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IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 74,349

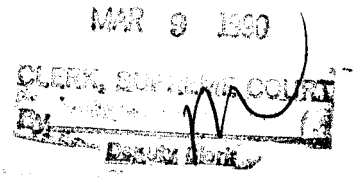
JULIA W. CARSWELL,

Petitioner,

vs.

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

Respondent.



RESPONDENT'S ANSWER BRIEF
ON THE MERITS

On Review from the District Court
of Appeal, Fourth District
State of Florida

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INTRODUCTION

This is an appeal from a decision affirming a final order awarding attorneys' fees to Respondent ("Warwick"). The order, over the sole objection of Petitioner ("Carswell"), awarded Warwick's attorneys' fees in the amount of $54,000. The order was affirmed by the Fourth District Court of Appeal, In re Estate of Warwick, 543 So.2d 449 (Fla. 4th DCA 1989). Carswell is a beneficiary and co-personal representative of the estate together with Atlantic National Bank now known as First Union National Bank (herein referred to as "bank"). References to the record are referred to as (R), and references to the trial transcript are referred to as (T).

STATEMENT OF THE CASE AND OF THE FACTS

Appellant's Statement of the Case and of the Facts are acceptable except for the following matters of disagreement or omissions which are clearly specified hereinafter.

Carswell was the only party who objected to Warwick's fee which led to the January 28, 1988 hearing. The trial court in its order of February 26, 1988 held that there was an implied agreement between Warwick and Carswell and that Carswell was estopped to dispute the fee. (T 84-85). The decedent's will established a trust with the bank as trustee and Carswell as the income beneficiary. The will further provided that upon

Carswell's death, the remainder of the trust would be distributed to decedent's heirs at law. (T 1-6). Consequently, Carswell was the only vested beneficiary of the testamentary trust and was the only party, other than the bank, who could object. The bank agreed to Warwick's attorney's fees. (T 85).

At the hearing, the bank's trust officer, Carol Gainer, testified that fees were discussed with Carswell. (T 33). Further, according to Gainer, Carswell received a copy of the estate tax return and at no time did she object to the attorneys' fees when Gainer and Carswell discussed the return. (T 34). The return set forth an attorneys' fee of $54,000 and a fee payable to the co-personal representatives in the sum of $81,720. (T 7). The co-personal representatives' fee was paid in full without objection. Carswell signed the return. (T 34). The attorney for Carswell had no questions of Gainer upon the conclusion of her direct testimony. (T 34).

It was Warwick's understanding that when the return was filed in 1985, the attorney's fees were agreeable to all parties. (T 7).

Carswell's expert, George Bailey, Esq., qualified his estimate of time by admitting that he was handicapped by reason of lack of records, did not know what telephone conversations took place and did not know how long Warwick spent at hearings. (T 46).

Bailey acknowledged Warwick's good reputation as a lawyer when he testified that he had a great deal of respect for him and that he did not think that anything that Warwick did in the case in terms of setting down an estimated fee in the return or the letter he wrote to the client or to the entire position he took in this matter was in the slightest respect inappropriate or unethical or anything of that sort and that in his opinion that he handled the file very competently. He had no quarrel with Warwick whatsoever in respect to his entire performance. (T 54).

Bailey acknowledged that Rowe, was decided after the estate file was opened and after exchange of correspondence between Warwick and Carswell. Bailey acknowledged that he had intentionally avoided becoming involved in whether Warwick entered into an enforceable agreement with his client. (T 54, 55).

Mike S. Buckner, Esq. appeared as an expert witness for the appellee. He examined Warwick's file and the court file. Buckner testified that in his opinion a reasonable fee for Warwick's services as an attorney was between $50,000 and $55,000.

Buckner opined that Warwick's estimate of 150 hours was a little conservative. (T 20, 23).

The factors that Buckner considered in arriving at his opinion were the statutory provisions for award of reasonable fees in estate proceedings, the time that Warwick had indicated to him he had spent, the time that it appeared to him to be a reasonable

estimate of what that time was in the absence of any time records, the fees customarily charged in Palm Beach County and Warwick's ability and experience and diligence and practice that he was aware of and the amount of the estate. (T 30).

Buckner did not consider the lodestar formula of Rowe. (T 30).

