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IN THE SUPREME COURT OF FLORIDA

Case No: 74,349

IN RE: ESTATE OF
HARVEY S. WARWICK,
Deceased,

JULIA W. CARSWELL,
Petitioners,

vs.

WARWICK, CAMPBELL, BURNS,
SEVERSON & BANISTER, P.A.
Respondent.

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By *Bygh*

BRIEF OF FLORIDA BANKERS ASSOCIATION AS AMICUS CURIAE

✓
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SUMMARY OF ARGUMENT

The standard for setting the fees of personal representatives and other professionals has been set by the legislature in Fla. Stat. 733.617 (1989). The legislature has given the judge the authority in probate matters to set the fees paid by the estate to the personal representative in the light of nine explicit criteria. The so called "lodestar" is a method derived by courts to set attorneys fees in cases where there was no fee agreement between the lawyer and the party paying the fees and there was no legislative guidance other than that "reasonable" fees be set. It would be completely improper to take the judicially developed "lodestar" method for establishing attorneys' fees in situations where there is no legislative direction and substitute it for the express statutory criteria for setting fees of personal representatives established by the legislature in Section 733.617.

The legislature has carefully crafted a statute by which fees are set in the probate context. That statute did not establish a "lodestar" method of fee setting when it was enacted. It is utterly without foundation to attempt to transpose the judicial creation of lodestar for setting attorneys' fees onto a statute by which the legislature laid down express criteria for setting all professional fees in probate.

The legislature has addressed how fees in probate matters are to be set. That method was not lodestar.

Neither the purpose nor the effect of Section 733.617 is to preclude absolutely the use of fee schedules or percentages as the sole criterion on which to determine reasonable compensation. So long as fee schedules and/or percentages constitute "the fee customarily charged in the locality for similar services," reasonable compensation may be based on that one factor.

I. FEES FOR PROFESSIONALS IN PROBATE MATTERS ARE SET OUT BY SECTION 733.617, NOT BY THE ROWE DECISION.

The Florida Probate Code has a long and clearly developed history. It governs how estates are administered, including how fees are set. Among its longstanding provisions is Section 733.617, which sets the compensation for personal representatives and professionals retained by the personal representatives, including attorneys.

Until 1976, the Probate Code provided expressly for percentage fees. Fla. Stat. Section 734.01 (1973). In 1976, the statutory percentage fee was abolished and put in its place was a list of criteria similar to those found in the present statute. Later that same year the statute was amended to add the phrase "one or more" before the list of criteria.¹

The legislature in Section 733.617(1) has spoken clearly and directly upon how fees are to be set in probate matters:

(1) Personal representatives, attorneys, accountants, and appraisers and other agents

1 This differentiates the Florida Statute from those of Maine and Colorado. See page 13, infra.

employed by the personal representatives shall be entitled to reasonable compensation. Reasonable compensation may include compensation for the services of the agents or employees of the person seeking compensation and may also include reimbursement of out-of-pocket costs. Reasonable compensation shall be based on one or more of the following:

- (a) The time and labor required.
- (b) The novelty and difficulty of the questions involved, and the skills requisite to perform the service properly.
- (c) The likelihood that the acceptance of the particular employment will preclude other employment by the person.
- (d) The fee customarily charged in the locality for similar services.
- (e) The nature and value of the assets of the estate, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person.
- (f) The results obtained.
- (g) The time limitations imposed by the circumstances.
- (h) The nature and length of the professional relationship with the decedent.
- (i) The experience, reputation, diligence, and ability of the person performing the services.

Fla. Stat. Section 733.617(1) (1989) (Emphasis added).

The heart of the Petitioners' argument is that the "lodestar" method of setting attorneys' fees developed in Florida Patient Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) should be superimposed on the clear language of Section 733.617 of the Probate Code. That argument should be rejected.

The Probate Code's compensation provisions contained in Section 733.617 had been in effect for almost 10 years when Rowe was handed down. During those ten (10) years it had guided courts and lawyers without significant problem. The legislature

had opportunity to amend it, but did not. If the legislature had felt that Section 733.617 was being applied in such a way as to frustrate its intent, it could have dealt with the issue at the time. It did not. What Petitioner urges is that the court take a method for setting fees for attorneys developed by the courts in 1985 and use it to modify a probate statute that has been in the books for many years.

