

Matter of Stafford

2018 NY Slip Op 32293(U)

August 29, 2018

Surrogate's Court, Nassau County

Docket Number: 2015-382730/A

Judge: Margaret C. Reilly

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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 NASSAU**

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Greg Stafford, as Executor of the Estate of

DECISION

**CONSTANCE STAFFORD,
a/k/a CONSTANCE MARTIN,**

**File No. 2015-382730/A
Dec. No. 34745**

Deceased,

**for leave to compromise causes of action for conscious
pain and suffering endured by her and to judicially
settle the account.**

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PRESENT: HON. MARGARET C. REILLY

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

Amended Petition with Exhibits.....	1
Waivers and Consents	2
Attorney’s Affirmation of T. Agoglia in Support.. . . .	3
Attorney’s Supplemental Affirmation of T. Agoglia in Support.	4
Attorney’s Affirmation of O. Dekajlo in Support.. . . .	5
Attorney’s Affirmation of Services.	6

In this uncontested proceeding for leave to distribute the proceeds of a personal injury action, the amended petition seeks a decree: (1) permitting the petitioner to disburse settlement funds in the amount of \$225,000.00 paid by Allstate Insurance Company; (2) allocating the entire settlement to the conscious pain and suffering of the decedent; (3) approving the disbursement of the funds of the estate of the decedent in accordance with the stipulation agreement executed by all of the decedent’s distributees and consistent with the court decree; (4) dispensing with the filing of a bond; and (5) to render and judicially settle the account of the executor through the payment of the balance of the settlement funds as follows: Department of Health and Human Services, Centers for Medicare and Medicaid

Services \$57,000.00; Law Offices of Thomas A. Agoglia \$78,236.41; Dekajlo Law Offices \$6,000.00; Estate of James Martin, Sr. \$27,921.20; Gregory Stafford \$18,614.13; Kenneth Stafford \$18,614.13 and John Stafford \$18,614.13.

Constance Stafford-Martin, also known as Constance M. Stafford-Martin and Constance Martin, died a resident of Nassau County on November 16, 2013. Decedent was survived by her spouse, James M. Martin, Sr., who post-deceased her on August 24, 2014, and by her adult children: Gregory Stafford, Kenneth Stafford and John Stafford. The decedent's last will and testament dated October 15, 2012, was admitted to probate by decree of this court dated February 6, 2015 and letters testamentary issued that same date to Gregory Stafford, the petitioner herein. The decedent's will provides that her residuary estate is to be distributed as follows: 45% each to Gregory Stafford and Kenneth Stafford and 10% to John Stafford.

A personal injury action was commenced on behalf of the decedent and her husband in Supreme Court, Nassau County against Joseph Moran, resulting from the decedent's trip and fall on September 5, 2009. The defendant's insurer, Allstate Insurance Company, offered \$225,000.00 in settlement of the action. By order dated February 18, 2015, Hon. Anthony L. Parga of Supreme Court, Nassau County approved the settlement and approved attorneys' fees in the sum of \$73,271.77 and reimbursement of disbursements in the sum of \$4,964.64, leaving the balance of \$146,763.59 to be distributed pursuant to the decree of this court.

Waivers and consents to this proceeding have been filed by James Martin, Jr., the administrator of the estate of the decedent's post-deceased husband; by each of the decedent's three children; and by the New York State Department of Taxation and Finance.

Since the decedent did not die as a result of the injuries she sustained in the subject accident, allocation of the proceeds of the settlement solely to the cause of action for conscious pain and suffering is appropriate.

The Center for Medicare & Medicaid Services (CMS) has agreed to accept \$57,000.00 as full payment for its claim against the estate of the decedent and that amount shall be paid to CMS from the net settlement proceeds. There are no other known liens or claims. The funeral expenses have been paid in full and no reimbursement is sought. Petitioner does not seek his statutory commissions.

Petitioner's counsel, the Dekajlo Law Offices, seeks an additional \$6,000.00 in attorneys' fees for this matter. By stipulation, the administrator of the estate of the decedent's late husband and each of the decedent's three adult sons have agreed to payment of this additional fee. The order of the Supreme Court, Nassau County approving the settlement of the underlying personal injury action, has already approved attorneys' fees of one-third of the net settlement amount.

Contingent fees in personal injury and wrongful death actions are limited by court rule (22 NYCRR § 691.20 [e]) and generally are not to exceed one-third of the recovery. Where counsel has provided necessary legal services for the administration of the estate, a fee may

be awarded for those services in addition to the contingent fee, but where those services relate to the underlying cause of action, which is the only asset of the estate, they are deemed to be part of the one-third retainer (*Matter of Bender*, 50 Misc 3d 1207 [A][Sur Ct, Broome County 2015]). Here, the only asset of the estate is the recovery from the personal injury action and the appointment of a personal representative was a necessary condition to the resolution of the personal injury action (EPTL § 11-3.2 [b]). The request for the payment of an additional sum of \$6,000.00 to petitioner's counsel for probate of the decedent's estate is **DENIED**, even though no party objects.

By stipulation, the administrator of the estate of the decedent's late husband and each of the decedent's three adult sons have also agreed that the net settlement proceeds, after payment of attorneys' fees and disbursements and after payment of the CMS lien, be distributed as follows: estate of James M. Martin, Sr. (33.33%) \$27,921.20; Gregory Stafford (22.22%) \$18,614.13; Kenneth Stafford (22.22%) \$18,614.13; and John Stafford (22.22%) \$18,614.13. Although not clearly set forth in the papers, the proposed distribution to the estate of the decedent's surviving spouse is apparently in recognition of his personal claim for damages as the result of the injury to his wife, the decedent. As such, and on the consent of the decedent's executor, that distribution is approved. However, and despite the parties' agreement, this court declines to approve a distribution of the net estate among the decedent's three children in contravention of the terms of the decedent's will.

The balance of the settlement which is exclusively allocated to conscious pain and suffering, to wit, the sum of \$55,842.39, is to be distributed to Gregory Stafford, as executor

of the estate of the decedent to be distributed in accordance with the terms of the decedent's last will and testament.

The petitioner is not required to file a bond herein. While the petition seeks judicial settlement of the executor's account, no account was submitted to the court with this application and that prayer for relief is therefore **DENIED**.

Settle decree.

Dated: August 29, 2018
Mineola, New York

E N T E R:

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

cc: Thomas Agoglia, Esq.
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