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| <b>Matter of Storer</b>                                                                                                                                                                                                        |
| 2018 NY Slip Op 32630(U)                                                                                                                                                                                                       |
| August 28, 2018                                                                                                                                                                                                                |
| Surrogate's Court, Nassau County                                                                                                                                                                                               |
| Docket Number: 2015-386346/D,E,F                                                                                                                                                                                               |
| 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**

**In the Matter of the Application of LUCILLE MARY  
STORER, as Administrator of the Goods, Chattels and  
Credits which were of**

**DONALD W. STORER,**

**Deceased,**

**for leave to compromise certain causes of action for  
conscious pain and suffering and 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**

**DECISION**

**File No. 2015-386346/D,E,F  
Dec. No. 34898**

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

|                                                              |   |
|--------------------------------------------------------------|---|
| Petition with Exhibits.. . . .                               | 1 |
| Citations with Proofs of Service. . . . .                    | 2 |
| Waivers and Consents. . . . .                                | 3 |
| Attorney’s Affirmations (5).. . . .                          | 4 |
| Accounting.. . . .                                           | 5 |
| Notice of Appearance of Guardian ad Litem.. . . .            | 6 |
| Report of Guardian ad Litem with Exhibits.. . . .            | 7 |
| Affirmation of Legal Services of Guardian ad Litem . . . . . | 8 |
| Proposed Decree. . . . .                                     | 9 |

In this proceeding for leave to settle and compromise an action for conscious pain and suffering and wrongful death, the petitioner, Lucille Mary Storer, seeks a decree authorizing her to: (1) distribute and allocate the net settlement proceeds of \$55,200.76, derived from the gross settlement with the defendant, Takeda Pharmaceuticals-Actos-NY in the sum of \$85,362.00 and approve attorneys’ fees totaling \$28,454.00 of which Weitz & Luxenburg,

P.C. is receiving \$21,112.87 and \$7,341.13 (8.6%) is paid to the MDL Common Benefits Fund, and \$1,707.24 to be paid to the Court Ordered Common Benefits Costs, leaving net settlement proceeds of \$55,200.76; (2) allocate 100% of the net settlement proceeds to the cause of action for conscious pain and suffering, dismissing the cause of action for wrongful death against the defendant, Takeda Pharmaceuticals-Actos-NY; (3) allocate the net sum of \$55,200.76, the net conscious pain and suffering settlement proceeds, to be distributed in accordance with EPTL § 4-1.1, to: Lucille Mary Storer, as and for her share as spouse and distributee of the decedent, \$27,600.38; Donald James Storer, as and for his share as issue and distributee of the decedent, \$6,900.09; Jamie Anne Storer, a/k/a Jamie Corsitto, as and for her share as issue and distributee of the decedent, \$6,900.09; Leslie Catherine Faber, a/k/a Leslie Catherine Storer, as and for her share as issue and distributee of the decedent, \$6,900.10; Jason Storer, as and for his share as issue and distributee of Peter W. Storer, decedent's predeceased issue, \$985.73; Felicity Storer, as and for her share as issue and distributee of Peter W. Storer, decedent's predeceased issue, \$985.73; Timothy Storer, as and for his share as issue and distributee of Peter W. Storer, decedent's predeceased issue, \$985.73; Cera Storer, as and for her share as issue and distributee of Peter W. Storer, decedent's predeceased issue, \$985.73; Bryan Storer, as and for his share as issue and distributee of Peter W. Storer, decedent's predeceased issue, \$985.73; Angelique Storer, as and for her share as issue and distributee of Peter W. Storer, decedent's predeceased issue, \$985.73; Michael Storer, as and for his share as issue and distributee of Peter W. Storer,

decedent's predeceased issue, \$985.72; for a total of \$55,200.76; (4) discontinue the cause of action for wrongful death; (5) remove and/or modify the restrictions in the limited letters of administration issued to Lucille Mary Storer, petitioner, as the administrator of the decedent's estate, to the extent necessary to carry out the provisions of such decree; (6) dispense with the filing of a bond; (7) discontinue this action against the defendant, Takeda Pharmaceuticals-Actos-NY; and (8) judicially settle and allow the petitioner's account with respect to the total amount of \$85,362.00.

Donald W. Storer died intestate, a resident of Nassau County, on October 18, 2014. He was survived by: his spouse, Lucille Mary Storer; three children, Donald James Storer, Jamie Anne Storer, a/k/a Jamie Corsitto, and Leslie Catherine Faber, a/k/a Leslie Catherine Storer; and the seven children of Peter W. Storer, his predeceased son: Jason Storer, Felicity Storer, Timothy Storer, Cera Storer, Bryan Storer, Angelique Storer, and Michael Storer. On January 29, 2016, limited letters of administration issued to Lucille Mary Storer, the petitioner.

