

Matter of Baldwin

2018 NY Slip Op 33466(U)

December 18, 2018

Surrogate's Court, Nassau County

Docket Number: 2015-387081/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 Jane Baldwin as
Administrator of the Goods, Chattels and Credits
which were of**

DECISION

**File No. 2015-387081/A,B,C
Dec. No. 35002**

ROBERT BALDWIN,

Deceased,

**for leave to compromise a certain cause of action for
wrongful death of the decedent and to render and have
judicially settled an account of the proceedings as
such administrator.**

PRESENT: HON. MARGARET C. REILLY

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

Petition with Exhibits.	1
Waivers and Consents.	2
Attorney’s Affidavit.	3
Attorney’s Affirmation.	4
Account.	5
Proposed Decree.	6

In this uncontested proceeding for leave to compromise a claim for the wrongful death of the decedent (EPTL 5-4.4), the petition seeks a decree (1) authorizing and empowering the administrator to compromise and settle a certain claim for the wrongful death of the decedent against Pankos Diner Corporation d/b/a Empress Diner and Midanas Corp. and Dongbu Insurance Company for the sum of \$535,000.00 and to discontinue the action for conscious pain and suffering; (2) allocating the entire recovery of \$535,000.00 to the cause of action for the decedent’s wrongful death; (3) modifying the provisions in the letters of administration

heretofore issued to the petitioner on December 16, 2015 to permit said compromise; (4) dispensing with the filing of a bond; (5) judicially settling the account of Jane Baldwin, as administrator in this proceeding; (6) directing defendant Pankos Diner Corporation d/b/a Empress Diner and Midanas Corp. and Dongbu Insurance Company to pay to The Bongiorno Law Firm PLLC out of the proceeds of the settlement for the claim of wrongful death, the sum of \$118,888.89 and to referring attorney David Mayer, Esq. the amount of \$59,444.44, as and for attorneys' fees, together with disbursements of \$10,854.08, payable to The Bongiorno Law Firm PLLC; (7) directing the defendant to pay \$124.19 to CMS in settlement of its lien and \$31,021.70 to Equian in settlement of its lien; (8) distributing the balance of the settlement, to wit, the sum of \$317,416.70 to Jane Baldwin, the surviving spouse of the decedent Robert Baldwin; and (9) upon payments as hereinbefore mentioned by the said Pankos Diner Corporation d/b/a Empress Diner and Midanas Corp. and Dongbu Insurance Company, the petitioner, as the administrator of the goods, chattels and credits that were of Robert Baldwin, deceased, shall execute and deliver to the said Pankos Diner Corporation d/b/a Empress Diner and Midanas Corp. and Dongbu Insurance Company, a full, final and complete release in the claim against them arising out of the aforesaid cause of action, together with any other papers necessary to effectuate said compromise.

The decedent, Robert Baldwin, died intestate, a resident of Nassau County, on September 8, 2015, survived by his wife and an adult daughter. Letters of limited administration issued to the petitioner on December 16, 2015 and the decedent's daughter filed a waiver and consent in this proceeding. The New York State Department of Taxation and Finance also 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 suffered head injuries when he slipped and fell at the Empress Diner on January 22, 2013. His death on September 8, 2015 was a result of the injuries he suffered in that fall. An action was commenced in Supreme Court, Nassau County on behalf of the decedent against Pankos Diner Corporation d/b/a Empress Diner and Midanas Corp. After mediation, \$535,000.00 was offered in settlement of the claim arising from the accident.

Under the circumstances of the accident, compromise of the claim for the sum of \$535,000.00 is approved. There being no objection, allocation of the proceeds of the settlement solely to the wrongful death claim is approved.

The retainer agreement entered into between the petitioner and counsel provides for attorneys' fees of 33 1/3% of the gross sum recovered, plus costs and disbursements (22 NYCRR § 691.20 [e]). Counsel is entitled to attorneys' fees of \$178,333.33. The petition seeks to divide the attorneys' fees two-thirds to The Bongiorno Law Firm PLLC in the sum of \$118,888.89 and one-third to referring attorney David Mayer, Esq. in the sum of \$59,444.44. 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 (*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 Koepfel*, 85 NY2d 549, 556 [1995]). There is no proof offered as to the services provided by the referring attorney, accordingly, the

court cannot approve payment of fees to him and the entirety of the approved attorneys' fees shall be payable to The Bongiorno Law Firm PLLC.

Petitioner's counsel seeks reimbursement of disbursements in the sum of \$10,854.08, however, that sum includes charges for postage and photocopies. With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]. In *Matter of Corwith* (NYLJ, May 3, 1995 at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994 at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance. Accordingly, the amount of disbursements for which petitioner's counsel may be reimbursed is \$10,223.48.

The decedent's funeral expenses have been paid in full and no reimbursement is sought. The petitioner has waived her right to statutory commissions. The only known liens against the estate are in the amount of \$124.19 from CMS owed to Medicare and \$31,021.70 owed to Equian. Both claims shall be paid from the proceeds of the settlement. There are no other known liens against the estate.

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]). Accordingly, the balance of the net proceeds of the settlement of \$315,297.30 shall be paid to Jane Baldwin, as the surviving spouse of the decedent.

The petitioner is not required to file a bond herein. The account of the petitioner is judicially settled. The restrictions on the letters of administration previously issued to the petitioner shall be removed to allow her to effectuate the settlement.

The decree submitted has been reviewed, found to be in proper order, and will be signed, as corrected.

Dated: December 18, 2018
Mineola, New York

E N T E R:

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

cc: Ellen Durst-Blair, Esq.
The Bongiorno Law Firm, PLLC
1415 Kellum Place, Suite 205
Garden City, New York 11530