The Florida lodestar cases developed in an effort to articulate how courts should set attorneys fees in cases where there were no explicit guidelines other than "reasonable fees". It is not surprising, therefore, that the courts looked to the professional rules governing attorneys for guidance. In the area of probate, however, the legislature has established detailed criteria for all professional fees, both attorney and non-attorney. The statute expressly applies to "Personal Representatives, attorneys, accountants, and appraisers and all other agents employed by the personal representative". Fla. Stat. Section 733.617(1)(1989). To adopt lodestar, a strictly attorneys fee concept, to the fees of appraisers, accountants, banks and any other agent is to apply the fee scheme for lawyers (set by the court in non-probate cases) to all probate fees for non-lawyers and lawyers alike. This is something clearly not intended by the legislature or contemplated by the statute. To do so would be to rewrite the law.

The phrase "one or more of the following" clearly displays that the Florida legislature does not require a personal representative's compensation (or that of other professionals) to be based upon a consideration of all the listed factors. The statute clearly allows a fee based on only one of the enumerated criteria.

Under the lodestar method, the "time and labor required" of a personal representative must always be considered as a factor. This quantum of time and labor must then be multiplied by a lodestar which would, in the case of Section 733.617, be a combination of one or more of the remaining eight criteria. Consequently, Petitioners are in effect arguing that what the legislature meant to say in 733.617 is that reasonable compensation shall be based on two or more of the following, or, more accurately, that the statute should read: "Reasonable compensation shall be based upon the time and labor required of the personal representatives multiplied by a factor based on one or more of the following". Petitioners overlook the obvious fact that the statute says neither of these two things, but instead says what it says.

While a trial court may apply many of the factors considered in the lodestar method in arriving at reasonable compensation under Section 733.617, the statute is not the lodestar method.

The Florida lodestar cases have applied only to the determination of attorneys' fees. There are no reported Florida

cases in which the lodestar method is applied to determine the compensation of any person working in any capacity but as an attorney. The lodestar is a judicially created mechanism for determining compensation for officers of the court. Section 733.617, on the other hand, is a statutory method of compensation promulgated by the legislature to be used in probate settings.

Legislative intent controls the construction of statutes, and that intent is determined primarily from the language of the statute. The plain meaning of statutory language is the first consideration. St. Petersburg Bank and Trust Company v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982).

Nine years before the lodestar analysis for setting attorney's fees was introduced into Florida by this Court, Section 733.617(1) was amended to provide the "one or more of the following" language to the sentence preceding the enumerated criteria. Consequently, since 1976, the statute itself has expressly permitted a court to use a variety of bases upon which to determine reasonable compensation. By its own terms, the statute is not limited to a lodestar analysis.

Moreover, the preamble of House Bill No. 2775, wherein the amended language has its origin, states that the amendment is intended to provide "that personal representatives, attorneys, accountants, and appraisers and other agents employed by a personal representative may receive reasonable compensation based upon one or more criteria rather than upon the entire list of the

current requirements". House Bill No. 2775, 4th Leg., Reg. Sess., 1976 Florida Laws 1 (emphasis added). The amendments to this bill were incorporated into the statute without change. Thus, even were there a question of ambiguity concerning the language of Section 733.617, the intent of the legislature clearly is that a lodestar approach not be used.

The "one or more of the following" clause of the statute precludes the mandatory use of lodestar. An interpretation of Section 733.617 mandating the use of lodestar would require a judge always to consider all of the criteria. See Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145, 1150-1151 (Fla. 1985). Such an interpretation would do more than render null and void the "one or more of the following" language of the statute; it would effectively rewrite Section 733.617 to read: "Reasonable compensation shall be based upon all of the following." It would also render the 1976 amendment itself utterly inoperative.

In construing a statute, a court cannot invoke a limitation or add words to the statute not placed there by the legislature. Chassee v. Miami Transfer Company, Inc., 288 So.2d 209, 215 (Fla. 1974). The clear language of Section 733.617 precludes the mandatory use of lodestar.

II. THE ROWE DECISION AND ITS PROGENY DO NOT AND CANNOT SUPERIMPOSE A MANDATORY LODESTAR UPON SECTION 733.617, WHERE THAT STATUTE CLEARLY PROVIDES FOR A BROAD RANGE OF ALTERNATIVES TO LODESTAR.

In Florida, lodestar is applied to determine attorneys' fees. Since Rowe, every Florida case applying lodestar has dealt exclusively with attorneys' fees. Eg. Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990).