The Decedent's probate estate was opened on or about January 3, 1985, when the Decedent's will was filed. (R 1-6). The estate tax return was filed before the end of 1985. (T 7). The probate inventory showed assets of an approximate value of $1,890.000. (T 8). No objection to the attorneys' fees were made until December 16, 1987. (R 68). Partial payment of attorneys' fee of $36,000 was paid upon filing the estate tax return in 1985, and the balance was paid upon receipt of the estate tax closing letter in October 1987. (T 8; R 56).

SUMMARY OF ARGUMENT

A primary issue to be decided is whether the lodestar formula is applicable to the calculation of reasonable attorney's fees pursuant to Section 733.617, Florida Statutes.

The lodestar formula is not applicable in typical probate administrations. It is applicable to litigated matters where the prevailing party is awarded fees from a nonclient. Certainly,

its application is not mandatory in a typical probate administration.

Section 733.617, Florida Statutes, conflicts with the lodestar formula and the statute controls. Under the statute, reasonable compensation is to be based on one or more of the criteria. Time is only one of the criteria set forth under the statute which may or may not be a critical consideration in a specific case. Another factor to be considered under the statute is the fee customarily charged in the locality for similar services. This is a function of the market place and it should be considered by the courts and may be the most important criteria in a specific case. If there is to be a change in the way reasonable compensation is to be determined, it must be done by the legislature and not the courts.

An equally important issue in this case is whether the lodestar issue is rendered moot by virtue of the holding by the trial court that there was an implied agreement between the parties and that Carswell was estopped to dispute the fee. The trial court's holding was not disturbed on appeal and therefore, the award of attorney's fees in this case should be affirmed irrespective of the resolution of the lodestar issue.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT THE FORMULA SET FORTH IN THE ROWE CASE SHOULD NOT BE USED IN DETERMINING REASONABLE ATTORNEY'S FEE CHARGEABLE AGAINST THIS ESTATE PURSUANT TO SECTION 733.617, FLORIDA STATUTES.

Carswell contended in the trial court that attorney's fees should have been determined in accordance with the lodestar formula set forth in Florida Patients' Compensation fund v. Rowe, 472 So.2d 1145 (Fla. 1985). The trial court refused.

The trial court's refusal to apply Rowe was based upon at least two holdings. First, that Rowe did not apply to an award of attorney's fees pursuant to Section 733.617, Florida Statutes. The second was that there was an implied agreement between Warwick and Carswell and that Carswell, by her actions, was estopped to dispute the attorney's fee. The bank agreed to the fee. The District Court was silent on the holding relating to agreement and estoppel. The fee agreement issue was resolved in favor of Warwick by the trial court. It held that the lodestar approach need not be applied in awarding an attorney's fee pursuant to Section 733.617 and that the trial court did not abuse its discretion in its award of attorney's fees. However, all of the trial court's holdings are meritorious and each is individually sufficient to sustain the award of attorney's fees in this case.

(A) THE LODESTAR FORMULA IS NOT REQUIRED TO BE USED IN THE CALCULATION OF A REASONABLE ATTORNEY'S FEE AWARDED PURSUANT TO SECTION 733.617.

This case involves typical probate administration. Warwick was the attorney for the co-personal representatives, i.e., the bank and Carswell, and Carswell was a beneficiary. The personal representatives employed Warwick to perform legal services for the estate. There was no litigation involved. Obviously, there was no prevailing party and there was no winner or loser. This is not a situation where an attorney seeks fees under Section 733.106. It is a typical probate proceeding where an attorney is to obtain a reasonable fee based upon Section 733.617 or an agreement with the parties bearing the impact of the fee.

Rowe is clearly distinguishable. Rowe and the federal cases that inspired the lodestar approach which is grounded on time based on hourly units are all situations where fees were imposed ancillary to primary actions against a nonclient. The cases all involve litigation and fees awarded to the prevailing party based upon common-law principles or statutory authorization. See Stabinski et al. v. Alvarez, 490 So.2d 159 (Fla. 3d DCA 1986) and Trend Coin v. Fuller, Feingold & Mallah, 538 So.2d 919 (Fla. 3d DCA 1989).

