

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of the Estate of William R. Wilson,  
Deceased

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ERIC V. SMITH, Personal Representative of the  
Estate of William R. Wilson, Deceased,

UNPUBLISHED  
April 11, 1997

Appellee,

v

No. 191989  
Wayne Probate Court  
LC No. 93-500472 SE

ANTHONY M. MALIZIA,

Appellant.

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Before: Hood, P.J., and Saad and T.S. Eveland,\* JJ.

PER CURIAM.

In this jurisdictional dispute, appellant, attorney Anthony M. Malizia, appeals as of right an order of the Wayne Probate Court approving the settlement and distribution of wrongful death proceeds. Because the probate court did not have jurisdiction to approve the settlement and distribution, we vacate the probate court's order.

Decedent, William R. Wilson, died at Henry Ford Hospital on January 2, 1993. On July 6, 1993, the Wayne Probate Court appointed appellee, Eric V. Smith, as personal representative of decedent's estate. Appellee subsequently retained appellant to represent decedent's estate in a wrongful death action against Henry Ford Hospital. Appellant agreed to a one-third contingency fee. The wrongful death action was then commenced in Wayne Circuit Court against Henry Ford Hospital. At some point before trial, an unrelated lawsuit was filed against decedent's estate arising out of an accident in which decedent had apparently broadsided a vehicle, resulting in the death of Anita Jo Clay. Rather than litigating the action against decedent's estate, the parties to the second lawsuit entered into a consent judgment in the amount of ten thousand dollars. The consent judgment provided that "should

\* Circuit judge, sitting on the Court of Appeals by assignment.

any money be paid to the Estate of William R. Wilson from the pending medical malpractice action or from any other source that the Estate of Anita Jo Clay should be entitled to satisfaction of this judgement.”

Decedent’s wrongful death suit against Henry Ford Hospital was subsequently settled during trial for \$325,000.00. At the circuit court’s direction, appellant (apparently without the knowledge of the personal representative), negotiated a proposed distribution of the settlement proceeds, obtained a waiver and consent to the settlement and proposed distribution from each of the thirteen claimants, and filed a motion for the circuit court’s approval of the settlement and proposed distribution. The proposed distribution allocated ten thousand dollars to satisfy the consent judgment, but it contained no allocation for decedent’s conscious pain and suffering. The circuit court approved the settlement and distribution on December 8, 1995.

When the personal representative learned of the order approving the settlement and distribution, he informed the circuit judge that he had not authorized the filing of the proposed distribution nor had he been given notice of it. The personal representative then requested that the settlement and distribution be reviewed by the probate court, and the circuit court apparently consented. In the probate court, the personal representative filed an objection to the distribution on the ground that a separate (additional) sum of money should have been allocated to the estate for conscious pain and suffering. However, in an apparent attempt to expedite distribution of the proceeds, appellant submitted an order to the probate court which was identical to the order entered by the circuit court, except that it reflected a ten thousand dollar reduction in his attorney fee, and an allocation of ten thousand dollars to be paid to decedent’s estate for conscious pain and suffering. The probate judge subsequently entered the order. All of the proceeds were then distributed, except for the ten thousand dollars which the probate court ordered allocated to decedent’s estate for pain and suffering, and which remains in appellant’s trust account.

Appellant argues that the probate court did not have jurisdiction to approve the settlement and distribution of proceeds from a wrongful death action commenced in circuit court. We agree.

The probate court is a court of limited jurisdiction, deriving all of its power from statutes. *D’Alessandro v Ely*, 173 Mich App 788, 794; 434 NW2d 662 (1988). Neither the circuit court nor the appellate courts can expand the jurisdiction of the probate court without legislative consent. *Id.* Furthermore, actions of the parties can not operate as a waiver or consent to subject matter jurisdiction. *Sumpter v Kosinski*, 165 Mich App 784, 797; 419 NW2d 463 (1988). The probate court is granted exclusive jurisdiction over certain matters by MCL 700.21; MSA 27.5021. *Id.* If a matter is not one of exclusive jurisdiction, the probate court may exercise concurrent jurisdiction with other courts over matters that are ancillary to the settlement of an estate as provided in MCL 700.22; MSA 27.5022. *Id.* However, the mere fact that an estate is involved in a lawsuit will not necessarily vest jurisdiction in the probate court. *Id.* at 798.

As the personal representative concedes, MCL 600.2922(5) and (6); MSA 27A.2922(5) and (6) grant the circuit court authority to approve a settlement of a wrongful death claim pending before it as well as the distribution of the settlement proceeds. Furthermore, MCL 700.222(g); MSA

27.5222(g), which governs distribution of wrongful death proceeds by the probate court, provides that, if a wrongful death claim is pending in a court other than the probate court, the procedures prescribed in MCL 600.2922; MSA 27A.2922, for distribution of the proceeds of a settlement of the wrongful death claim are applicable. Accordingly, the probate court here had no jurisdiction to approve the settlement of the wrongful death claim against Henry Ford Hospital or the subsequent distribution of the settlement proceeds.

However, as noted by the personal representative, MCL 600.2922(5) and (6); MSA 27A.2922(5) and (6) require that the personal representative file a motion for authority to settle the wrongful death claim and to distribute the proceeds of the settlement. The personal representative claims that he did not authorize appellant to file a motion for distribution of the settlement proceeds, nor did he receive notice that such a motion was filed, or that an order approving appellant's proposed distribution was filed. However, an irregularity in the circuit court proceeding will not vest the probate court with jurisdiction to distribute the settlement proceeds, *D'Allessandro, supra*, 173 Mich App 794; *Sumpter, supra*, 165 Mich App 797-798, and in any event the failure to notify the personal representative was not the subject of this appeal from the probate court order. The probate court did not have jurisdiction to approve the settlement and distribution and, therefore, the probate court's order approving the settlement and distribution is void. *In the Matter of Hague*, 412 Mich 532, 544; 315 NW2d 524 (1982). Accordingly, we vacate the probate court's order approving the settlement and distribution.

Vacated. We do not retain jurisdiction.

/s/ Harold Hood  
/s/ Henry William Saad  
/s/ Thomas S. Eveland