

Matter of Hernandez
2016 NY Slip Op 32050(U)
September 20, 2016
Surrogate's Court, Nassau County
Docket Number: 2013-375864/A,B,C
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Application of
Jeffrey DeLuca, Public Administrator of
Nassau County, as Limited Administrator
of the Estate of**

**DECISION
File No. 2013-375864/A,B,C
Dec. No. 31884**

GUADALUPE CABRERA HERNANDEZ,

Deceased,

**For Leave to Compromise a Certain Cause of Action
for Wrongful Death of the Decedent and for Judicial
Settlement of the Account With Respect to the Proceeds.**

PRESENT: HON. MARGARET C. REILLY

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

Petition with Exhibits.....	1
Affirmation of Isaac Dorfman, filed May 27, 2015.....	2
Affirmation to Amend Petition, filed July 28, 2015.	3
Affirmation of Raymond Ardito, dated June 15, 2016.	4
Guardian ad Litem Report.	5
Affirmation of Legal Services by Guardian ad Litem.	6
Affirmation of Legal Services by Mahon Mahon Kerins & O’Brien LLC. .	7
Account.	8

In this proceeding for leave to settle and compromise an action for wrongful death, the petitioner, the Public Administrator of Nassau County, seeks a decree: (1) authorizing the petitioner to settle the cause of action for wrongful death for the sum of \$50,000.00 and to discontinue the action for conscious pain and suffering; (2) allocating the recovery of \$50,000.00 entirely to the cause of action for wrongful death; (3) authorizing the petitioner to execute and deliver any and all papers necessary to effectuate the settlement, including, but not limited to, general releases; (4) modifying the letters of administration

previously issued to the petitioner to permit this compromise; (5) dispensing with the filing of a bond; (6) directing payment out of the settlement proceeds to Dorfman & Dorfman, the petitioner's tort attorneys, of legal fees of \$12,256.71 (27 1/3% of the net amount after disbursements and payments to Cesar Valdebenito, Esq. and Raymond Ardito, Esq., pursuant to a retainer agreement), and reimbursement for disbursements in the amount of \$179.12, pursuant to a contingency arrangement; (7) allowing payment to Raymond Ardito, Esq., in the amount of \$680.50, and payment to Cesar Valdebenito, Esq. in the amount of \$680.50, for each attorney's share of the legal fee pursuant to his respective agreement with Dorfman & Dorfman; (8) allowing payment to Mahon, Mahon, Kerins & O'Brien, LLC, counsel to the petitioner, in the amount of \$2,989.25 (6% of the net recovery, pursuant to a retainer agreement); (9) allowing payment to the Public Administrator of Nassau County in the amount of \$1,760.70 for commissions pursuant to SCPA § 2307; (10) allowing payment to the Public Administrator of Nassau County in the amount of \$352.14 for costs pursuant to SCPA §1207 [4]; (11) allowing reimbursement to Mahon, Mahon, Kerins & O'Brien, LLC, in the amount of \$51.00 for the petition filing fee and \$25.00 registered mail for service of the citation, for total reimbursements of \$76.00; (12) allowing reimbursement to Mahon, Mahon, Kerins & O'Brien, LLC, in the amount of \$280.00 for the filing fee for the wrongful death petition; (13) allowing reimbursement to Jose Angel Cabrera in the amount of \$3,979.00 for

payment of the decedent's funeral expenses; (14) allowing payment to the decedent's infant daughter and sole distributee, Sulma Cabrera-Villatoros, by her mother and natural guardian, Maria Concepcion Villatoros, in the amount of \$10,000.00, pursuant to SCPA § 2220; (14) allowing the remaining balance of \$16,766.08 payable to Sulma Cabrera-Villatoros to be paid to the guardian to be appointed for her; and (15) judicially settling the petitioner's account. In addition, the court must fix the fee of the guardian ad litem appointed to represent the interests of the infant distributee, Sulma Cabrera-Villatoros.

The decedent was an unmarried adult with one infant child, Sulma Cabrera-Villatoros, born on July 14, 2008, who resides in El Salvador with her mother. The decedent resided at 43 Lee Street, Roosevelt, New York. At the time of his death on June 16, 2012, the decedent was 30 years old and employed as a landscaper. The death of the decedent occurred when he was struck, while walking, by a motorcycle owned and operated by Oronde I. Black, who also died as a result of the accident. The motorcycle was insured by Progressive Insurance Company and had a policy limit of \$50,000.00.

Limited letters of administration issued to the petitioner on August 15, 2013. The petitioner's tort attorneys demanded the full policy limits from Progressive Insurance Company. On September 18, 2014, Progressive Insurance Company offered the full \$50,000.00 as final settlement of the wrongful death action. On October 1, 2015, this

court appointed a guardian ad litem to represent the interests of the infant distributee, Sulma Cabrera-Villatoros.

The petitioner asserts that the proposed settlement is fair and in the best interests of the decedent's estate. Since the decedent never regained consciousness after the accident, and there was no provable pain and suffering, the proceeds of the settlement should be entirely allocated to wrongful death. The decedent died intestate and he had no other assets. There are no outstanding tax liabilities.

