NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3515-11T2

ESTATE OF RICARDO MENDONCA,

Plaintiff-Appellant,

v.

PEDRO JUNIOR DA SILVA;
ESTATE OF PEDRO DA SILVA;
GILBERTO JOSE DA SILVA; and
PROGRESSIVE CASUALTY INSURANCE
COMPANY,

Defendants-Respondents.

Submitted January 28, 2013 - Decided February 22, 2013

Before Judges Parrillo and Sabatino.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, Docket No. P-412-10.

Clark Law Firm, PC, attorneys for appellant (Gerald H. Clark, of counsel and on the brief).

Respondents have not filed a brief.

PER CURIAM

This is an appeal from a January 30, 2012 order of the Chancery Division, Probate Part, awarding the Clark Law Firm, PC (law firm), attorney for plaintiff, the Estate of Ricardo

Mendonca, the reduced counsel contingent fee rate of 25%, instead of the contracted-for and standard $33^{1/3}$%. We affirm.

This matter arises out of a one-car motor vehicle crash that occurred on January 9, 2009, on Interstate 695 in Maryland when a cargo van in which Ricardo Mendonca was a passenger ran off the roadway into an embankment striking a large tree and catching fire. Both Mendonca and the driver of the van, Pedro Da Silva, died in the crash.

Mendonca died intestate. His only heir was his minor child, G.M., who lives in Brazil with his mother, who was never married to Mendonca. G.M. was eight-years old at the time of his father's death. Mendonca's parents also reside in Brazil.

Sometime after the crash, Mendonca's parents had executed a power of attorney, empowering Pedro's brother, Gilberto Da Silva, who owned the vehicle involved in the fatal accident, to pursue a wrongful death claim against the vehicle's insurer, Progressive Insurance Company (Progressive). Apparently, the claim was filed in Maryland and settled for the $100,000 policy limit, the proceeds of which were purportedly evenly divided between the Estate of Mendonca and Da Silva,[1] who supposedly were represented by the same attorney. However, the minor's

[1] At the time, there was some doubt as to the identity of the driver, since the bodies of the two men were burned beyond recognition.

mother and guardian, Vanessa Silva (Silva), who wished to pursue wrongful death and survivorship claims for the benefit of her son, was unaware of this litigation and received none of the proceeds of the purported settlement, either for herself or her minor son's behalf.

Thereafter, Silva retained the Clark law firm, who successfully petitioned the court to appoint Mark Comer, Esq., as Administrator Ad Prosequendum of the Estate of Ricardo Mendonca for the purpose of filing a wrongful death lawsuit in New Jersey arising out of the June 9, 2009 automobile crash. By then, dental records had identified Pedro Da Silva as the driver of the vehicle and the one at fault for the collision. Comer filed the underlying wrongful death lawsuit on January 7, 2011.

Despite Pedro Da Silva's clear liability, Progressive objected to paying out the policy limit a second time. However, following motions and further negotiations, the law firm succeeded in having Progressive agree to pay out the full $100,000 policy coverage to the Mendonca's Estate, for the benefit of his son.

At a "friendly" settlement hearing on December 21, 2011, the Probate judge approved the settlement. Without opposition, the law firm sought a $33^{1/3}$% contingent fee, consistent with the percentage set forth in the retainer agreement with the client.

The judge, however, relying on Rule 1:21-7, authorized a 25% contingent fee only, ruling that "because the only beneficiary is a minor, the 25 percent fee . . . will be utilized." The judge also declined the law firm's request for an enhanced fee under Rule 1:21-7(f) based on its exceptional work in obtaining a second settlement from the insurer. The judge reasoned:

> [M]y thought originally was that the 25 percent fee should apply, because the child is the only beneficiary under the estate.
>
> And when litigating a wrongful death action, no matter who brings the action, recovery is effectuated in one lump sum, representing past and future economic loss to the class of beneficiaries entitled to share in the proceeds in this action.
>
> The class of beneficiaries is understood as those who can recover via intestacy, N.J.S.A. 2A:31-4.
>
> And the point is, although Mr. [Clark's] . . . client was the estate, the recovery was for the exclusive benefit of [G.M.], who's a child. And I find that this case does not fall under McMullen [v. Maryland Cas. Co., 127 N.J. Super. 231 (App. Div. 1974), aff'd sub nom., McMullen v. Conforti & Eisele, Inc., 67 N.J. 416 (1975)] or Gerszberg [v. Jacuzzi Whirlpool Bath, 286 N.J. Super. 197 (App. Div. 1995)].
>
> . . . .
>
> [T]his is a case, I guess of first impression, because the McMullen case states that they're specifically not ruling on whether or not if the only beneficiary was a minor, it would be a 25 or 33 and a third percent.

But I find since the beneficiary is a minor, it should be 25 percent, and not 33 and a third percent.

I'll also note that Mr. Clark talks about . . . what he did in this case. And he says in his brief, "Counsel achieved a tremendous result." He did.