In typical probate proceedings, there is no litigation and no losing party. The Rowe methodology simply does not fit. Fur-

ther, our legislature specifically addressed by statute, Section 733.617, the method to determine reasonable compensation:

> "Reasonable compensation shall be based on one or more of the following: ... ." (emphasis supplied)

Time is only one of the factors and is not, therefore, essential in all cases. See In re Estate of Platt, 546 So.2d 1114 (Fla. 4th DCA 1989).

The other factors do not include a "contingent fee" consideration which appears to be the only factor to enhance the fee by a multiplier. A careful reading of Rowe seems to say that the factor of "results obtained" cannot be used as an enhancer, but can be used to reduce the fee. Under Section 733.617, the results obtained is one of the factors and conceivably could be the primary or only basis to award a fee in a specific case. The statute and the Rowe approach conflict and, obviously, the statute controls.

A Commentator in Basic Practice Under The Florida Probate Code, Third Edition, a Florida Bar publication, at pages 606 and 607 stated:

> "There are many reasons why the lodestar method is inappropriate to the determination of reasonable fees for attorneys in probate. The principal reason is that the legislature has preempted the subject by setting out in F.S. 733.617 the factors to be applied and by significantly omitting the criterion 'whether the fee is fixed or contingent,' which is a core factor in the lodestar process. See What An idea, Inc. v. Sitko, 505 So.2d 497 (Fla. 1st DCA 1987), in which the court, in interpreting a statute almost identical to F.S.

733.617, held the lodestar approach and Rowe 'inapplicable in instances in which the Legislature has provided specific guidelines for determination of attorney's fee awards.' 505 So.2d at 498. See also Division of Administration, State Department of Transportation v. Ruslan, Inc., 497 So.2d 1348 (Fla. 4th DCA 1986); Rivers v. SCA Services of Florida, Inc., 488 So.2d 873 (Fla. 1st DCA 1986). Second, there is a long and respected body of case law setting forth the principles upon which reasonable fees for attorneys are to be set in probate matters. Perhaps, the greatest weakness in attempting to apply the lodestar principle to probate matters is that the lodestar virtually ignores the criterion of the amount of assets involved and does not assign value to the responsibility of the lawyer and his exposure to liability as it varies with the size of the estate, the complexity of such elements as tax planning, and other factors that are not present in the usual litigation cases for which the lodestar process was developed. Nor does the lodestar take into account that, unlike contingent fee cases such as Rowe, the only source for payment to the estate attorney is the fee allowed pursuant to F.S. 733.617, whereas the fee awarded in contingent fee and similar cases is an 'add on' to the compensation of the prevailing attorney, which involves shifting the burden to pay the fee, or, as in class actions, involves sharing the fund created by the litigation. Furthermore, the direction of the Florida Probate Code is not that the court determine what the amount of the fee should be, but whether the fee paid or proposed to be paid is reasonable. The fee is not set by the court in the first instance, but the court is charged with reviewing the judgment of the personal representative as to what such fees should be. The function of the court in passing on fees in probate matters is similar to that of a court considering whether a jury verdict should be subject to remittitur. Finally, the lodestar approach ignores the fact that the attorney has rendered services on a contractual or semi-contractual basis for the personal representative, who has a fiduciary duty to the beneficiaries to make a judgment as to the reasonableness of the attorney's fee."

More recently, this court discussed the lodestar approach in Quanstrom v. Standard Guaranty Insurance Co., 519 So.2d 1135 (Fla. 5th DCA 1988), 15 FLW S23. Again, this was a case determining appropriate attorney's fees to be paid to a prevailing party in a litigated matter. In its opinion, the court discussed the theory of payment of fees in condemnation cases and stated that the attorney is assured of a fee when the action commences. The court then stated:

> "Similarly, an attorney's fee is generally assured in estate[9] and trust matters.[10] Under ordinary circumstances, a contingency fee multiplier is not justified in this category, although the basic lodestar method of computing a reasonable attorney's fee may be an appropriate starting point." (emphasis supplied)

Footnote 9 refers to Section 733.106. This court is referring to fees in litigated matters and not to typical probate administration which is governed by Section 733.617. However, even if it is, the court is not mandating that the basic lodestar approach is required in these cases. It says it may be an appropriate starting point. The District Court merely said that the lodestar need not be applied. These statements are not inconsistent.

