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IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO

Estate of Neil A. Armstrong

Case No 2012005552

Judge James Cissell

(FILED UNDER SEAL)

REPORT OF GUARDIAN

Facts

1 The undersigned received an appointment by this Court on September 25, 2014 to serve as Guardian *ad Litem* of the Minors Kyle Patrick Armstrong (age 15), Lillian Marie Armstrong (age 14), and Bryce Nelson Armstrong (age 13), the minor grandchildren of the Decedent in the Estate above captioned. The purpose of the appointment is to report to the Court on issues of the proposed Wrongful Death Settlement.

2 This Entry of Appointment, all pleadings regarding a Wrongful Death Settlement, and this Report have all been filed under seal, pending the Court's ultimate determination whether to seal the record.

3 The undersigned has been instructed that confidentiality is required and that if any information regarding this settlement becomes public, that the entire settlement must be repaid in its entirety, with no tolling of time.

4 Under the condition of confidentiality, the undersigned has not spoken to or met the minor grandchildren.

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JAMES CISELL, JUDGE
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5 The minor grandchildren of the Decedent are “next of kin” under R C §2125 02, are thus entitled to recover from any wrongful death suit, and are interested parties entitled to service

6 The children’s father is Eric Armstrong, the son of the Decedent and an interested party with an interest adverse to his minor children

7 Eric Armstrong filed for Divorce on April 24, 2012

8 The Decedent died during the pendency of the divorce on August 25, 2012

9 Eric Armstrong and Karen Armstrong were divorced and granted a Decree of Shared Parenting on March 6, 2013

10 Under the condition of confidentiality, the undersigned has not spoken to or met the Mother of the minor grandchildren

11 Eric Armstrong, pursuant to his equal custodial Shared Parental rights, through the representative of the interested parties, Attorney Wendy Armstrong, pursued his claim in the wrongful death action and included his minor children in pursuit of settlement proceeds

12 Neither Karen Armstrong nor any of the minor grandchildren have received actual or constructive notice of the existence of the Wrongful Death action or the proposed settlement of the action

13 The Father of the three minor grandchildren never objected to the legal representation of his minor children and has accepted Notices for his minor children

14 Under the proposed distribution of settlement proceeds, all grandchildren are proposed to receive the same amount - \$24,000

15 Each of Decedent's two siblings is to receive \$250,000 under the proposed settlement

Documents Reviewed

Last Will and Testament of Neil A. Armstrong and the First Codicil thereto
Application for Approval of Attorney Fees filed by the Attorney for the Estate
Motion to Approve and Memorandum in Support [MOTION TO SEAL]
Application for Order Appointing Guardian *Ad Litem*
Motion for Approval [OF WRONGFUL DEATH SETTLEMENT]
Application to Approve Settlement and Distribution of Wrongful Death and
Survival Claims -- Form 14 0
Attachment to Form 14 0
Statement in Support of Settlement
The Separation Agreement between Karen and Eric Armstrong
The Shared Parenting Plan between Karen and Eric Armstrong

Law Reviewed

- 1 R C §149.43 – Availability of Public Records
- 2 R C §2111.01 (G) “Parent” means a natural parent or adoptive parent of a minor child whose parental rights and responsibilities have not been terminated by a juvenile court or another court
- 3 R C § 2111.23 - Guardian *ad litem* needed when ward's guardian has an adverse interest
- 4 R C §2125.02(A) Wrongful Death statute
- 5 R C §2125.03(A)(2) Court can create a trust for any beneficiary under age 25
- 6 Ohio Rules of Civil Procedure 4.2 –(B) When a person is under the age of 16, service must be on a person serving EITHER as the person's guardian, or any one of the following persons with whom the person to be served lives or resides: father, mother, or the individual having the care of the person
- 7 Hamilton County Probate Court Local Rule 70.1 (D) requires notice of proposed settlement to “interested parties”

- 8 Brinkman v Doughty, 140 Ohio App 3d 494, 748 N E 2d 116 (Clark 2000), review denied, 91 Ohio St 3d 1480, 744 N E 2d 1194 (2001) – notice required to “next of kin”
- 9 Senig et al v Nationwide Mutual Insurance Company et al, 76 Ohio App 3rd 565, 602 NE 2d 438 (10th Dist Franklin County 1992) – “Next of kin” includes all blood relatives of the same degree of relationship determined by counting outward from a common ancestor
- 10 In re Estate of Payne, 2005-Ohio-2391 (10th Appellate District) – Grandmother and aunt are not the same degree of kinship
- 11 In re Estate of Carpenter 2004-Ohio-830 (Hamilton County 1st District) – Criteria for Sealing of Records
- 12 The State Ex REI Highlander v Rudduck, Judge, et al 103 Ohio St 3d 370, 2004-Ohio-4952 (September 23, 2004) – Any record used by a court is a public record
- 13 Schussheim v Schussheim, 137 Ohio St 3d 133, 2013-Ohio 4529 – Court has inherent authority to seal a civil record if unusual and exceptional circumstances

