

101 E Chesapeake Avenue
Fifth Floor
Baltimore, Maryland 21286
410-821-6800
410-821-1265 Fax
www.azraelfranz.com

AZRAEL FRANZ

SCHWAB & LIPOWITZ, LLC

Jonathan A Azrael
Keith S. Franz
Paul J. Schwab, III
Judson H. Lipowitz
John R. Solter, Jr.

Protecting Families: Wrongful Death and Survival Actions*

Paul J. Schwab, III, Esquire
Judson H. Lipowitz, Esquire

I. Wrongful Death Act: CTS. & JUD. PROC. §§ 3-901 – 3-904

A. Qualified Beneficiaries

1. **Primary** – Wrongful death actions are for the benefit of the spouse, the parent, and the child of the deceased person. CTS. & JUD. PROC § 3-904(a)(1)
2. **Secondary** – If there are no primary beneficiaries, an action shall be for the benefit of any person related to the deceased person by blood or marriage who was “substantially dependent” upon the deceased. CTS. & JUD. PROC § 3-904(b)

B. Wrongful Death Action

1. **One Action Rule** – Only one action under this subtitle lies in respect to the death of a person. CTS. & JUD. PROC. §3-904(f)
2. Use-Plaintiffs

- a. **Plaintiff** – All persons who are or may be entitled by law to damages by reason of the wrongful death shall be named as plaintiffs whether or not they join in the action. The words “to the use of” shall precede the name of any person named as a plaintiff who does not join in the action. Md. Rule 15-1001(b). *Walker v. Essex*, 318 Md. 516, 569 A.2d 645 (1990); *Williams v. Work*, 192 Md. App. 438, 995 A.2d 744 (2010), *aff'd*, Ace Am. Ins. Co. v. Williams, 15 A.3d 761, 418 Md. 400 (2011).

* The materials are presented at this April 20, 2017 seminar in the hope that they will assist Maryland estates and trusts attorneys in their practices. The seminar and accompanying materials are not intended to be all encompassing or to render any legal or other advice with respect to specific circumstances.

b. **Notice to Use Plaintiff** – The party bringing the action shall mail a copy of the complaint by certified mail to any use plaintiff at the use plaintiff's last known address. The complaint shall be accompanied by a notice informing the use plaintiff of their potential rights to damages in the wrongful death action. Md. Rule 15-1001(d).

The notice shall be in the substantially the following form:

NOTICE TO [Name of Use Plaintiff]

You may have a right under Maryland law to claim an award of damages in this action. You should consult Maryland Code, § 3-904 of the Courts Article for eligibility requirements. Only one action on behalf of all individuals entitled to make a claim is permitted. If you decide to make a claim, you must file with the clerk of the court in which this action is pending a motion to intervene in the action in accordance with the Maryland Rules no later than [than] the earlier of (1) the applicable deadline stated in § 3-904 (g) and §5-201 (a) of the Courts Article ["the statutory deadline"] or (2) 30 days after being served with the complaint and this Notice if you reside in Maryland, 60 days after being served if you reside elsewhere in the United States, or 90 days after being served if you reside outside of the United States ["the served notice deadline"]. You may represent yourself, or you may obtain an attorney to represent you. If the court does not receive your written motion to intervene by the earlier of the applicable deadlines, the court may find that you have lost your right to participate in the action and claim any recovery.

c. **Complaint** – The complaint shall state (1) the relationship of each plaintiff to the decedent whose death is alleged to have been caused by the wrongful act, (2) the last known address of each use plaintiff, and (3) that the party bringing the action conducted a good faith and reasonably diligent effort to identify, locate, and name as use plaintiffs all individuals who might qualify as use plaintiffs. Md. Rule 15-1001(c).

C. **Statute of Limitations and Notices**

1. **General Rule** - In most cases a wrongful death action must be commenced within three (3) years after the death of the injured person. CTS. & JUD. PROC. §3-904(g)(1)

2. **Condition Precedent** – The statute of limitations in a wrongful death action is a condition precedent to filing suit and must be affirmatively alleged in the complaint.
3. **Minority** – CTS. & JUD. PROC. § 5-201(a) does not save a cause of action for wrongful death notwithstanding the disability of the person at the time the action accrued. Waddell v. Kirkpatrick, 331 Md. 52, 626 A.2d 353 (1993). It can be argued, however that in making statutory changes after Waddell Maryland's General Assembly overruled the case.
4. **Fraudulent Actions** – If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud. CTS. & JUD. PROC. § 5-203; Geisz v. Greater Baltimore Medical Center 313 Md. 301, 545 A.2d. 658 (1988).
5. **Use Plaintiff** – If a use plaintiff who is served with a complaint and notice in accordance to Md. Rule 15-1001(d) does not file a motion to intervene by the served notice deadline, the use plaintiff may not participate in the action or claim any recovery unless, for good cause shown, the court excuses the late filing. The court may not excuse the late filing if the statutory deadline is not met. Md. Rule 15-1001(e)(3).
6. **Notice to Certain Defendants** - Various statutes require that notices be given to governmental defendants "soon" after the incident.