However, Section 733.617, unlike the Florida cases applying lodestar, is not limited in its scope to attorney's fees. Indeed, its very title, "Compensation of Personal Representatives and Professionals" underscores the futility of pigeon-holing it into such a narrow class of cases.

Moreover, lodestar is a judicially created mechanism which applies to the compensation of officers of the court. Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145, 1150 (Fla. 1985). This court created lodestar in order to promote the policies of objectivity and uniformity. Id. at 1149. In dealing with probate fees however, the legislature has spoken clearly of compensation for personal representatives, and, while likewise adopting the policy of objectivity, has chosen to promote a policy of flexibility. If petitioners take umbrage with the wisdom of this policy, their recourse is through the legislature, not through the courts.

Lastly, to mandate the application of lodestar, as articulated in Rowe and later modified by Quanstrom, is to effectively rewrite Section 733.617(1). A court cannot add words

to the statute not placed there by the legislature. Chassee v. Miami Transfer Company, Inc., 288 So.2d 209, 215 (Fla. 1974). The Rowe method requires the use of the criteria listed in Rule 4-1.5(B) of the Rules Regulating the Florida Bar, rules which apply only to attorneys. Although the criteria in Rule 4-1.5(B) and Section 733.617(1) are similar, they are nonetheless different, and the legislature presumably had its reasons for authorizing the use of the statutory criteria instead of those in Rule 4-1.5(B). It is instructive to note that Rule 4-1.5(C) requires a consideration of all the factors enumerated in 4-1.5(B), whereas, again, Section 733.617 expressly allows for consideration of less than all of its enumerated factors.

Even assuming arguendo that the Rowe lodestar, when applied to Section 733.617(1), would incorporate the statutory criteria of Section 733.617(1), a mandatory application of the Rowe lodestar would fundamentally transform Section 733.617(1). As noted earlier, such mandatory application would rewrite "one or more of the following" to read "all of the following".

Furthermore, the Rowe lodestar would alter the statute by dividing the criteria of Section 733.617(1) into three sub-sets. Rowe states that "[t]he first step in the lodestar process requires the court to determine the number of hours reasonably expended." Rowe 472 So.2d at 1150. To arrive at this first figure, the court looks to the time and labor required and the novelty and difficulty of the question involved. Id. These

factors correspond to subsection (a) and the first clause of subsection (b) of Section 733.617. "The second half of the equation...requires the court to determine a reasonable hourly rate for the services of the prevailing party's attorney". Rowe, 472 So.2d at 1150. In establishing this hourly rate, the court must look to all the criteria of Section 733.617(1), except for the one and a half subsections mentioned above and subsection (e), which looks to the results obtained. See Rowe, 472 So.2d at 1150-1151. These numbers arrived at by the above two functions are then multiplied and, if appropriate, the product therefrom is increased or decreased by a number reflecting the value of Section 733.617(f) (The results obtained). Rowe, 472 So.2d at 1151.

This explication of the Rowe lodestar approach illustrates the impropriety of mandating its use in applying Section 733.17. The statutory criteria would have been organized into the respective sub-sets into which Rowe would have them organized. Section 733.617(1)(b) would have been divided into two separate subsections, so that the first clause could be incorporated into the "reasonable hours" sub-set and the second clause into the "reasonable rate" sub-set. Also, Section 733.617(1)(h) would not have been so improvidently inserted within the "reasonable rate" sub-set, but would hold a place of its own.

The legislature has had the opportunity to rewrite Section 733.617 so as to reflect the Rowe lodestar process. In 1988,

three years after Rowe, it amended the statute. However, it chose neither to strike or rewrite the "one or more of the following" clause, nor to reorganize or subdivide the enumerated criteria. This legislative forbearance fortifies the fact that Section 733.617 does not mandate the use of the lodestar method.

III. NEITHER THE PURPOSE NOR THE EFFECT OF SECTION 733.617 IS TO PRECLUDE ABSOLUTELY THE USE OF FEE SCHEDULES OR PERCENTAGES AS THE SOLE CRITERION ON WHICH TO DETERMINE REASONABLE COMPENSATION.

Section 733.617(1)(d) authorizes the use of fee schedules as a reasonable fee, so long as that fee schedule is the fee customarily charged in the locality for similar services. Fees customarily charged comprise one of the statutory criteria that, either alone or in conjunction with any number of the other statutory criteria, a court may consider when determining reasonable compensation.

The contention that Section 733.617 was passed in order to preclude the use of fee schedules as a sole criterion is without merit. A logical reading of the statute itself permits such use, so long as fee schedules comprise the fee customarily charged. If such latitude displeases petitioners, they must seek redress in the legislature, not in the courts.