Issues and Discussion

CONFIDENTIALITY

The Settlement Agreement has not been reviewed But the undersigned has been told that by its negotiated terms, if the existence of the wrongful death action and settlement are ever revealed by the parties to the agreement, the entire payment must be repaid in full

To date, all current pleadings have been filed under seal pending this Court’s ultimate determination And this Court must also decide whether to seal all future guardianship filings or trusts for the distribution of funds for the minor children Regrettably, the decisions are inextricably linked, for to seal the current pleadings without sealing the future required filings could result in all of the settlement proceeds having to be repaid

This Court's analysis in the case of In Re Carpenter, 2004-Ohio 830 and Hamilton County Probate Court Local Rule 57.2 set forth the law regarding sealing of records and what the Court must find in order to seal a record. "To seal a record, a court must find that the risk of harm to the individual's privacy rights outweighs the public's interest in maximum public access to court records, governmental accountability, public safety, and the use of the courts to resolve disputes and the efficient use of the court's staff." Carpenter at ¶9.

The Supreme Court has held that *any* record used by a court to render a decision is a record subject to R.C. § 149.43. The State Ex Rel Highlander v Rudduck, Judge, et al, 103 Ohio St. 3d 370, 2004-Ohio-4952 (September 23, 2004), rehearing denied twice (emphasis added). The Rudduck Court nonetheless confirmed that properly sealed court records are exempted from R.C. § 149.43 under R.C. § 2953.52 (criminal issues), or other applicable *statutory* authority, but that local rules cannot prevail over R.C. § 149.43.

The Motion to Seal relies on Schussheim v Schussheim, 137 Ohio St. 3d 133, 2013-Ohio 4529 (October 16, 2013), which acknowledges a court's inherent authority to expunge or seal a record. Schussheim involved the sealing of a dismissed Civil Protection Order before a full hearing -- a withdrawn allegation of domestic violence. To seal a record, a court must find "unusual or exceptional circumstances" that warrant sealing a record. Id.

A wrongful death case and its settlement is neither unusual nor an exceptional circumstance. Notwithstanding, there is likely nothing in *this* case that could be exposed,

learned, or gained by the public's knowledge of this disputed cause of action or its settlement. Any linkage of this health provider to the death of Decedent could irreparably and unfairly forever taint the business enterprise. But for Decedent's iconic stature in the history of mankind, it is unlikely that a wrongful death settlement in this amount, with disputed causation, would have been reached. No institution wants to be remotely associated with the death of one of America's greatest heroes. And so the economic damage to the health care provider paying this fairly substantial sum would be grave. There are more than enough medical malpractice and wrongful death actions already in the public domain to inform the public, so that sealing *this* particular case would be warranted.

In balancing the public's access to court records against an individual's privacy rights, the Court should consider the privacy rights of the Decedent especially in his manner of death. The Decedent *was* unusual and exceptional. Despite his universal fame, he was private in life and deserves privacy in death. No one needs to know how he died. Decedent is *sui generis*. He never commercialized his fame. Never brought disgrace. If any individual has ever earned privacy in death, it was Decedent.

And the Court should also weigh the privacy rights of each of his 10 beneficiaries. Since Decedent set foot on the moon, each of the beneficiaries has had to share him with the world while he lived. If the amounts of the settlement are known, the beneficiaries become targets for theft, burglary, kidnapping. Just as the law allows a trust to shield what a beneficiary receives privately, the Court should shield what each family

member receives from this tragic loss. Each beneficiary should be afforded the requested confidentiality to buffer their losses privately after his death. There is nothing to be gained by public access to this case. If not this Decedent and his family, it would be hard to imagine any person worthy of the Court's sealing of records.

So although the undersigned could find no statutory authority for the sealing of the type of case before the Court, the Court has the inherent jurisdiction to seal this civil case and all current pleadings.

If required by the terms of the settlement agreement, and if this Court approves sealing of the Settlement Agreement, confidentiality must still be maintained in future filings. The future damages, the pecuniary loss to the beneficiaries, is actually quantifiable. It totals six million dollars of harm.

It would be profoundly inequitable if the other beneficiaries would lose their share *if* any minor child, upon emancipation, would not consent to the requirement of confidentiality. Or even if a child inadvertently leaked the information. It would only take one person to make all other nine beneficiaries return the full amount of the settlement.

