Counsel for both parties are advised to meet with the judge who will hear the case and try to establish a few ground rules. Some of those ground rules should probably include:

1. Closed hearing. Emotional, private and potentially inflammatory testimony is certain to come out at the hearing. There is no need to have strangers in the courtroom.

2. Sequestration of witnesses. Witnesses should be sequestered. This serves the usual purpose and prevents either side from arguing that the witnesses are colluding against one party or the other.

3. Discuss the standard of review and the applicable law with the judge. As noted above, the standard for apportionment is the past relationship of each parent with the deceased child. The standard of appellate review is abuse of discretion. As our judge put it, the only way a judge can abuse his discretion in such cases is to not hear all the evidence. Therefore, the hearing should be essentially wide open and the judge should admit any evidence bearing on the relationship of the deceased child with the parents.

This is also a good time to explain to the judge that the legal standard for a apportionment under the statute is a fairly loose one. The non-moving parent might attempt to analogize it to the standard for termination of parental rights or abandonment. Although the conduct or actions discussed at hearing may be similar to that which would constitute an abandonment and similar to that which would be offered in proof of an abandonment or termination of parental

rights, the statute does *not* require the moving parent to prove facts sufficient to require the court to find an abandonment or termination of parental rights. Those are stringent standards, as they should be, and are not applicable to the statute.

Direct examination of the witnesses: What to elicit. As previously noted, topics for direct examination include statements that the deceased child made to his close friends and acquaintances, statements he made to his custodial parent, and statements made to his preacher. Extremely important testimony will come from the decedent's siblings.

Putting a sibling on the stand, however, raises special problems. In most cases, it would not be unusual to find that the child has divided loyalties. He or she may recognize that the deceased child despised, disliked or even hated his non-custodial parent and may have significant evidence on that relationship. However, that witness is also going to be hesitant to get on the stand and impugn one of his parents. However, through careful questioning, courtesy to the witness, compassion for his plight, and a closed courtroom, the evidence can be obtained. An alternative suggestion is that the witness, judge and lawyers meet in-camera to present evidence and testimony, and leave both parents out of it.

In the above referenced case, the judge awarded the moving parent sixty-six percent of the wrongful death proceeds. In his apportionment order, the judge discussed the non-moving parents' sudden and unexplained disappearances, her extramarital relationship, and the impact the disappearances and illicit relationship had on the deceased child. The judge also found significant the fact the moving parent personally spent time and effort to find out the true cause of his son's death, which was not readily apparent from the facts of the automobile collision itself.

Conclusion

The Georgia Wrongful Death Apportionment Statute may lead to an evidentiary hearing which is far from pleasant. It may lead personal injury counsel into the fringes of domestic relations law. However, the Georgia legislature has imposed a new duty on attorneys who represent wrongful death plaintiffs. Those attorneys must be aware of the statute and must find out if their client falls within the ambit of the statute. Additionally, they must be willing to engage in a forthright discussion with their clients about whether the motion should or ought to be brought, whether there is independent evidence to support the motion, and whether the client can or should bear the emotional cost associated with such a motion. ■

END NOTES

[1] *See* 1987 Ga. Laws 619, § 2; *Dove v. Carter*, 197 Ga. App. 733, 399 S.E.2d 216 (1990).

[2] The apportionment statute reads in full:

(6) For cases in which the parents of a deceased child are divorced, separated, or living apart, a motion may be filed by either parent prior to trial requesting the judge to apportion fairly any judgment amounts awarded in the case. Where such a motion is filed, a judgment shall not e automatically divided. A post-judgment hearing shall be conducted by the judge at which each parent shall have the opportunity to be heard and to produce evidence regarding that parent's relationship with the deceased child. The judge shall fairly determine the percentage of the judgment to be awarded to each parent. In making such a determination, the judge shall consider each parent's relationship with the deceased child, including permanent custody, control, and support, as well as any other factors found to be pertinent. The judge's decision shall not be disturbed absent an abuse of discretion.

O.C.G.A. § 19-7-1(c)(6).

[3] *Id.* § 19-7-1(c)(2)(C).

[4] *Id.* § 19-7-1(c)(6) ("Where such a motion is filed, a judgement shall not be automatically divided.").

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* (emphasis added).

[9] *Id.*

[10] *Id.*