

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

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JACOB ROBINSON, as Personal Representative  
of the Estate of JACQUELINE ROBINSON,

UNPUBLISHED  
January 20, 2011

Plaintiff-Appellee,

v

No. 293821  
Oakland Circuit Court  
LC No. 2009-097875-NI

KIMBERLY DANCY and MICHAEL JUAREZ,

Defendants-Appellees,

and

JUDITH CAROL PARENT, as Next Friend of  
KEITH PARENT and BRUCE PARENT

Appellant.

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Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Appellant Judith Parent, as next friend of Keith Parent and Bruce Parent, appeals as of right the August 28, 2009, order approving the settlement of this action under the wrongful death act, authorizing the distribution of the settlement proceeds, and dismissing the wrongful death action with prejudice. We vacate and remand.

**I. FACTS**

This case arose following the death of Jacqueline Robinson as a result of injuries she sustained when she was struck by a vehicle driven by defendant Kimberly Dancy. She had four children: Jacob Robinson and Alexander Robinson, who are now adults, and Keith Parent and Bruce Parent, who are minors and were adopted by Judith, their maternal grandmother, prior to Jacqueline's death.

Jacqueline's relationship with her children is unclear and unsupported by the lower court record. For example, Jacob contends that Jacqueline had a long history of substance abuse, including crack cocaine addiction, and that her parental rights to her two youngest children were terminated. On the other hand, Judith claims that the minor children continued to have daily

contact with Jacqueline and called her “mom” even after Judith adopted them. She also claims that neither of the adult children had contact with Jacqueline for several years before her death and that neither attended her funeral. Again, none of these controversial allegations is supported by evidence.

Although the document is not contained in the lower court record, the pleadings in this case indicate that Judith filed a petition with the Wayne Probate Court and was named special personal representative of Jacqueline’s Estate. Judith’s petition apparently listed the whereabouts of Jacob and Alexander as unknown. Nonetheless, Judith commenced the instant action, as personal representative of Jacqueline’s estate, on February 3, 2009, alleging a breach of duty by Dancy in her operation of a motor vehicle resulting in Jacqueline’s injury and death, and seeking damages on behalf of the estate and all individuals eligible to recover under the wrongful death act, MCL 600.2922.<sup>1</sup>

The pleadings in this case also indicate that a hearing was held on March 2, 2009, at which time Jacob was appointed personal representative of Jacqueline’s Estate. On March 20, 2009, Jacob filed a motion to amend the complaint. In the motion, he iterated that he had been named personal representative of Jacqueline’s Estate and that Judith lacked the authority to petition the court to be appointed personal representative and to hire attorney Jeffrey Hayes to commence this wrongful death action. Accordingly, Jacob asked the court to remove Judith as plaintiff and enter the appearance of Gregory Mlynarek as counsel for Jacob, personal representative of the estate.

Although there is no order disposing of this motion, the trial court entered an order allowing substitution of attorneys on April 8, 2009, reflecting a stipulation and agreement that Mlynarek would be substituted for Hayes in this action. The order does not explicitly state that Jacob had replaced Judith as the representative of the estate or as plaintiff, but it shows Mlynarek as attorney for Jacob and Hayes as attorney for Judith. Despite her apparent replacement as plaintiff, Judith, through attorney Hayes, continued to participate in the lawsuit as next friend of the minor children. There is no indication in the record that she was designated next friend by any court.

On May 1, 2009, defendants filed an answer to the complaint. They admitted that Dancy was driving the vehicle at the time of the accident, but denied that the vehicle was owned or co-owned by Juarez. They admitted that a collision had occurred, but denied that the collision or Jacqueline’s injuries were the result of any negligence, misconduct, improper operation of the vehicle, or breach of any duty on the part of Dancy.

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<sup>1</sup> The complaint also alleged a breach of duty on the part of a second defendant, Juarez, the later identified owner of the vehicle, for entrusting the vehicle to Dancy when Juarez knew or should have known that she had a bad driving record. Juarez was ultimately dismissed by stipulated order.