In her capacity as administrator, the petitioner commenced an action against the defendant, Takeda Pharmaceuticals-Actos-NY, in the United States District Court, Western District of Louisiana, alleging that the decedent's death resulted from taking the drug Actos to treat his diabetes. The action resulted in a settlement awarded through the Notice of Point Award from the National Actos Settlement Program, which requires that a Multi-District Litigation (MDL) fee of 8.6% be paid to the MDL Common Benefits Fund from attorneys'

fees, and 2.0% be paid from the client's net settlement. These terms have been approved by the federal judge overseeing this settlement program.

The adequacy of the settlement from Takeda Pharmaceuticals-Actos-NY in the total amount of \$240,750.00 was approved by order of the United States District Court, Western District of Louisiana, and later increased to \$246,664.51. Allocation and distribution of the first settlement payment of \$161,302.51 was approved by decision of this court dated June 15, 2018 (Decision No. 34506). This proceeding seeks approval of the allocation and distribution of the second and third payments, which total \$85,362.00.

All of the decedent's distributees have either been served with citation or filed waivers and consents. A waiver and consent has been filed by the New York State Department of Taxation and Finance. 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]).

A guardian ad litem was appointed by this court to represent the interests of two of the distributees, Bryan Storer, an incarcerated individual, and Michael Storer, an incapacitated individual, who are two of the seven children of Peter W. Storer, the decedent's predeceased son. The guardian ad litem reports that she has no objection to the petition and the settlement of the petitioner's account as it relates to the settlement with the defendant. On behalf of her wards, the guardian ad litem consents to the relief requested by the petitioner.

In fixing the fee of the guardian ad litem, "[t]he Surrogate's Court bears the ultimate responsibility for deciding what constitutes a reasonable attorney's fee, and the evaluation of

what constitutes a reasonable attorney's fee is a matter within the sound discretion of the court” (*Matter of Goliger*, 58 AD3d 732, 732 [2d Dept 2008] [citations omitted]; *accord*, *Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). In determining what constitutes a reasonable attorney’s fee, the court may consider factors such as “the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained” (*Matter of Szkambara*, 53 AD3d 502, 502-503 [2d Dept 2008] [citations omitted]; *see Matter of Freeman*, 34 NY2d 1 [1974]). The legal fee must bear a reasonable relationship to the size of the estate (*see Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]).

The guardian ad litem is entitled to a fee for services rendered (SCPA 405). The factors listed above apply equally to an attorney retained by a fiduciary or to the court-appointed guardian ad litem (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Burk*, 6 AD2d 429 [1st Dept 1958]; *Matter of Reisman*, NYLJ, May 18, 2000, at 35, col 4 [Sur Ct, Nassau County]). Moreover, the nature of the role played by the guardian ad litem is an additional consideration in determining an appropriate fee (*Matter of Ziegler*, 184 AD2d 201 [1st Dept 1992]). Normally, the fee of a guardian ad litem is an administration expense of an estate and is paid from estate assets.

The guardian ad litem appointed to represent the interests of Bryan Storer and Michael Storer submitted an affirmation stating that she provided 4.6 hours of services on behalf of

her wards in connection with this proceeding. The court fixes the fee of the guardian ad litem in the amount of \$1,610.00.

Compromise of the proceeding for the gross settlement amount of \$85,362.00 is approved, as is the allocation of the proceeds entirely to the cause of action for conscious pain and suffering and none to wrongful death. The cause of action for wrongful death against the defendant is dismissed.

The court dispenses with the filing of a bond.

The petitioner has waived her commissions.

The gross settlement offer of \$85,362.00 and the legal fees of 33.33%, totaling \$28,454.00, of which Weitz & Luxenberg, P.C., is receiving \$21,112.87, and \$7,341.13 (8.6%) is payable to the MDL Common Benefits Fund and payment of \$1,707.24 to the Court Ordered Common Benefits Costs, were approved by the United States District Court, Western District of Louisiana. The fee for the guardian ad litem of \$1,610.00 shall be paid from the net settlement proceeds.

The petitioner is authorized to distribute and allocate the balance of \$53,590.76.

The petitioner shall distribute this amount in accordance with EPTL § 4-1.1, to:

Lucille Mary Storer, 1/2 of the net conscious pain and suffering proceeds;

Donald James Storer, 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Jamie Anne Storer, a/k/a Jamie Corsitto, 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Leslie Catherine Faber, a/k/a Leslie Catherine Storer, 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Jason Storer, 1/7 of 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Felicity Storer, 1/7 of 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Timothy Storer, 1/7 of 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Cera Storer, 1/7 of 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Bryan Storer, 1/7 of 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Angelique Storer, 1/7 of 1/4 of 1/2 of the net conscious pain and suffering proceeds;

Michael Storer, 1/7 of 1/4 of 1/2 of the net conscious pain and suffering proceeds.

The account is approved.

The fee of the guardian ad litem is fixed in the amount of \$1,610.00, to be paid within thirty (30) days of the date of the decree.

The restrictions on the administrator's letters are lifted, giving the petitioner full authority to execute any and all documents necessary to effectuate the settlement on the foregoing terms.

Settle decree.

Dated: August 28, 2018  
Mineola, New York

**E N T E R:**

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

cc: Glenn Zuckerman, Esq.  
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