The decedent's funeral expenses of \$5,979.00 were paid by his father, Jose Angel Cabrera, who was reimbursed \$2,000.00 from the no-fault death benefit collected by Dorfman & Dorfman. Jose Angel Cabrera remains, therefore, a funeral creditor of the decedent's estate in the amount of \$3,979.00. The petitioner requests that this amount be paid from the recovery proceeds.

The petitioner asks the court to approve the following breakdown of the \$50,000.00 settlement proceeds plus the \$2,000.00 no-fault death benefit:

Total settlement proceeds	\$50,000.00
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Less legal fees and disbursements:

Disbursements of Dorfman & Dorfman	\$ 179.12
Legal fee of Dorfman & Dorfman	12,256.71
Legal fee of Cesar Valdebenito, per agreement ¹	680.50

¹ Pursuant to the retainer agreement between the petitioner and Dorfman & Dorfman as the torts attorney, Dorfman & Dorfman is entitled to a fee of 27 1/3% of the net recovery, or \$13,617.71.

Legal fee of Raymond Ardito, per agreement	680.50
Fee of Mahon, Mahon, Kerins & O'Brien, LLC (6%)	<u>2,989.25</u>
Net Proceeds	\$33,213.92
Plus: No-fault death benefit	<u>+ 2,000.00</u>
Total Proceeds for Distribution	\$35,213.92
Distribution:	
Pub. Admin. Nassau County (commissions 5%)	\$ 1,760.70
Pub. Admin. Nassau County (1% per SCPA §1207 [4])	352.14
Pub. Admin. Nassau County (Wrongful Death Petition)	280.00
Disbursements of Mahon, Mahon, Kerins & O'Brien, LLC	76.00
Payment to Jose Angel Cabrera as funeral creditor	<u>3,979.00</u>
Gross Amount available for distributee Sulma Cabrera-Villatoros	\$28,766.08
No-fault benefit paid to Jose Angel Cabrera	2,000.00
Net Amount Payable to Sulma Cabrera-Villatoros ²	<u>\$26,766.08</u>

The guardian ad litem filed her report on October 26, 2015, approving the settlement and the account filed by the petitioner.

Accordingly, compromise of the proceeding for the sum of \$50,000.00 is approved, as is the allocation of the proceeds entirely for wrongful death and none for conscious pain and suffering (*see Cummins v County of Onondaga*, 84 NY2d 322 [1994]). The court dispenses with the filing of a bond. The account as filed is approved.

Dorfman & Dorfman entered into an agreement with plaintiff's prior attorneys, Cesar Valdebenito, Esq., and Raymond Ardito, Esq., pursuant to which together they will receive 10% of this amount, or \$1,361.00. Accordingly, each will be paid \$680.50, representing 5% of the fee to which Dorfman & Dorfman is entitled.

²As discussed below, this amount will be reduced by the fee of the guardian ad litem.

Reimbursement of Jose Angel Cabrera for funeral expenses in the amount of \$3,979.00 is allowed.

The court has also been asked to approve legal fees. Each attorney submitted a detailed affirmation of legal services provided by counsel. Fee sharing agreements are enforceable, provided that the attorney who seeks to share in the fee contributed some work, labor, or service to the fee earned (*see Reich v Wolf & Fuhrman, P.C.*, 36 AD3d 885 [2d Dept 2007]; *Witt v Cohen*, 192 AD2d 528 [2d Dept 1993]). Furthermore, “the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either refused to contribute more substantially” (*Benjamin v Koeppel*, 58 NY2d 549, 556 [1995]). Accordingly, attorneys’ fees in the total sum of \$16,606.96, plus disbursements of Dorfman & Dorfman in the amount of \$179.12, and disbursements of Mahon, Mahon, Kerins and O’Brien, LLC of \$76.00 are allowed.

There are no medical or hospital bills outstanding, and no assignments, compensation claims or liens filed with the petitioner as administrator. There are no social services claims or liens nor are there any creditors’ claims. The restrictions on the administrator’s letters are lifted, giving him full authority to execute any and all documents necessary to effectuate the settlement on the foregoing terms.

Considering all of the factors normally considered in the fixing of attorneys' fees (*see Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY 2d 1 [1974]), the court fixes the fee of the guardian ad litem in the sum of \$1,200.00. After payment of this amount to the guardian ad litem, the net proceeds payable to Sulma Cabrera-Villatoros will be \$25,566.08.

The court denies the petitioner's request for payment to the decedent's infant daughter and sole distributee, Sulma Cabrera-Villatoros, by her mother and natural guardian, Maria Concepcion Villatoros, in the amount of \$10,000.00, pursuant to SCPA §2220. When an infant is entitled to receive the sum of \$10,000.00 or more, a guardian of the infant's property must be appointed, and a bond must be posted (SCPA §2220 [1]; *see Matter of Mede*, 177 Misc 2d 974 [Sur Ct, Kings County]). Accordingly, the balance of \$25,566.08 payable to Sulma Cabrera-Villatoros will be paid to the property guardian who has been, or will be, appointed for her.

Settle decree on five days' notice with five additional days if service is by mail.

Dated: September 20, 2016
Mineola, New York

E N T E R:

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

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