

Present: HON. ROBERT L. NAHMAN  
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY

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In the Matter of the Judicial Settlement  
of the Account of Proceedings of

RICHARD J. ALAIMO, ESQ.,

File No. 2455-2000

as Executor under the Last Will and  
Testament of

VITO CRISTINA,

Deceased.  
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In this proceeding to settle the account of Petitioner RICHARD J. ALAIMO, ESQ. as Executor, Objectant STEPHANIE DePACE, Guardian of the property of KATLYN F. TORO, moves for partial summary judgment pursuant to CPLR 3212 (e) determining that KATLYN F. TORO is the sole distributee of the decedent and surcharging Petitioner the sum of \$630,000.00, together with interest at 9 % per annum from the dates the Estate funds were distributed to CROCIFISSA CRISTINA, GIOACCHINO CRISTINA, FRANK CRISTINA and ROSALIA CRISTINA.

KATLYN F. TORO was born on January 6, 2000. Her mother, Objectant STEPHANIE DePACE, is the Guardian of her property. STEPHANIE DePACE

and her husband, PHILIP TORO signed an acknowledgment of paternity on January 7, 2000. The infant's birth certificate filed February 22, 2000, however, lists the decedent, VITO CRISTINA, as the father of the infant.

The decedent had asked the mother of the child, STEPHANIE DePACE, to have a blood test to determine whether or not he was the father. In the presence of Petitioner, the decedent gave instructions to his brother, JACK (GIOACCHINO) CRISTINA, to have a blood test done to determine the paternity of KATLYN F. TORO, and said that if there was a blood test and the child was his, then JACK CRISTINA should turn over the house at 10 Hideaway Lane.

On February 8, 2000, decedent executed his Last Will and Testament which bequeaths his entire estate to MONICA APOLTOL "...if she is married to me at the time of my death and there is no action pending for divorce, annulment, separation or to dissolve such marriage." The Will also names Petitioner as the nominated Executor. Decedent died on May 13, 2000 and his Last Will and Testament was admitted to probate on July 14, 2000 and Letters Testamentary issued to the Petitioner. As the decedent was not married to MONICA APOLTOL at the time of his death, the bequest to her lapsed and the entire residuary estate passes in intestacy.

A DNA test was performed to determine whether PHILIP TORO was the child's father. The Report of LISA WHITE, PhD., dated October 4, 2000, indicated that PHILIP TORO was not the father of the child.

On October 7, 2000, Petitioner made partial distributions of \$75,000.00 each to GIACCHINO CRISTINA and CROCIFISSA CRISTINA, the decedent's siblings. On March 2, 2001, Petitioner deeded 10 Hideway Lane, Marlboro, New York to STEPHANIE DePACE in consideration of STEPHANIE DePACE's Individual General Release. On March 23, 2001, Petitioner distributed \$75,000.00 each to GIACCHINO CRISTINA and CROCIFISSA CRISTINA and distributed the further sum of \$165,000.00 each to FRANCISCO CRISTINA and ROSALIA BENVENUTO.

On July 10, 2001, STEPHANIE DePACE filed a petition in the Family Court seeking an Order of Filiation against the decedent. The blood test results admitted into evidence in that proceeding disclosed that the decedent VITO CRISTINA could not be excluded as the biological father of KATLYN F. TORO and that, based on genetic testing, the probability of paternity is 99.56% . The Order of Filiation was issued by the Family Court of the State of New York on March 7, 2003 adjudging and declaring that VITO CRISTINA is the father of KATLYN F. TORO *nunc pro tunc* as of July 10, 2001.

In Grivas v. Port Authority (227 AD2d 105), the Appellate Division, First Department held that, pursuant to the provisions of EPTL 4-1.2 (a)(2), a posthumous order of filiation declaring decedent to be the child's father is insufficient, by itself, to establish the child's status as a qualified distributee, but a non-marital child can inherit from his or her father by presenting clear and

convincing evidence of paternity and the father's open and notorious acknowledgment of the child as his own.