D. **Damages**

1. **Noneconomic Damages** – In an action for wrongful death, noneconomic damages include damages for each beneficiary's mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education. CTS. & JUD. PROC. § 11-108(a)(2)(i)(2); CTS. & JUD. PROC. § 3-904(d)
2. **Economic Damages ("Pecuniary Loss" or "Pecuniary Benefit")** – Economic damages are based on the evidence and the relationship of each plaintiff to the deceased person.
 - a. **Spouse of Deceased** – The economic losses to be considered include the financial support as well as the replacement value of the services that the deceased furnished or probably could have been expected to furnish. The jury may consider the deceased's earnings and future earning capacity for the probable time both had been expected to live to determine the amount that

the surviving spouse could reasonably have expected to receive. Maryland Civil Pattern Jury Instructions (“MPJI”) 10:24

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 - b. **Parent of Deceased Child** – The economic losses to be considered are any financial benefits a parent would have been expected to have received from the deceased child. MPJI 10:25
 - c. **Minor Child of Deceased Parent** – The economic losses to be considered include the financial support as well as the replacement value of the services that the deceased furnished or probably would have been expected to furnish. MPJI 10:26

3. Damages Awarded In Proportion To Injury

- a. **Proportionate among Beneficiaries** - Damages may be awarded to the beneficiaries proportioned to their injury resulting from the wrongful death. CTS. & JUD. PROC. § 3-904(c)(1)
- b. **Determination by Jury** - The amount recovered shall be divided among the beneficiaries in shares directed by the verdict. CTS. & JUD. PROC. § 3-904(c)(2)

4. Noneconomic Damages Cap

- a. **If One Beneficiary** – The limitation on noneconomic damages increases by \$15,000 on October 1 of each year. CTS. & JUD. PROC. § 11-108 (b)(2)(ii). The cap on noneconomic damages if there is only one claimant for actions arising between October 1, 2016 and September 30, 2017 is \$830,000.00.
- b. **If Two or More Beneficiaries** – In a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed 150% of the limitation for one beneficiary, regardless of the number of claimants or beneficiaries who share in the award. CTS. & JUD. PROC. § 11-108 (b)(3)(ii). Accordingly, the noneconomic damages cap in wrongful death actions arising between October 1, 2016 and September 30, 2017 with two or more claimants is \$1,245,000.00.
- c. **Award Reduced Proportionately by Court** - In a wrongful death action in which there are two or more claimants or beneficiaries, if the jury awards an amount for noneconomic damages that exceeds the limitation on noneconomic damages, the court shall reduce each individual award of a primary claimant proportionately to the total award of all of the primary claimants so

that the total award to all claimants or beneficiaries conforms to the limitation. CTS. & JUD. PROC. § 11-108 (d)(2)(ii)(1)(A).

II. Survival Action

A. **Damages** – In an action instituted by the personal representative against a tortfeasor for a wrong which resulted in the death of the decedent, the personal representative may recover the funeral expenses of the decedent up to the amount allowed under § 8-106(b) of the Estates and Trusts Article in addition to other damages recoverable in the action. EST. & TRUSTS § 7-401.

1. Noneconomic Damages

- a. Conscious pain and suffering (between the time of injury and the time of death).
- b. Mental anguish, including pre-impact fright.

2. Economic Damages

- a. Funeral Expenses. EST. & TRUSTS § 7-401(y).
- b. Expenses, including medical expenses (between the time of injury and the time of death).
- c. Loss of wages (between the time of injury and the time of death).

B. Counsel Fee

1. **Petition** - An attorney is entitled to reasonable compensation for legal services rendered to the estate and/or the personal representative. Upon the filing of a petition in reasonable detail by the personal representative or the attorney, the court may allow a counsel fee to an attorney employed by the personal representative for legal services. The compensation shall be fair and reasonable in the light of all the circumstances to be considered in fixing the fee of an attorney. EST. & TRUSTS § 7-602(a)-(b).
2. **Exceptions to Petition Requirement** - Attorney's fees may be paid without court approval if:
 - (a)(1)(i) Each creditor, who has filed a claim that is still open, and all interested persons consent to the payment in writing;
 - (ii) The combined sum of commissions payments and attorney's fees do not exceed amounts provided in § 7-601; and

(iii) The signed written consent form states the amounts of the payments and is filed with the register of wills; or

(b)(i) The fee is paid to an attorney representing the estate in litigation under a contingency fee agreement signed by the decedent or current personal representative;

(ii) The fee does not exceed the terms of the contingency fee agreement;

(iii) A copy of the contingency fee agreement is on file with the register of wills; and

(iv) The attorney files a statement with each account stating that the scope of the representation by the attorney does not extend to the administration of the estate. EST. & TRUSTS § 7-604(a)

III. Wrongful Death Considerations for Estate Planner

A. **Minimum Required Liability Limits –Automobile Insurance**— Maryland presently requires liability insurance of no less than \$30,000.00 per person and \$60,000.00 per occurrence.