On July 29, 2009, Jacob, as personal representative of the estate, moved for entry of an order approving the proposed settlement and authorizing him, as personal representative, to execute a release and settlement agreement, to approve the wrongful death proceeds, and dismiss the action with prejudice. The motion stated that the parties had, after conducting reasonable discovery, reached a compromise in the best interest of the estate and that Jacob, as personal representative, was authorized to execute the release and settlement agreement on behalf of the estate. Attached to the motion were: 1) a "Personal Representative's Release," a document releasing defendants and State Farm Automobile Insurance Company from liability for the accident for \$100,000; 2) a "Distribution and Settlement Statement," listing how the \$100,000 would be divided; and 3) a proposed "Order Approving Settlement and Authorizing Personal Representative to Execute Release and Settlement Agreement and Approving Distribution in the Wrongful Death Action and Dismissing Entire Action with Prejudice."

On August 24, 2009, Hayes filed an objection, on behalf of Judith and the minor children, to the proposed attorney fee in the settlement agreement. He claimed that he had performed work in the case, including filing the original complaint and First Amended Complaint, "prior to Mr. Mlynarek substituting in due to a change of personal representatives." He believed the attorney fees should be divided between Hayes and Mlynarek on a "quantum merit" basis.

The trial court held a hearing on the motion to approve settlement on August 26, 2009. There was no dispute that the court had previously replaced Judith with Jacob as personal representative of the estate. Hayes stated that Judith had adopted the minor children and also claimed that the adult children had no contact with Jacqueline for ten years prior to her death. He stated that he objected to the settlement because he did not believe that there had been an appropriate investigation into a possible dram shop action. He believed Mlynarek, as attorney for the estate, should interview witnesses who were with Dancy on the night of the accident to determine how many drinks she had consumed in order to determine whether the establishment that served her alcohol should have been on notice that she was intoxicated. Hayes also requested a share of the attorney fees for the work he completed in the case and claimed that other family members who he did not represent objected to the proposed distribution. He believed the court should hold an evidentiary hearing on those two issues.

With respect to the possible dram shop action, Mlynarek responded that he had talked to Dancy and defense counsel and did not believe Dancy was intoxicated at the time of the accident. He also noted that Hayes had four months to investigate a possible dram shop action before he was replaced. Defense counsel noted that the police had investigated whether Dancy was intoxicated and that she was in prison in connection with the accident (failing to stop at the scene of the accident) but that there had been no charges relating to intoxication. With respect to attorney fees, Mlynarek stated that Hayes had unduly prolonged the proceedings by refusing to voluntarily step down when he learned that Judith was not the proper party to open the estate. Mlynarek also stated his belief that the proposed distribution was fair, and noted that only his clients would take under the laws of intestacy.

After inquiring about whether there had been a police investigation, the court indicated that it would approve the settlement. Mlynarek proceeded to briefly voir dire Jacob about his authority to settle and the terms of the settlement. The court again stated that the motion to approve the settlement was granted, and the following exchange took place:

*Mr. Mlynarek.* And I assume the other motion as to the distribution—

*The Court.* Yes.

*Mr. Mlynarek.* —you’re going to set it for an evidentiary hearing?

*The Court.* No. So tell me what the distribution is.

Hayes placed his objection on the record, stating that, “I represent Keith Parent and Bruce Parent. We object to the distribution in the form it has been suggested by the Court.” He also reiterated his objection to the entire attorney fee going to Mlynarek and believed that an evidentiary hearing should be held on both issues.

On August 28, 2009, the trial court entered the proposed order approving the settlement, approving the distribution, and dismissing the action. Judith, as next friend of the minor children, now appeals of right the trial court’s order.

## II. APPOINTMENT OF FIDUCIARY OR GUARDIAN AD LITEM

On appeal, appellant argues that the trial court erred in approving the settlement and distributing the proceeds without appointing a fiduciary or guardian ad litem for the minor children or holding an evidentiary hearing as required by the wrongful death act, MCL 600.2922.