There is no question that Objectant has presented clear and convincing evidence that the decedent is in fact the father of KATLYN F. TORO. The positive DNA test upon the decedent and the negative DNA test on PHILIP TORO, together with the statements of the decedent leave no doubt that the decedent is, in fact, the father. Petitioner, instead, contends that the decedent never openly and notoriously acknowledged the child as his own. While it is true the decedent died before learning of any DNA test results, the Court finds that the decedent's instructions to his brother, in the presence of the Petitioner, constitutes open and notorious acknowledgment. The decedent did not deny paternity, but rather acknowledged the possibility that he was, in fact, the father and that, if the blood tests were positive, his intention to provide for his child.

Accordingly, the first branch of the motion seeking partial summary judgment determining that KATLYN F. TORO is the sole distributee of the decedent is granted.

A fiduciary may be absolutely liable in paying the wrong person when the fiduciary was either in a position to discover the facts or could have taken preventative steps (See: *Matter of Spitzmuller*, 279 AD 233). If, however, the fiduciary acts in good faith and without knowledge of the claim at the time the

distribution is made, then the fiduciary will not be surcharged (See: Matter of Goldberg, 14 AD2d 294).

In the instant matter, the Petitioner obtained actual knowledge of the possibility the decedent was the father of the child from the decedent himself. Petitioner had knowledge of the claim prior to the distribution of the bulk of the Estate assets when Petitioner deeded the real property to the infant's guardian. The Court finds that the Petitioner had knowledge of the claim prior to the distribution of the funds, yet distributed the bulk of the Estate prior to resolving the claim.

Accordingly, the second branch of the motion for partial summary judgment is granted and Petitioner is surcharged the following sums:

\$150,000.00 plus interest at 9 % per annum from  
October 7, 2000;

\$480,000.00 plus interest at 9% per annum from  
March 23, 2001.

Settle Order.

The Clerk of the Court is directed to mail a copy of this decision to the parties appearing in this proceeding.

Dated: June 13, 2005



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SURROGATE

At the Surrogate's Court held in and for the  
County of Queens at the General Courthouse  
located at 88-11 Sutphin Boulevard, Jamaica  
New York in said County on the 28 day of  
June, 2005.

PRESENT: HON. ROBERT L. NAHMAN, Surrogate

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in the Matter of the Judicial Settlement  
of the Account of Proceedings of

File No.: 2455-2000

**ORDER**

RICHARD J. ALAIMO, ESQ.,

As Executor under the Last Will and  
Testament of

VITO CRISTINA,

Deceased.  
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Based upon the accounting of RICHARD J. ALAIMO, ESQ. dated April 14, 2004; the  
Objections to the Accounting filed by STEPHANIE DEPACE, as guardian of the person and  
property of Katlyn F. Toro dated June 24, 2004; the Objections to the Accounting filed by  
STEPHANIE DEPACE, individually, dated June 24, 2004; the motion for partial summary  
judgment of Stephanie DePace, as guardian of the person and property of Katlyn F. Toro, an  
infant, dated January 24, 2004; the Affirmation in Support of Partial Summary Judgment by  
CHRISTOPHER RENFROE, ESQ., as attorney for STEPHANIE DEPACE, individually dated  
February 3, 2005; the Affidavit in Support of the Motion for Partial Summary Judgment by the  
PUBLIC ADMINISTRATOR OF QUEENS COUNTY dated March 16, 2005; the Affidavit in  
Opposition to the DePace Motion by RICHARD J. ALAIMO, ESQ. dated May 25, 2005; the  
Affirmation in Opposition to the DePace Motion by MICHAEL F. MONGELLI, ESQ., dated

May 25, 2005; and the decision of the Surrogate dated June 13, 2005; it is hereby

**ORDERED**, that the motion for partial summary judgment is granted, and it is further

**ORDERED**, that Katlyn F. Toro is the sole distributee of the decedent, Vito Cristina; and

it is further

**ORDERED**, that Richard J. Alaimo, Esq. is surcharged and ordered to pay the following sums to the Estate of Vito Cristina:

a) \$150,000.00 plus interest at 9% per annum from October 7, 2000 ~~to the date said Order is docketed as a judgment; and~~

b) \$ 480,000.00 plus interest at 9% per annum from March 23, 2001 ~~to the date said Order is docketed as a judgment; and~~

~~c) 9% per annum on the judgment amounts from the date said Order is docketed as a judgment.~~

Surrogate