

Matter of Roberti

2017 NY Slip Op 30354(U)

February 6, 2017

Surrogate's Court, Nassau County

Docket Number: 2013-373139/A

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Application of Elizabeth T. Woods Roberti
as the Executor of the Estate of**

ROY B. ROBERTI,

Deceased,

DECISION

**File No. 2013-373139/A
Dec. No. 32502**

**for leave to compromise a certain cause of action for personal
injury and wrongful death of the decedent and to allocate
and distribute the net settlement proceeds for the wrongful
death and personal injury of the decedent and to render and
have judicially settled an account of the proceedings as
such Executor.**

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PRESENT: HON. MARGARET C. REILLY

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

Petition with Exhibits.	1
Attorney’s Affirmation.	2
Supplemental Attorney’s Affirmation.	3
Waivers and Consents (3).	4
Citation.	5
Proof of Service of Citation.	6
Account.	7
Report of Guardian Ad Litem.	8

In this proceeding for leave to compromise a cause of action for wrongful death and conscious pain and suffering the petitioner seeks a decree: (1) authorizing the executor, the decedent’s wife, to compromise the cause of action as against the defendants Randy Geller, D.M.D. and the Geller Dental Group, P.C. for the sum of \$1,500,000.00; (2) dispensing with the filing of a bond; (3) fixing attorneys’ fees and disbursements; (4) allocating the gross recovery of \$2,565,000.00, which includes a settlement against other defendants previously

approved by Supreme Court, Nassau County, 50% to the cause of action for wrongful death and 50% to the cause of action for conscious pain and suffering; (5) distributing the conscious pain and suffering portion of the recovery to the executor for distribution pursuant to the decedent's last will and testament; (6) distributing the wrongful death portion of the recovery pursuant to *Matter of Kaiser*; and (7) settling the account of the executor.

At the time of his death on December 8, 2012, the decedent Roy B. Roberti was a married father of three infant children, two of whom have since attained the age of majority. The interests of the third child are being represented by a guardian ad litem appointed by this court. The decedent's death was the result of alleged dental malpractice in that the defendants failed to diagnose and treat the decedent's oral squamous cell carcinoma. A cause of action for personal injuries was commenced during the decedent's lifetime and after his death the cause of action for wrongful death was added. The cause of action as against several of the named defendants was settled, resulting in a compromise order that issued from Supreme Court, Nassau County, Hon. Norman Janowitz, on May 17, 2016, that approved the adequacy of the settlement of \$1,065,000.00 as against those defendants, and fixed attorney's fees in the sum of \$246,023.00, plus disbursements of \$8,180.00, leaving the sum of \$810,797.00 to be distributed pursuant to the order of this court.

The executor has now reached agreement with the remaining defendants and seeks approval to settle that portion of the case for an additional \$1,500,000.00. The decedent's two adult children have executed and filed waivers and consents agreeing to all terms of the

proposed settlement. The guardian ad litem appointed to represent the interests of the infant child has filed his report wherein he also consents to the entry of a decree approving the settlement. Finally, the New York State Department of Taxation and Finance has also filed a waiver and consent. There are no other parties whose consent is required or who are entitled to notice of this proceeding.

Accordingly, the compromise in the total sum of \$2,565,000.00 is approved as is the allocation of the recovery 50% to the cause of action for wrongful death and 50% to the cause of action for conscious pain and suffering. Attorney disbursements incurred up to the time of the settlement of the action as to the first group of settling defendants were fixed by Supreme Court order in the sum of \$8,180.00. Since that time additional disbursements have been incurred, including the filing fee for this proceeding, totaling \$3,438.00, all of which are allowed, for a combined total of disbursements of \$11,618.00. The net recovery against which attorneys' fees are to be calculated pursuant to Judiciary Law § 474-a is therefore \$2,553,382.00. Attorneys' fees are therefore allowed in the sum of \$405,338.00, plus allowable disbursements of \$11,618.00, for a total of \$416,956.00.

The guardian ad litem avers that he spent 4 hours on this proceeding and that his customary billing rate is \$325.00 per hour. Being cognizant of the fees customarily sought and awarded in similar proceedings, the court fixes the fee of the guardian ad litem in the sum of \$1,300.00.

Of the net recovery of \$2,146,744.00, 50%, or the sum of \$1,073,372.00, representing

the share allocated to the cause of action for conscious pain and suffering, shall be paid to the executor for distribution pursuant to the decedent's last will and testament. The remaining sum of \$1,073,372.00, representing the share allocated to the cause of action for wrongful death, shall be allocated among the decedent's distributees in accordance with their estimated pecuniary loss pursuant to the formula established in *Matter of Kaiser* (198 Misc 582 [Sur Ct, Kings County 1950]). Here, the surviving spouse's period of anticipated support from the decedent is 31.26 years. Because a parent is financially responsible for a child until that child attains the age of 21 (Family Court Act § 413 [1][a]; *see also Matter of Acquafredda*, 189 AD2d 504, 506 n 1 [2d Dept 1993]), the *Kaiser* calculation period begins at the death of the parent and ends at the child's twenty-first birthday. Accordingly, the surviving spouse is entitled to 69.06% of the net recovery, or the sum of \$741,270.70. The decedent's son Luke is entitled to 1.1% thereof, or the sum of \$11,807.10; the decedent's daughter Joan is entitled to 12.34% thereof, or the sum of \$132,454.10; and the decedent's son Mark is entitled to 17.50% thereof, or the sum of \$187,840.10.

The share of the infant child Mark shall be paid to the guardian of his property.

Settle decree.

Dated: February 6, 2017
Mineola, New York

E N T E R :

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

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