

Matter of Rodriguez

2016 NY Slip Op 30165(U)

January 28, 2016

Surrogates Court, New York County

Docket Number: 2002-3747/A/B/C

Judge: Rita M. Mella

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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 NEW YORK

New York County Surrogate's Court

Date: JANUARY 28, 2016

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In the Matter of the Petition of Diana Rodriguez,
as Administrator of the Goods, Chattels and Credits Which
Were of

ROBERT RODRIGUEZ,

DECISION

Deceased,

File No.: 2002-3747/A/B/C

For Leave to Compromise Causes of Action for the
Wrongful Death and Conscious Pain and Suffering
of the Decedent and to Judicially Settle the Petitioner's
Account.

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M E L L A, S.:

The 48-year-old decedent, Robert Rodriguez, was struck and killed instantly as a pedestrian at the corner of 86th Street and Avenue U in Brooklyn on March 10, 2002, when two cars collided. At the time of his death, he was employed as a porter earning \$21,000 per year. Decedent's surviving spouse obtained limited letters of administration and sued the two defendants for decedent's wrongful death. She petitions here for approval of a proposed compromise of a wrongful death action, and to allocate and account for the proceeds. In addition to his spouse, decedent was survived by two children, one, Robert James Rodriguez ("Robert"), an adult, and the other, Nicholas Jay Rodriguez ("Nicholas"), a minor, for whom a *guardian ad litem* was appointed. The *guardian ad litem* raised several issues regarding the proposed distribution, which includes a structure for future payments, but these were resolved by a stipulation, which the *guardian ad litem* requests court authorization to enter into on behalf of his ward. That authorization is granted to the *guardian ad litem*, as discussed in further detail below.

A settlement in principle of the underlying wrongful death action was reached in 2004.

One defendant's insurer, Allstate Insurance Company, offered \$250,000 in settlement, while the other defendant's insurer, Newark Insurance Company, had offered the limit of its policy, or

\$50,000. The Newark Insurance Company, however, filed for bankruptcy protection shortly thereafter. It was Newark Insurance Company's bankruptcy that petitioner's attorneys claim delayed this matter for several years. Pursuant to Article 76 of the Insurance Law, respondent New York Liquidation Bureau has confirmed that the Superintendent of Financial Services (formerly known as the Superintendent of Insurance) will pay the \$50,000 policy limit that Newark Insurance Company offered before its insolvency.

In light of all the circumstances, the proposed compromise is approved. Several issues regarding distribution of the proceeds and approval of attorney's fees, however, require discussion.

When the settlement was first contemplated in 2004, Allstate funded two \$50,000 annuities, one for each of decedent's children. The \$50,000 used to fund the annuity for decedent's adult child, Robert, however, is more than the petition requests be distributed to him as pecuniary damages from his father's death under *Matter of Kaiser* (198 Misc 582 [Sur Ct, Kings County 1950]). Both annuities earned interest – which was accumulated because there was never a petition to approve the compromise until the one currently before the court. The annuity for the minor, however, provided for four annual payments to him commencing only on August 6, 2016. The four installments in Robert's annuity were paid on April 5th of 2008, 2009, 2010 and 2011. Petitioner's counsel held Robert's checks in their office, inasmuch a petition for approval of the compromise had not been filed.

Robert's share of the wrongful death proceeds is based on an agreement of the parties as to the particular percentages that constitute each distributee's relative share of the proceeds based on their pecuniary damages. This stipulation, filed with the court and signed by Robert, provides

that the surviving-spouse petitioner's share is 53.7738%,¹ that Robert's share is 15.8345%, and that the minor's share is 30.3917%. These percentages vary slightly from those proposed in the petition and represent a slight increase in the minor's share.

Petitioner's attorneys request, as fees, one-third or \$99,676.66 of the proceeds after payment of \$970 in out-of-pocket disbursements, pursuant to their retainer. Statutory commissions are not sought, and there are no other claims or debts. This leaves \$199,353.34, of which Robert's 15.8345% share, as agreed to in the stipulation of settlement, is \$31,566.60.

Because the entirety of \$50,000 that funded Robert's prior annuity by Allstate was not due him, there was the further issue of how to distribute the \$10,769.48 in interest that that annuity earned during the pendency of this proceeding. The stipulation among the parties resolves this issue as well, providing that Robert will receive 63.13% or \$6,798.77 of that interest, that Nicholas gets 21.18% or \$2,280.98 of this interest, while petitioner takes the remaining 15.69% or \$1,689.73.

One other issue deserves discussion. After the settlement in principle was reached and while his annuity checks were being held by petitioner's attorneys, Robert sought an advance on the settlement proceeds from two legal funding entities. To make Robert whole, petitioner's attorneys have agreed in the stipulation to pay Robert, from the attorney's fees fixed herein, any interest charged to him by these two entities, in order to ensure that he receives \$38,365 otherwise due him in this proceeding. Counsel has also agreed to pay Robert from their fees "5% interest on any portion of said sum not paid to [Robert] from the time payment was due to be

¹In the stipulation filed with the court, as a result of a typographical error, this figure is stated as 55.7738%

paid on each periodic payment [of Robert's share of the prior annuity] until such payment was or is made."

The attorneys have further stipulated to pay 5% interest on both the share of Robert's prior annuity which has been allocated to Nicholas and the share of that annuity allocated to petitioner "from the time each periodic payment was due until payment is made."

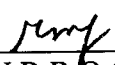
On condition of these agreements by petitioner's attorney, the court will approve the attorney's fees as requested. The disbursements of counsel are appropriate and allowed.

Accordingly, the petition, as modified by the stipulation, is granted, and the account is settled. The restrictions on the letters issued by this court are removed, and the administrator is authorized to collect the compromise proceeds and to execute such receipts and releases as may be required. Petitioner has agreed that the compensation of the *guardian ad litem*, fixed in the decree, is to be paid from petitioner's individual share of the proceeds.

The net proceeds, which are allocated to the claim of wrongful death, shall be distributed in the percentages set forth in this decision (*see* EPTL 5-4.4[a][1]), and the interest from the prior annuity for decedent's son Robert shall be paid in the percentages also set forth herein. In addition to the structured settlement for part of Nicholas' share, he is to be paid a sum outright as well as interest by petitioner's attorneys as set forth above. These amounts shall be paid to the guardian of Nicholas' property, jointly with the clerk of the court.

Decree signed. Clerk to notify.

Dated: January 28, 2016



SURROGATE