

Pena v Bronx-Lebanon Hosp. Ctr.
2008 NY Slip Op 33682(U)
April 21, 2008
Supreme Court, Bronx County
Docket Number: 21294/02
Judge: Mary Ann Brigantti-Hughes
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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 15**

Present: Honorable Mary Ann Brigantti-Hughes

HENDRICK PENA, an infant, by his Mother and
Natural Guardian, YANIRIS MEDRANO and
YANIRIS MEDRANO, Individually,

Plaintiffs,

-against-

BRONX-LEBANON HOSPITAL CENTER,

Defendants.

DECISION/ORDER

Index No.: 21294/02

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The following papers numbered 1 to 2 were read on this motion.

Papers Submitted
Motion & Exhibits
Supplemental Affirmation &
Affirmation of Legal Services

Numbered
1
2

Upon the foregoing papers, Evelio Gabriel Pena moves for an Order amending the infant compromise order dated June 21, 2004 and substituting himself as the father and natural guardian of the infant Plaintiff Hendrick Pena, in place of the infant mother and natural guardian Yaniris Medrano and for the partial withdrawal of funds for the following: \$20,000 for past day care, \$10,000 for the funeral expenses of the infant mother Yaniris Medrano, \$1500 per month stipend for the care, maintenance and support of the infant Plaintiff, of which \$140 per month to be used for medical insurance and \$8,125 for attorneys fees.

The medical malpractice action was commenced by Plaintiffs for injuries sustained by the infant Plaintiff during his delivery. An amended infant compromise order established a structured settlement trust and settled the case for \$975, 000 of which \$236,318.28 was paid to attorneys and \$738,681.72 was paid to Northern Trust Company of New York as Trustee.

An unsworn letter from Northern Trust dated September 25, 2007, was included in the instant application for withdrawal which stated that the current market value of the infant's trust is \$768,799.58. The Court searched the file for an accounting or a statement which would indicate why the market value of the trust fund increased only \$30, 117.86 which, in a period of three years, amounts to a rate of return of less than 1½ % per year. A regular savings account would have provided a greater return on investment. In searching the record, the Court found that the Infant Compromise Order and Trust did not contain any language for an accounting. The concept that trusts are subject to annual accountings to be approved by the Court is well-established. *In Re Felice*, 1 Misc.3d 909 (A) (Supr. Ct. Suffolk Co. 2004), *DiGennaro v Community Hospital of Glen Cove*, 204 AD2d 259 (2nd Dept. 1994) and *Stortecky v Mazzone*, 85 NY2d 518 (1995). As such, the Court finds that an annual accounting is necessary.

In addition, the Court notes that this is the third application by the movant for the requested relief. The moving papers and decision for the first application, which was made in New York County Supreme Court, was not attached and the attorney's affirmation merely stated that the request was "inexplicably denied." The second application, which was made to a different Justice of the Bronx County Supreme Court, was denied due to an evidentiary discrepancy regarding the infant Plaintiff's place of residence but was clarified in the instant application. Although the failure to provide the pleadings from its first application is sufficient cause to deny the instant application, the Court hereby **denies** the instant application for the additional reasons stated herein.

The Court has a duty to protect the assets of a trust created by an infant compromise order. *See Leon v. Walker*, 1 Misc.2d 219 (Supr. Ct. NY Co. 1955); "a minor is entitled to

receive from the court all available and necessary protection in the preservation of the fund” and *Matter of Groom*, 203 Misc 574 (Yates Co. Ct. 1952); the duty of protecting the infant’s settlement “should be scrupulously discharged.” As such, the evidentiary and substantiation requirements for an approval for withdrawal of funds are rigorous. The infant compromise order designates that the trust provide for medical needs, medical insurance, educational and life needs which are related to the infant Plaintiff’s disability. Withdrawal requests must be strictly scrutinized to insure that the proposed purposes meet the requirements provided in the infant compromise order.

Once a settlement for an infant’s injuries has been made, the courts have properly declined to permit the money to be used for the infant’s or infant’s family necessities. *Marsh v LaMarco*, 46 AD2d 888 (2nd Dept. 1974). Therefore, that portion of the application requesting withdrawal of \$10,000 for the funeral expenses of the infant mother Yaniris Medrano is **denied**. The funeral expenses, which have already been paid, should have been borne by the movant who, in the moving papers, pronounced himself as the common law husband and was living with the decedent Plaintiff as domestic partners at the time of her death. As infant compromise trust funds are not to be used for family necessities and the fact that funeral expenses for Yaniris Medrano is not an approved purpose in the infant compromise order, no withdrawal for funeral expenses for a person other than infant Plaintiff may be made.

When a person decides to have children, he bargains for and accepts the responsibility of meeting that child’s everyday needs including food, education, medical, clothing and shelter. It is the primary duty of the parent to support a child. *Laumeier v Laumeier*, 237 NY 357 (1924); said duty should not be shifted to the infant. *Conigliaro v Rosa*, 24 Misc.2d 15 (Supr. Ct. Nassau Co.

1960). "The withdrawal of funds requires clear proof of the inability of the parents to supply funds needed for the infant's sole use and benefit in order to equalize or lessen the consequences of the infant's injuries." *Smith v Lavine*, 78 Misc2d 776 (Supr. Ct. Monroe Co 1973) and *Matter of Groom*, *supra* at 576. The movant failed to establish that the requested amount was necessary to provide for the infant Plaintiff's needs that arose as a result of his injury and disability and not just for the infant's everyday needs that should be the parent's responsibility. In addition, there was no documentation as to past day care costs and the type of care provided to the infant Plaintiff. As such, that portion of the application seeking \$1500 per month for the care, maintenance and support and \$20,000 for past day care of the infant Plaintiff is **denied**.

That portion of the application which seeks \$140 per month to be used for medical insurance is **denied** as the movant has failed to provide documentation and specifics as to the intended medical insurance and whether the child is covered by medicaid.

That portion of the application seeking substitution of the Plaintiff decedent Yaniris Medrano with Evelio Gabriel Pena as the father and natural guardian of the infant Plaintiff Hendrick Pena is hereby **denied** as the supporting documentation was uncertified and insufficient.

That portion of the application which seeks an exorbitant \$8,125 compensation in attorney fees for three applications is hereby **denied**. All too often, attorneys, in their moving papers, provide excessive documents or their evidentiary submissions fall far below the minimum standard, both of which frustrate the Court and wastes judicial resources. As such, the Court does not see fit to compensate the attorney for his own failure to provide the necessary substantiation and documentation, especially given that fact that he's had three chances to get it

right. Accordingly, it is hereby

Ordered, Evelio Gabriel Pena's application is hereby **denied** in its entirety, and it is further

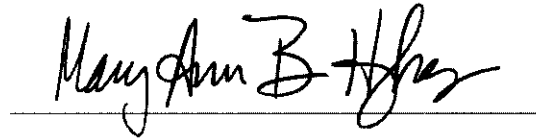
Ordered, that Northern Trust Company of New York as Trustee shall provide an annual accounting of the Hendrick Pena Trust to this Court, and it is further

Ordered, that Northern Trust Company of New York as Trustee shall provide an accounting of the Hendrick Pena Trust to this Court within 60 days of this Order and it is further

Ordered, that the movant, by its attorney, serve Northern Trust Company of New York a copy of this Decision with Notice of Entry.

This constitutes the Decision and Order of this Court.

Dated: April 21, 2008



Hon. Mary Ann Brigantti-Hughes, J.S.C

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