### A. STANDARD OF REVIEW

We generally review a trial court’s decision concerning the distribution of settlement proceeds in a wrongful death action for clear error. *Reed v Breton*, 279 Mich App 239, 241; 756 NW2d 89 (2008). “‘A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.’” *Id.* at 241-242, quoting *McTaggart v Lindsey*, 202 Mich App 612, 615-616; 509 NW2d 881 (1993). “If the reviewing court determines that the trial court made a mistake, it will then substitute its own appraisal of the record and reduce damages or conditionally affirm the award.” *McTaggart*, 202 Mich App at 616. We review issues of statutory construction de novo as questions of law. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

### B. ANALYSIS

The wrongful death act permits the personal representative of a deceased’s estate to bring an action for damages that the deceased would have been entitled to maintain had death not ensued. MCL 600.2922(1), (2). “[T]he wrongful-death act is essentially a ‘filter’ through which the underlying claim may proceed.” *Wesche v Mecosta County Rd Comm*, 480 Mich 75, 88; 746 NW2d 847 (2008). The persons who may be entitled to damages under the act are limited to those listed in the statute, including “[t]he deceased’s spouse, children, descendants, parents, grandparents, brothers and sisters” who “suffer damages and survive the deceased.” MCL

600.2922(3).<sup>2</sup> MCL 600.2922(6) governs the distribution of the proceeds of a settlement of a wrongful death action and provides, in relevant part:

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. *The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:*

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(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. *The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased.* If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict. [Emphasis added.]

Thus, the trial court “shall” distribute the proceeds of a wrongful death settlement to the “persons designated in subsection (3) who suffered damages . . . in the amount as the court . . . considers fair and equitable considering the relative damages sustained by each of the persons . . .” MCL 600.2922(6)(d). In *McTaggart*, 202 Mich App at 616, this Court explained that “[a] claim for loss of society and companionship under the wrongful death act addresses compensation for the destruction of family relationships that results when one family member dies.” The Court opined that, “[t]he only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship.” *Id.* After an evidentiary hearing, the trial court in *McTaggart* concluded that the appellant was not entitled to recover any amount for the loss of society and companionship of his daughter because he had “almost completely shirked the duties of parenthood.” *Id.* at 615. After reviewing the evidence, this Court agreed because “there was evidence that the appellant

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<sup>2</sup> The eligibility of Bruce Parent and Keith Parent to receive damages under MCL 600.2922(3) is not contested. Assuming they were no longer Jacqueline’s legal children at the time of her death as a result of their adoption by Judith, they were Jacqueline’s legal brothers.

never contributed to the financial needs of his daughter, never visited his daughter or expressed any interest to do so, and never took any steps to assert his parental rights.” *Id.* at 616.

In this case, there was no factual record on which the trial court could have based an assessment of the fairness and equitability of the distribution “considering the relative damages” suffered by each of the relevant persons. Under the circumstances, we agree with Judith that the trial court erred in approving the distribution of the settlement proceeds without holding an evidentiary hearing. Moreover, an independent appellate assessment of the fairness and equitability of the distribution is impossible without an evidentiary record. See *McTaggart*, 202 Mich App at 616 (“If the reviewing court determines that the trial court made a mistake, it will then substitute its own appraisal of the record and reduce damages or conditionally affirm the award.”). Accordingly, we remand to the trial court for an evidentiary hearing. Because of our conclusion that a remand is necessary, we decline to address Judith’s argument that the trial court erred in failing to appoint a fiduciary or guardian ad litem as required by MCL 600.2922(6)(c),<sup>3</sup> and that the error requires reversal. Instead, we direct the trial court to address and comply with MCL 600.2922(6)(c) on remand.

Vacated and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood

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<sup>3</sup> MCL 600.2922(6)(c) provides:

If any interested person is a minor, a disappeared person, or an incapacitated individual for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated individual.