

Matter of Nhan
2018 NY Slip Op 32291(U)
August 27, 2018
Surrogate's Court, Nassau County
Docket Number: 2013-377575/A,B,C,D
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 David D. Nhan,
as Administrator of the Estate of**

DECISION

CHRISTIE M. NHAN,

**File No. 2013-377575/A,B,C,D
Dec. No. 34643**

Deceased,

**for leave to allocate and distribute the net settlement
proceeds from the claims and causes of action arising
out of the death of said decedent and to judicially
settle the account relating to the proceeds thereof.**

PRESENT: HON. MARGARET C. REILLY

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

Petition with Exhibits.	1
Waiver and Consent.	2
Attorney’s Affidavit.	3
Attorney’s Supplemental Affidavit.	4
Attorney’s Affirmation.	5
Account & Accounting	6
Report of Guardian ad Litem.	7
Supplemental Report of Guardian ad Litem.	8
Amended Report of Guardian ad Litem.	9
Affirmation of Services of Guardian ad Litem.	10

In this uncontested proceeding for leave to allocate and distribute the net proceeds of causes of action for conscious pain and suffering and wrongful death, the petition seeks a decree: (1) allocating the net settlement proceeds from the underlying wrongful death action as follows: 85% to the wrongful death claims and cause of action and 15% to the conscious pain and suffering claims and cause of action; (2) authorizing Pegalis & Erickson, LLC, as escrow agent, to pay and distribute (from the escrow funds which will be received and held by Pegalis & Erickson, LLC, pursuant to the wrongful death compromise order dated

9/29/17), a sum to be determined by the court to the court-appointed guardian ad litem for her fee for services on behalf of the infant/minor distributee Ellie Nhan (said fee to be paid from the petitioner's share of the recovery herein); (3) apportioning the total distributive shares of the net wrongful death and conscious pain and suffering settlement proceeds from the underlying action (based on the petitioner David D. Nhan's voluntary reduction of his distributive share for the benefit of his daughter, the infant distributee Ellie Nhan) as follows: \$1,169,905.00 to David D. Nhan, as the decedent's surviving spouse and \$1,000,000.00 to Ellie Nhan, as the decedent's daughter; (4) authorizing Pegalis & Erickson, LLC, as escrow agent, to pay and distribute (from the escrow funds which will be received and held by Pegalis & Erickson, LLC, pursuant to the wrongful death compromise order dated 9/29/17), the sum of \$1,169,905.00 (less the guardian ad litem's fee to be fixed by this court in this proceeding) to David D. Nhan, as and for his distributive share of the net wrongful death and conscious pain and suffering settlement proceeds from the underlying action; (5) authorizing, in accordance with the wrongful death compromise order dated 9/29/17 of the Supreme Court, Nassau County (McCormack, J.), periodic payments on behalf of and for the benefit of the infant Elli Nhan, the decedent's infant daughter, as and for payment of her distributive share of the net wrongful death and conscious pain and suffering settlement proceeds from the underlying action; (6) modifying the restrictions or limitations of the letters of administration issued to the petitioner to the extent necessary to carry out the provisions of such decree; (7) authorizing the petitioner to carry out the provisions of such decree; (8)

dispensing with the filing of a bond; and (9) judicially settling and allowing the petitioner's final account with respect to the total amount of such settlement.

Christie M. Nhan died intestate, a resident of Nassau County, on June 8, 2013. Decedent is survived by her spouse, David D. Nhan, who is the petitioner, and by her infant daughter, Ellie Nhan. Letters of limited administration issued to the petitioner on December 12, 2013.

On March 17, 2014, the petitioner, individually, and as administrator of the estate of the decedent, commenced a medical malpractice action in Supreme Court, Nassau County against S. Jacob Scheinerman, M.D., Robert S. Palazzo, M.D., Trupti Shah, M.D. and Long Island Jewish Medical Center, alleging that the defendants' negligence caused the decedent's injuries and death. After a trial to jury verdict for the plaintiff, the matter settled, pursuant to a "high-low" agreement, for the sum of \$3,000,000.00. By order dated September 29, 2017, Hon. James P. McCormack of Supreme Court, Nassau County approved the \$3,000,000.00 settlement with defendant Long Island Jewish Medical Center.¹ The settlement consisted of up-front funds of \$2,000,000.00, plus the sum of \$1,000,000.00 for the cost of two structured settlement annuities for the benefit of the infant daughter of the decedent. By that same order, the court also fixed and approved attorneys' fees for petitioner's counsel in the sum of \$723,301.00 and disbursements in the sum of \$106,794.00, for a total of \$830,095.00, leaving net settlement proceeds of \$2,169,905.00.