If the Court decides to seal the record, in order to maintain the strict confidentiality of the agreement, Karen Armstrong, the Mother of the minor grandchildren should be given notice of these proceedings, allowed to consent or object to the settlement, and ultimately be appointed either the Guardian of the Estates or the Trustee of the Trust for the minor grandchildren. Through this appointment, she would

be bound by the terms of the sealed court records and bound by a fiduciary duty to her own children not to disclose the terms or nature of this Agreement

NOTICE TO MOTHER OF MINORS

The minor grandchildren are “next of kin” and are entitled to participate in the wrongful death proceeds. As interested parties each is entitled to notice of all proceedings. Civil Rule 4-2 requires service on a guardian or either parent with whom the person under age 16 resides. Father, the parent with an interest adverse to his children, has had notice of all aspects of this wrongful death action. Given the confidentiality requirements, Mother has received no notice and thus has had no ability to present any evidence of the proof of damages on behalf of each of her children or to consent or object to the amount of the proposed settlement that each child is to receive.

Mother and Father enjoy Shared Parenting of their children, and as such, are expected to make decisions jointly with respect to the minor children. The parents have equal time allocation, equally pay for all the expenses of the children, provide health insurance, and do not exchange child support.

Pursuant to their Shared Parenting Plan, both parents have “equal access to any record that is related to the children”, including school and medical records unless a Court determines that it is not in the best interest of the children for a parent to have access. Under Ruddick, this action is a record. *Supra*, 103 Ohio St. 3d 370, 2004-Ohio-4952 (September 23, 2004). Under the Shared Parenting Plan, Mother should have equal notice and ability to consent or object to the proposed wrongful death settlement.

The undersigned could find no requirement under the wrongful death statute requiring the notice to both of the parents of a minor beneficiary. A LEXIS search for “shared parenting” within 100 words of “wrongful death” resulted in only one case in the State of Ohio not on point (same sex custody) which discussed the definition of “parent” for purposes of taking under a wrongful death statute.

However, R.C. § 2111.181 Settlement of Claim of Emancipated Minor requires that written notice of the time and place of a hearing must be “given to each of the *living* parents of the minor” when a minor claims to be emancipated in order to maintain the minor’s own action and recover damages. The statute makes no distinction regarding custody or suitability. Both living parents should be given notice.

Because of the terms of the Shared Parenting Order, Mother must be given notice, an opportunity to be heard and present evidence of proof of damages to her children or to consent to the proposed settlement. If the Settlement Agreement would permit notice to Mother, the undersigned has no independent ability to predict whether Mother would abide by the terms of the confidentiality agreement absent a Court order requiring Mother’s adherence to the confidentiality provision.

AMOUNT OF PROPOSED DISTRIBUTION

The law presumes that the surviving spouse, the children and the parents of a decedent have suffered damages. “Next of Kin” must prove their damages, since there is no statutory presumption of damages. The undersigned does not have the ability to *prove* damages for the grandchildren because of the confidentiality element of this settlement.

Notwithstanding, as proposed, each grandchild would receive \$24,000 from the wrongful death settlement. The adult grandchildren can willingly consent to whatever amount each wishes to receive. However, as Guardian, the undersigned objects to the proposed \$24,000 for each minor grandchild because the minor grandchildren are the same degree of consanguinity as Decedent's two siblings, each of whom is receiving \$250,000. It is assumed that the amount to be received by each minor grandchild was selected to fall within Local Rule 67.1 simplifying and minimizing the costs of the administration of their funds.

Under RC § 2125.03(A)(1) this Court has the duty to accept, reject or deviate from these proposals and divide the funds as it determines is appropriate. And the Court can adjust the shares of the beneficiaries based upon the injury and loss to each beneficiary resulting from the death, the age and condition of the beneficiaries,

Factors that Could Inform the Adjustment of Settlement

R.C. § 2125.02 (B) provides factors to consider in determining compensatory damages that will inform the Court. And again, the undersigned has no ability to gather evidence on each of these factors. Notwithstanding, the following arguments can be made:

(1) Loss of support from the reasonably expected earning capacity of the decedent. Guardian has no knowledge that Decedent supported any of the minor grandchildren directly or indirectly. Other than per stirpital references, Decedent's Last Will and Testament made no bequest or devise to the minor grandchildren. Decedent's Trust has not been reviewed and it is unknown whether any generation skipping trust, 529 Plan, insurance trust, or any other type of distribution was made by Decedent for the minor

grandchildren The Separation Agreement of Eric and Karen Armstrong recites that Decedent entered into an agreement with Eric and a hospital for the repayment of health expenses for one of the minor grandchildren

(2) Loss of services of the decedent, Guardian has no knowledge that Decedent provided any services to the minor grandchildren

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent, The minor grandchildren, having had the least time with the Decedent have suffered the greatest loss of time, attention, protection, advice, guidance, counsel, and affection than those family members that have had him the longest time Logically they will have had fewer birthdays with Decedent, they will not have their famous grandfather at high school graduations, will not be able to have him present at any induction ceremonies in college, or graduations, or grandparents' day It is likely that since the moment of each child's birth, they were identified with one of the most famous and courageous men on the planet And they have each lost a brilliant limelight before each child matured into adulthood