B. **Uninsured Motorist Coverage** – It pays the insured if the “at fault” driver has no insurance or does not have enough insurance to pay the compensatory damages for bodily injury and property damage that the insured is legally entitled to recover on the claim. The amount of such coverage generally cannot be higher than the limits of liability insurance provided by the policy. House Bill 5 and Senate Bill 0403 enacted by the Maryland General Assembly in 2017 permits “stacking” of certain Uninsured Motorist Coverage. Its effective date is October 1, 2017

C. **Umbrella Policy** – It increases liability insurance above the amount provided by the underlying policies. It provides additional coverage if someone gets injured at the insured’s residence (and possibly a second residence) or by or in their insured vehicle(s). Some insurers will for little or no additional premium provide uninsured motorist coverage under the umbrella.

D. Household Exclusion

1. If the amount of liability insurance under the policy exceeds the minimum required liability limits, which at the present are \$30,000.00/\$60,000.00, this exclusion may limit the amount of coverage for claims made by certain injured members of the insured’s family so that the excluded family members riding with the insured have less financial protection than other passengers. Section 5-806 of the Courts and Judicial Proceedings Article, however, provides that when there is an action by or against an unemancipated child or his estate by or against his parent or the parent’s estate for wrongful death, personal injury or

property damage arising from the operation of a motor vehicle, the victim may not be restricted by the doctrine of parent-child immunity or any insurance policy provisions up to the limits of liability or uninsured vehicle coverage.

2. **Section 19-504.1 of the Insurance Article** – It provides that the insurer shall on a form approved by the Insurance Commissioner offer the first named insured/applicant liability insurance coverage for a family member in the same amount as the coverage for claims made under the policy by a nonfamily member. The form shall “clearly and concisely explain in 10 point boldface type:
 - (i) the nature, extent, benefit, and cost of the amount of liability coverage for claims made by family members that is available to the first named insured; and
 - (ii) that an insurer may not refuse to underwrite a first named insured because the first named insured requests or elects the liability coverage for claims made by family members in an amount equal to the coverage provided for claims made by nonfamily members.

IV. Victim’s Family Comes to Estate Planning Attorney with Possible Wrongful Death Claim

A. Accept Sole Responsibility for Claims and Keep Entire Fee?

1. **Address Conflicts of Interest** – Besides possible conflict with tortfeasor and/or tortfeasor’s insurer, there are conflicts of interest (i) between the wrongful death claimants on the allocation of the wrongful death recovery among them and (ii) between the wrongful death claimants as a group and the decedent’s estate on how much, if any, of a recovery is allocated to the estate’s survival action.
2. **Meet Limitations and Notice Deadlines**
3. **Address Liens of Medical Providers** – The attorney in many cases will have to deal with Medicare, Medicaid, hospital, Blue Cross/Blue Shield and/or workers compensation liens. Certain statutes, including Medicare, make the attorney personally responsible for his or her failure to properly protect the lien.
4. **Satisfy Rule 1.5(c) of the Maryland Rules of Professional Conduct** – A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted

from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be responsible whether or not the client is the prevailing party.

B. **Associate with Experienced Lawyer Having Joint Responsibility and Shared Fee?**

1. **Rules 1.5(e) of the Maryland Rules of Professional Conduct** – A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the joint representation and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

2. **Confirm Agreement between Associated Lawyers on Division in Writing**

C. **Refer or Decline Matter Without Responsibility and No Fee for Claims?**

V. **Acting as Personal Counsel for Defendant in Wrongful Death Case**

A. **Review Insurance Policies and Make Sure of Timely Notice**

B. **Find Competent Counsel for Traffic, Criminal and/or MVA Matters**

C. **Monitor Insurance Carrier's Defense** – If necessary insurance counsel may need to be reminded about potential bad faith claim.

D. **Determine Whether "Excess" Judgment is Dischargeable** – 11 U.S.C.A. § 523(a)(9) provides that a discharge in bankruptcy does not discharge a debt for “death or personal injury caused by the debtor’s operation of a motor vehicle, vessel or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.”

E. **Prepare to Discuss Maryland's Uniform Fraudulent Conveyance Act** – It is found in Sections 15-201 to 15-214 of the Commercial Law Article

F. **Review Beneficiary Designations, Deeds, Trusts, Wills and Other Documents of Spouse, Parents and Other Family Members**

VI. Services provided with Respect to Survival Action.

- A. **Factors Relevant to Allocation** – If giving advice on the amount, if any, to be allocated to estate consider all relevant factors, including facts of the underlying claim (decedent's pain, evidence that decedent likely aware of impending death, etc.), claims against and creditors of the estate, the distribution of any residuary estate and the time and expense of "running part of recovery through the estate".
- B. **Advise Client of Time and Expense Associated with Disposition of Survival Action Recovery** – Depending upon what has been filed, the Estate's recovery will require the handling of the attorney's fee and possibly the giving of notice, the posting of a bond and/or the conversion of a small estate.