¹ The claims against the individual defendant physicians had been discontinued, with prejudice.

In this proceeding, the petitioner seeks to allocate and distribute the net proceeds of the settlement. Jurisdiction in this proceeding is complete. The New York State Department of Taxation and Finance has filed a waiver and consent in this proceeding. There are no other parties whose consent is necessary or who are entitled to notice of this proceeding (EPTL § 5-4.4 [a]; 22 NYCRR § 207.38 [c]). The decedent's funeral expenses have been paid and reimbursement is waived. Petitioner has also waived his right to statutory commissions herein.

Given the circumstances of the decedent's death, the petitioner's request for allocation of the net settlement proceeds 85% (\$1,844,419.25) to the cause of action for wrongful death and 15% (\$325,485.75) to the cause of action for conscious pain and suffering is approved.

The net recovery in a wrongful death action is distributed to the decedent's distributees in accordance with their anticipated years of support from the decedent in proportion to the pecuniary loss suffered by each (*Matter of Kaiser*, 198 Misc 582 [Sur Ct, Kings County 1950]). Pursuant to the *Kaiser* formula, the decedent's surviving spouse, David D. Nhan, is entitled to 69% (\$1,272,649.28) of the net wrongful death proceeds and the decedent's daughter, Ellie Nhan, is entitled to 31% (\$571,769.97) of the net wrongful death proceeds.

Pursuant to EPTL § 4-1.1 (a) (1), the petitioner, as the decedent's surviving spouse, would be entitled to \$50,000.00 and one-half of the residue of the net conscious pain and suffering proceeds (\$187,742.87), with the balance (\$137,742.88) distributed to the decedent's daughter.

However, the petitioner requests that his total share of the net settlement proceeds be reduced to \$1,169,905.00 so that his daughter may receive a total of \$1,000,000.00, to be used to purchase two annuities for \$500,000.00 each, with structured payments to commence when she becomes 18 years old.

A guardian ad litem was appointed for the decedent's daughter. In her report, the guardian ad litem finds the allocation of the net settlement proceeds acceptable and approves of the petitioner's offer to increase the value of her ward's combined share of both the wrongful death and conscious pain and suffering net proceeds. The guardian ad litem also finds that a structured settlement is suitable to satisfy her ward's share of the net settlement proceeds. However, the guardian ad litem requests a larger up front payout to her ward to ensure that her ward's college tuition and any other expenses associated with her education can be paid in full. According to the supplemental report of the guardian ad litem, the petitioner's counsel has modified the payment schedule of the Metropolitan Tower Life Insurance Company annuity to accommodate the guardian ad litem's request.

The court adopts the recommendations of the guardian ad litem and approves the distribution of the total net settlement proceeds: \$1,169,905.00 to the petitioner and \$1,000,000.00 to the decedent's daughter for the purchase of two annuities with structured payments to commence when she becomes 18 years old.

The court must set the fee for the guardian ad litem for the decedent's daughter. The affirmation of legal services submitted by the guardian ad litem indicates that the guardian ad litem expended a total of 29.6 hours on this proceeding. "The Surrogate's Court bears the

ultimate responsibility for deciding what constitutes a reasonable attorney's fee, and the evaluation of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the court” (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008] [citations omitted]; *accord*, *Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). In determining what constitutes a reasonable attorney’s fee, the court may consider factors such as “the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained” (*Matter of Szkambara*, 53 AD3d 502, 502-503 [2d Dept 2008] [citations omitted]; *see Matter of Freeman*, 34 NY2d 1 [1974]). The legal fee must bear a reasonable relationship to the size of the estate (*see Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]). These factors apply equally to an attorney retained by a fiduciary or to a court-appointed guardian ad litem (*Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Berkman*, 93 Misc2d 423 [Sur Ct, Bronx County 1978]; *Matter of Reisman*, NYLJ, May 18, 2000, at 35, col. 4 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining his or her fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]). Considering the foregoing, the court fixes the fee of the guardian ad litem in the sum of \$10,360.00. Petitioner requests that the guardian ad litem’s fee be deducted from his share of the net settlement proceeds and that request is approved.

The petitioner is not required to file a bond herein. The restrictions on the letters of administration previously issued to the petitioner shall be removed to allow him to effectuate the settlement. The account of the petitioner in this proceeding is judicially settled. The decree to be entered must set forth in detail the terms of the structured settlement.

Settle decree.

Dated: August 27, 2018
Mineola, New York

E N T E R:

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

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