One grandchild has special needs Given the confines of this confidential assignment, the gravity of those needs is unknown Decedent might have made special efforts to provide additional assistance to this child It is equally possible that Decedent would *not* have made any distribution that might have disqualified this child for state assistance

(4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death, This factor is not relevant given Decedent's estate planning

(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent While it can be argued that Decedent's siblings distributions are so much larger because they loved him the longest, depended on him the most, and his loss is thus most painful to them than to his minor grandchildren who knew him the least, the opposite is equally true The youngest grandchildren can be seen to be suffering the greater loss because they have lost their universally beloved and revered grandfather, who could magically open any door, innocently pave ways into college admissions, and who would have always carried a defacto hero element to any school or athletic or workplace function They have lost the opportunity as they mature to benefit from his wisdom and companionship Their loss is the greatest for having had the least amount of time with him

Only the Mother of the children could consent to the currently proposed amount of distribution for each of her children or present evidence to prove damages of each child's loss

DISTRIBUTION FOR MINOR GRANDCHILDREN

Any amount approved by this Court or adjusted by the parties for the minor grandchildren could be held either under a guardianship or held by a trust. Under a typical guardianship, a parent has the ability to petition the Court for expenditures/distributions on behalf of the children. Without notice, Mother would be precluded from seeking such expenditures from the Court. The Shared Parenting Plan recites that at the time of the Plan, Mother's gross income was \$140,000 and Father's gross income was \$110,000. On these facts it does not appear likely that either parent would need to be asking the Court for distributions from a guardianship for any of their children.

R.C. § 2125.03(A)(2) permits a Court to create a trust for any beneficiary who is under twenty-five years of age by ordering a deposit into a trust until the beneficiary is twenty-five years of age. The person appointed trustee is to be approved by each adult beneficiary (of the wrongful death settlement) and by the guardian of each minor beneficiary of the trust.

For all practical purposes, either Mother or an institutional trustee would best be suited to hold, invest, file tax returns, and ultimately disburse the trust proceeds if this Court elects this distribution vehicle.

OTHER ISSUES

One of the minor children has special needs. Would these wrongful death funds disqualify this child if he needed Medicaid coverage? Would the Court allow Mother to create a special needs trust for discretionary expenses for her child with special needs?

Absent Mother's notice, how would each parent complete a FAFSA form for college aid without revealing, at a minimum, the amount of the funds?

What explanation would be given to each child upon distribution about the source of the funds?

How could the children be forced to comply with a secret they never agreed to keep?

All these questions could be answered and confidentiality maintained if the Mother of these minors is given notice and appointed Guardian or Trustee for her children.

GUARDIAN'S RECOMMENDATION TO THE COURT

Based upon the law and the circumstances, the undersigned respectfully recommends

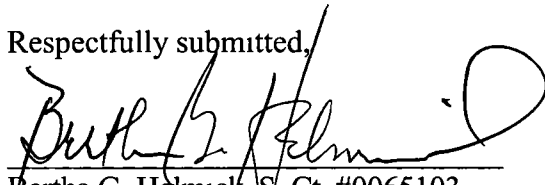
1 That current and future pleadings related to this case be sealed, subject to the following condition

2 That with the consent of all the parties to the Settlement Agreement and by Court Order requiring strict confidentiality, the Mother of the Minor Grandchildren be allowed to have notice of all the pleadings and the hearing scheduled for November 7,

2014 at 10 00 a m, and that she be allowed to either consent to the distribution or prove damages for her children

3 That, to avoid any required guardianship pleadings, any distribution for a minor grandchild be held in trust pursuant to 2125 03(A)(2)

Respectfully submitted,



Bertha G Helmick S Ct #0065103

Helmick & McNally LLC

Guardian *ad Litem* for Kyle, Lillian, and Bryce Armstrong

810 Sycamore Street 4th Floor

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Report of Guardian was served by US Mail Certified Mail upon the following interested parties on this 16th day of October, 2014

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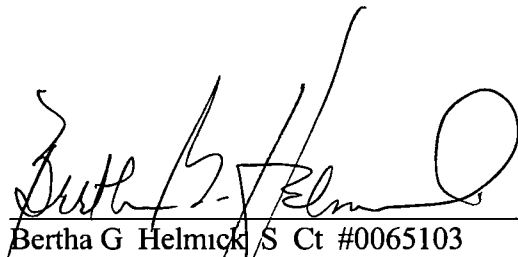
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A handwritten signature in dark ink, appearing to read "Bertha G. Helmick", is written over a horizontal line.

Bertha G Helmick S Ct #0065103
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