But he also talks about the matters that he had to overcome in order to take this case. In my review of the court file on the automatic case system, as I said, there was a complaint for jury demand, a motion for substituted service, a stipulation to extend time to answer, and one motion. That motion, Mr. Clark won.

And as soon as he won that motion, Progressive paid him the entire policy. It was clever lawyering, and he did an excellent job.

But -- and I also look and see the expense sheet. There were no depositions taken in this matter. I can't see whether there were any interrogatories sent, but that did not happen.

There was difficulty, because of the language barrier. But I don't feel that that would -- makes this case eligible for an enhanced fee.

. . . .

So, I don't see what was done in this case that would warrant an advanced -- enhanced fee.

So, I find that because the only beneficiary is a minor, the 25 percent fee should -- will be utilized, and Mr. Clark is only entitled to 25 percent rather than 33 and a third percent.

On appeal, the law firm argues that the court erred in reducing its counsel fee to 25% because its client was the Estate and not the minor child, rendering that provision of Rule 1:21-7 inapplicable. Appellant also ascribes error to the court's denial of its alternative request for an enhanced fee under Rule 1:27-7(f). We disagree with both contentions and affirm substantially for the reasons stated by the Probate judge in her oral decision of January 20, 2012. We add only the following comments.

Rule 1:21-7 provides that in tort actions, an attorney may contract for and collect a contingent fee of $33^{1/3}$% on the first $500,000 recovered, except:

> where the amount recovered is for the benefit of a client who was a minor or mentally incapacitated when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.
>
> [R. 1:21-7(c)(6).]

Although the Rule speaks in terms of the "client," the Probate judge in the instant matter held that the relevant status is that of the beneficiary where, as here, a minor is the only recipient of the settlement proceeds.

Our case law provides support for this proposition. In McMullen, supra, a father who was working as a mason was killed

on a construction project. He left surviving a wife and minor children. When the case settled, the trial court decided to apply a 25% fee to the portion of the settlement proceeds allocated to the children, and he standard $33^{1/3}$% fee for the portion allocated to the wife. In ruling this was incorrect, we reasoned that no matter who brings a wrongful death action, under our Death Act, N.J.S.A. 2A:31-6, "recovery is effectuated in one lump sum representing past and future economic loss to the class of beneficiaries entitled to share in the proceeds of the action. This class consists of 'the persons entitled to take any intestate personal property of the decedent.' N.J.S.A. 2A:31-4." 127 N.J. Super. at 238. Since there can be only one recovery, "the fee schedule is to be applied to the total amount received, no matter how many beneficiaries are entitled to share in it, and not to the amounts of the various shares after distribution is determined." Id. at 239. Thus, we held that Rule 1:21-7(c)(6), which limits fees to not more than 25% on amounts recovered by way of settlement for the benefit of infants and incompetents, "was not intended to apply to wrongful death recoveries where the class of beneficiaries included one or more adults." Ibid.

McMullen involved multiple beneficiaries, namely the decedent's wife and minor children. Significant for present

purposes, however, we intimated that "[i]t may be that the 25% limitation is applicable to a wrongful death recovery where all the beneficiaries are infants or incompetents – a point on which we do not rule." Id. at 239-40. (emphasis added).

Similarly, in Gerszberg, supra, there was a Death Act recovery by the executrix who sued in a representative capacity, subject to later equitable division among those entitled to benefit, namely the decedent's widow and four minor children, pursuant to N.J.S.A. 2A:31-4. 256 N.J. Super. at 199. As in McMullen, supra, the trial court mistakenly reduced the attorney fee to 25% for that portion of the wrongful death proceeds paid to minors. Id. at 201. In holding this to be error, we cited McMullen and reiterated that Rule 1:21-7(c)(6) "'was not intended to apply to wrongful death recoveries where the claim of beneficiaries included one or more adults.'" Id. at 204 (quoting McMullen, supra, 127 N.J. Super. at 239). Just as importantly, we noted there were no compelling equitable reasons why the attorney's fee should be calculated any differently "unless all possible distributees were minors when the fee agreement was executed." Id. at 204. (emphasis added).

Here, it is undisputed that there is only one class of beneficiary; indeed the sole beneficiary of decedent Mendonca's estate is a minor, his eight-year old son. He is the only

recipient of the lump sum wrongful death recovery, which unlike McMullen and Gerszberg, will not be divisible among any other class or classes of beneficiaries, including adults. In such a situation, where the exclusive distribution is to minors or mentally incapacitated individuals, we find that for all intents and purposes, the wrongful death action was settled on behalf of, and the amount was recovered for, that class of persons within the intendment of the contingent fee reduction provision of Rule 1:21-7(c)(6). We find such an interpretation better serves the underlying rationale for the 25% limitation which, obviously, is to preserve a greater recovery for such dependent persons.

Affirmed.