

Matter of Dugan

2016 NY Slip Op 32033(U)

September 6, 2016

Surrogate's Court, Nassau County

Docket Number: 2010-361447/A,B,C

Judge: Margaret C. Reilly

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This opinion is uncorrected and not selected for official publication.

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Application of
Patricia Dugan, as Administrator of the Estate of**

DECISION

**DANIEL KEARNEY,
a/k/a DANIEL T. KEARNEY,**

**File No. 2010-361447/A,B,C
Dec. No. 31859**

Deceased,

**For Leave to Compromise a Certain Cause of Action for
Conscious Pain and Suffering of the Decedent and to
Render and Have Judicially Settled an Account of the
Proceedings as Such Administrator.**

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition with Exhibits.....	1
Attorney Affirmation dated April 4, 2016.	2
Affirmation to Amend Petition filed June 3, 2016.	3
Order Approving Adequacy and Sealing Settlements.	4
Waiver of Citation and Consent of N.Y.S. Department of Taxation and Finance.....	5
Waivers and Consents.....	6
Attorney Affirmation filed April 27, 2016.....	7
Account.....	8

In this proceeding for leave to settle and compromise an action for conscious pain and suffering, the petitioner, Kathleen Kearney, seeks a decree: (1) authorizing the petitioner to settle the cause of action for conscious pain and suffering for the sum of \$50,000.00 from Georgia-Pacific Corporation, \$7,000.00 from Ingersoll Rand Company, and \$10,000.00 from Union Carbide Corporation, for a total of \$67,000.00; (2) allocating the recovery of \$67,000.00 entirely to the cause of action for conscious pain and

suffering; (3) modifying the letters of administration previously issued to the petitioner to permit this compromise; (4) dispensing with the filing of a bond; (5) judicially settling the account of the administrator; and (6) allocating the proceeds as follows: (a) legal fees of \$20,393.10 and disbursements of \$5,820.71 to the law office of Belluck & Fox, LLP; and (b) \$40,786.20¹ to the decedent's surviving spouse, Kathleen Kearney, pursuant to EPTL § 4-1.1.

At the time of his death on April 27, 2009, the decedent was a resident of 382 Briarwood Road, North Massapequa, New York. He was survived by his wife, Kathleen Kearney, and two adult children: Kelly Ann Espenkotter, and Thomas Robert Kearney. Limited letters issued to the petitioner on July 23, 2010. The petition states that the decedent was exposed to a variety of products and/or materials containing asbestos during the second half of the 1960's while working for the Parts Department of General Motors Company in Nassau County, New York. The decedent was also exposed to asbestos products while employed as a roofer for Kenvin Corporation on Long Island from 1968-1969, and as a laborer performing home construction and renovation throughout the late 1970's. As a result of this exposure, the decedent allegedly developed lung cancer related to asbestos exposure and died of asbestos-related disease.

¹The precise number is actually \$40,786.19, but it was rounded up to \$40,786.20 throughout the petitioner's papers, and that number will be used throughout this decision.

On May 25, 2010, the petitioner retained the law office of Belluck & Fox, LLP, to prosecute a cause of action for the decedent's injuries and damages caused by his occupational exposure to products and materials containing asbestos. On January 5, 2011, a cause of action for the decedent's conscious pain and suffering and wrongful death was commenced against numerous manufacturers and suppliers of asbestos, in the Supreme Court, New York County, Index No. 190004/2011. Counsel for the petitioner received offers of settlement from the following defendants: \$50,000.00 from Georgia-Pacific Corporation; \$7,000.00 from Ingersoll Rand Company; and \$10,000.00 from Union Carbide Corporation. On motion of counsel to the petitioner, New York City Asbestos Litigation Special Master Shelley Rossoff-Olsen signed an order dated May 24, 2016 confirming and approving the proposed settlement amount of \$67,000.00 and ordering that the disbursements of counsel, in the sum of \$5,820.71, be deducted from the gross settlement amount, and that legal fees of \$20,393.10 be payable to counsel, which is equal to 33 1/3% of the net recovery, and that the net proceeds of \$40,786.20 be payable to Kathleen Kearney pursuant to EPTL § 4-1.1, subject to the submission and filing of the original order and approval of the Nassau County Surrogate's Court as to the proper allocation and distribution of the net proceeds. The Special Master further ordered that the original order and the original attorney affirmation be sealed under 22 NYCRR §

216.1 (a) and filed with the Clerk of New York County, and the Clerk deny access to the file and records to anyone without an authorized order to review the same.

The petitioner states that it is in the best interests of the estate of the decedent to accept the settlements offered, and she asks the court to approve the following distribution of the proceeds:

Gross settlement proceeds		\$67,000.00
Reimbursed expenses	\$ 5,820.71	
Legal fees (33 1/3%)	<u>\$20,393.10</u>	
Net Proceeds		<u>\$40,786.20</u>

The decedent died intestate and he had no other assets. The decedent's funeral expenses of \$12,467.00 were paid by his son, Thomas Robert Kearney, who has not sought reimbursement. The petitioner waives her statutory commission. Notice was provided to the New York State Department of Taxation, which filed a waiver of citation and consent. The decedent's two adult children, his only other distributees, have also executed and filed waivers and consents. The petitioner avers that there are no outstanding tax liabilities.

Accordingly, compromise of the proceeding for the total sum of \$67,000.00 is approved, of which \$50,000.00 will be paid by Georgia-Pacific Corporation, \$7,000.00 will be paid by Ingersoll Rand Company, and \$10,000.00 will be paid by Union Carbide

Corporation. The court approves the allocation of the proceeds entirely to the cause of action for conscious pain and suffering. The surviving spouse is statutorily entitled to the first \$50,000.00 of the assets of the estate of her husband who died intestate (EPTL § 4-1.1 [a] [1]). The total of the conscious pain and suffering portion of the recovery of this petition is the sum of \$40,786.20, after payment of attorney's fees in the total sum of \$20,393.10, plus disbursements in the amount of \$5,820.71, all of which are allowed. There are no medical or hospital bills outstanding, and no assignments, compensation claims, social services claims, creditors' claims or liens were filed with the petitioner as administrator. The restrictions on the administrator's letters are lifted, giving her full authority to execute any and all documents necessary to effectuate the settlement on the foregoing terms. The court dispenses with the filing of a bond. Payment shall be made to Kathleen Kearney of the remaining balance of \$40,786.20.

Submit decree.

Dated: September 6, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Belluck & Fox, LLP
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