

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

No. 08-835V

Filed: April 29, 2010

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TAMARA CAPRIOLA, Executrix of	*	
the Estate of CHARLES CAPRIOLA,	*	
Deceased,	*	
	*	
Petitioner,	*	Attorney fees and costs;
	*	Reimbursement for probate
v.	*	proceeding
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

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**DECISION ON ATTORNEYS' FEES AND COSTS<sup>1</sup>**

**GOLKIEWICZ**, Special Master.

This Decision is one for attorneys' fees and costs in the above-captioned matter. The only disputed issue is whether the costs of setting up an estate for the original petitioner in this matter, who died during the pendency of the Petition, may be reimbursed under the Program.

The Underlying Petition

The underlying Petition was filed on November 24, 2008, by Charles Capriola. At that time, Mr. Capriola alleged he suffered from Guillain-Barré Syndrome ("GBS") caused by an influenza vaccination he received on March 26, 2008. Petition, filed November 24, 2008; Stipulation, filed November 6, 2009. Following the filing of medical records and expert reports, Mr. Capriola passed away on April 6, 2009. P Ex 9. On July 13, 2004, petitioner filed a Motion to Substitute Party, which was granted after petitioner filed the Certificate of Appointment naming Tamara Capriola executor of Mr. Capriola's estate. Order, filed September 10, 2009; P Ex 17. On July 24, 2009,

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<sup>1</sup>The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id.

petitioner filed a status report informing the court the parties had reached a tentative settlement in the case. Status Report, filed July 24, 2009. The 15-week Stipulation Order was filed on July 27, 2009, the parties filed the Stipulation regarding entitlement on November 6, 2009, and the undersigned issued a Decision on the Stipulation on November 9, 2009.

### The Motion for Attorneys' Fees and Costs

Petitioner subsequently filed her Motion for Attorney Fees and Costs on November 23, 2009. The Motion requests \$28,019.50 in attorney fees and \$9,584.60 in attorney costs for petitioner's counsel of record. Also, petitioner requests \$5,375.00 in fees and costs incurred by petitioner's probate attorney, Raymond Bolton. See P Motion, filed November 23, 2009; P Ex A; P Ex B; P Ex D; P Ex E. The Motion states petitioner did not personally incur costs in the pursuit of this Petition. P Motion ¶ 4.

On December 17, 2009, respondent filed a Response to Petitioner's Application for Attorneys' Fees and Costs. Respondent states petitioner's counsel of record agreed to make reductions in both his fees and costs after respondent voiced concerns related to certain issues. Respondent avers petitioner now seek \$27,882.00 for attorneys' fees and \$9,561.60 in attorney's costs. Respondent states she does not object to compensation in these amounts. R Response at 1, filed December 17, 2009. However, respondent does object to an award of fees and costs for petitioner's probate attorney, Raymond Bolton. R Response at 2.

Respondent's position is that these fees and costs were not incurred as a result of the Petition and they were not incurred in a proceeding on the Petition. Respondent references case law where costs for conservatorships, guardianships and probate proceedings have been denied. R Response at 2 (citing Siegfried v. Sec'y of the Dept. of Health & Human Servs., 19 Cl. Ct. 313 (1990); Barnes v. Sec'y of the Dept. of Health & Human Servs., No. 90-1510V, 1992 WL 185708 (Fed. Cl. Spec. Mstr. 1992); Curtis v. Sec'y of the Dept. of Health & Human Servs., No. 90-1500V, 1993 WL 42853 (Fed. Cl. 1993); Widdoss v. Sec'y of the Dept. of Health & Human Servs., No. 90-486V, 1992 WL 80809 (Fed. Cl. 1992)). However, respondent disagrees with but acknowledges cases where special masters have reimbursed these types of costs. R at 3-4 (citing e.g., Hill ex rel. Sherman v. Sec'y of the Dept. of Health & Human Servs., No. 03-619V, 2007 WL 5160382 (Fed. Cl. Spec. Mstr. 2007)).

Also on December 17, 2009, petitioner filed a Reply to respondent's Response and a letter from the probate attorney. P Reply, filed December 17, 2009; P Ex 18. The letter from the probate attorney states:

[w]e initiated a probate proceeding . . . for the sole purpose of pursuing the Vaccine Act litigation and handling the Vaccine Act award. Mr. Capriola did not own real estate or other personal property by himself: the pending litigation provided the only reason a probate proceeding was required. . . . The proceeds of the Vaccine Act award are the only asset listed in the inventory and will be the only asset decreed to interested parties by the probate court."

P Ex 18. Petitioner's position is that without establishing an estate, petitioner lacked the standing and authority to pursue and settle the Petition and the settlement could not be received and

distributed. P Reply, filed December 17, 2009.

### Discussion

The special masters examining this and similar issues have determined that the appropriate test by which to analyze reimbursement of such costs is a “but for” test. See, e.g., Ceballos v. Sec’y of the Dept. of Health & Human Servs., 2004 WL 784910 (Fed. Cl. Spec. Mstr. 2004); Velting v. Sec’y of the Dept. of Health & Human Servs., No. 90-1432V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. 1996); Thomas v. Sec’y of the Dept. of Health & Human Servs., No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. 1997); Gruber v. Sec’y of the Dept. of Health & Human Servs., No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. 2009), vacated - - Fed. Cl. - -, 2010 WL 966640 (Fed. Cl. 2010)(Judge Horn remanded the case for further proceedings but did not reverse the special master’s award of fees for petitioner’s probate attorney).

In the case *sub judice*, petitioner would not have petitioned to be named executor of Mr. Capriola’s estate but for the pending Vaccine Act Petition. See 42 U.S.C. § 15 (a)(2);P Reply, filed December 17, 2009; P Ex 18. In numerous cases over the past many years, respondent has consistently argued and made clear that while section § 11(b)(a)(A) permits a legal representative of any person to file a claim in a death case, payment will only be made to the estate of the deceased pursuant to § 15(a)(2). Thus, it is clear that the only reason the probate expenses were incurred was to comply with the Act as interpreted by respondent. With the exception of Mol v. Sec’y of the Dept. of Health & Human Servs., 50 Fed. Cl. 588 (Fed. Cl. 2001), the cases relied upon by respondent date back to the early 1990s. The undersigned and other special masters have explained why those cases should not be followed in deciding cases, such as the present one. Respondent presented no new argument or support. Thus, the undersigned sees no reason to alter his view that these costs are legally and reasonably reimbursable.

Upon review of the Motion for Attorneys’ Fees and Costs, the parties’ briefs and petitioner’s supplemental documentation, the court hereby awards the petitioner \$42,818.60 in attorneys’ fees and litigation costs. **Specifically, petitioner is awarded \$42,818.60 in the form of a check payable jointly to petitioner and petitioner’s attorney of record.**

The Clerk of the Court is directed to enter judgment accordingly.<sup>2</sup>

**IT IS SO ORDERED.**

s/ Gary J. Golkiewicz  
Gary J. Golkiewicz  
Special Master

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.

Furthermore, this amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, “advanced costs” as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).