The suggestion that, by enacting the Florida Probate Code, the legislature eliminated the past practice of awarding fees based upon a percentage of the estate, and in its place substituted a reasonableness standard, misstates the distinction

between Section 733.617 and its predecessor, Fla. Stat. Section 734.01 (1973).

The predecessor statute, Section 734.01, mandated the use of statutory percentages for the compensation of ordinary services performed by a personal representative. Section 734.01(1)(a) Fla. Stat. (1973). The effect of Section 733.617 is to abolish the mandatory use of fee schedules by providing a statutory laundry list of alternatives from which a court may chose as many or as few criteria as it deems proper to use. Consequently, a court is no longer required to apply a fee schedule to determine the compensation of a personal representative, although a court is still permitted to apply a fee schedule, provided it complies with Section 733.617(d).

Moreover, the statute permits a court to apply a fee schedule as the sole criterion on which to base its decision. If a fee schedule reflects the fee customarily charged, the judge may then select it as the one criterion upon which to base reasonable compensation. Fla. Stat. Section 733.617(1)(d) (1989).

If, as petitioners contend, the legislature intended to preclude the use of fee schedules or fees customarily charged as the sole criteria on which to base reasonable compensation, it certainly was able to clearly express such an intent. Section 73.092, pertaining to attorney's fees in eminent domain proceedings, contains the following: "However, under no circumstances shall the attorney's fees be based solely upon a

percentage of the award". Fla. Stat. Section 73.092(1) (1987). If it had so wished, the legislature could have included a similar provision in Section 733.617, substituting "estate" for "award". The legislature, presumably aware of this alternative, has chosen to forego it. This is particularly evident by virtue of the legislature's 1988 post-Rowe amendments to Section 733.617. Accordingly, it is clear that the legislature did not intend to foreclose the use of fee schedules as the sole criterion on which to base the reasonable compensation of a personal representative in those circumstances where the court deemed it appropriate.

The decisions reached by the Colorado and Maine courts, respectively, in Matter of Estate of Painter, 567 P.2d 820 (Colo. App. 1977) and Estate of Davis, 509 S.2d 1175 (Me. 1986), fail to compel a different reading of Section 733.617. In each of these cases, the courts interpreted statutes that did not contain the critical "one or more of the following" language of the Florida Statutes. See Colo. Rev. Stat. Section 15-12-721 (1975) and Me. Rev. Stat. Title 18, Section 3-721.

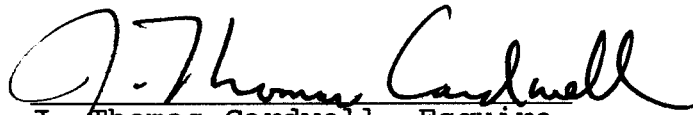
Consequently, the trial court operated well within the parameters of Section 733.617 when it determined the reasonable compensation for the co-personal representatives.

CONCLUSION

The reasonable compensation of personal representatives in Florida probate matters is determined by a clearly articulated

statutory method set out in Section 733.617 of the Florida Statutes. That method is not lodestar, a creature of the judiciary which is used exclusively for the calculation of attorneys' fees.

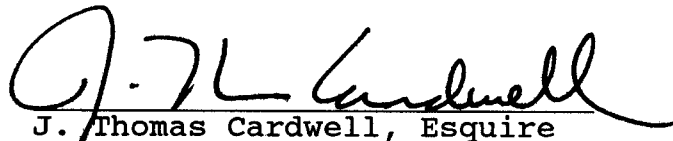
Therefore, this Court should affirm the decision of the Court below.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John F. Harkness, Jr., Executive Director, The Florida Bar, 620 Apalachee Parkway, Tallahassee, Florida 32399-2300; William S. Belcher, Esquire, Belcher & Fleece, P.A. 600 1st Avenue, N., Ste. 301, P. O. Box 330, St. Petersburg, Florida 33731; Rohan Kelley, Esquire, Rohan Kelley, P.A. 3365 Galt Ocean Drive, Ft. Lauderdale, Florida 33308; Louis L. Hamby, III, Esquire, Alley, Maass, Rogers, Lindsay & Chauncey, P.A., 321 Royal Poinciana Plaza, Palm Beach, Florida 33480 and James E. Weber, Esquire, Suite 502, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida this 24th day of May, 1990.



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