The concept of making hourly units of time the required "starting" point and then determining an hourly rate by using criteria which really cannot be equated to time is not a sound approach to determine reasonable compensation in typical probate

administration. Section 733.617 recognizes the fee customarily charged in the locality. Where the market place in a locality establishes customary percentage fees, such local practice should not be overlooked by the courts because Section 733.617 controls, not Rowe, and such a practice makes sense.

A percentage-oriented system has two components, (i) a value base and (ii) a percentage. In probate areas, the first component usually includes the probate assets valued at fair market value. The second component always is a function of the market.

Time-oriented systems tend to reward the expenditure of time, per se. Thus, they tend to reward inefficiency and to penalize efficiency.

Except to any extent that the value of a product or service is directly proportional to the lawyers' time that is spent to make or render it, a time-oriented system tends to produce a fee that has only a random relationship to value. Increased use of systems and technology to deliver a lawyer's products additionally attenuates the relationship between time and value.

An attenuated relationship between value, on the one hand, and the marginal time that a lawyer needs to perform a job, on the other, particularly inheres in estate planning. Systems, technology, research and nonlawyer services are relatively important to, and costly components of, the highest quality of estate

planning compared to the highest quality of other types of legal work.

Estate planning and estate administration are more efficient, and provide better results, when they include use of inputs other than lawyers' time. These other inputs include elaborate procedures that, themselves, are the product of time and other inputs. Any attorney who uses these procedures must avoid using a straight-time system of charging if he is to receive compensation commensurate with his efficiency.

Percentage-oriented fees and product-oriented fees reward efficiency directly.

If the value of a lawyer's work is a function of the value of the property that the lawyer is preserving or creating, a percentage-oriented fee tends to bear a direct relationship to the value that the client receives. Similarly, if both consumers and producers adequately are informed, the market should tend to cause a product-oriented fee to bear a direct relationship to the value that the client receives.

Malpractice insurers and the law of professional responsibility indicate that responsibility and compensation for breach of responsibility are functions of the number of dollars that are involved. The legal measure of an attorney's responsibility seems also an appropriate basis for an attorney's calculation of his compensation. Regardless of what some courts and some con-

sumers may think, the market is saying that, other things being equal, an attorney should receive more compensation for working with a larger value than for working with a smaller value.

Product-oriented fees and percentage-oriented fees additionally have the advantage of tending to provide certainty to both attorney and client. Additionally, each tends to avoid the significant variations that appear when fees are based solely upon time.

Some courts attempt to disallow all fees in excess of a certain rate per hour. They determine the maximum rate in advance, with little regard to the lawyer's responsibility, competence, efficiency or reputation and with little regard to the nature of the work. An hourly rate ceiling compounds all of the problems that inhere in a time-oriented system. It often applies arbitrarily as well as perversely. Whereas a time-oriented system, per se, emphasizes the lawyer's expenditure of time, the addition of a ceiling tends to prevent the lawyer from using the other inputs that are essential to production of work of the highest quality.

An hourly rate ceiling ignores the one or more bases upon which the attorney actually determines the fee. It substitutes time (i.e., a number of hours) as the sole criterion. The use of time as the sole criterion inherently presupposes, and the use of time as a principal criterion tends to presuppose, that time is

fungible. However, one attorney's time is not fungible qualitatively with any other attorney's time.

An hourly limit will tend to affect most adversely the most efficient lawyers. These are precisely the lawyers that the system most should encourage. Since a principal purpose of the system is to promote efficient transmission of wealth at death, a ceiling that undermines this purpose should be unreasonable, per se.

If two attorneys produce different outputs during the same period of time, the better producer will tend to use more input, e.g., supplies, equipment, office space, secretarial services, research and development. Obviously, a system that compensates each at the same rate per unit of time will provide each with an identical amount of gross income but will provide a greater amount of net income to the lawyer who produces less.

The problem also is describable in terms of a single lawyer. Assume that this lawyer's preparation of an estate plan formerly consumed $1,000 of expenses and ten hours of the lawyer's time. He charged a fee of $2,500 or $250 per hour, and he generated net income of $1,500, or $150 per hour. This lawyer's infusion of additional input other than his time permits him now to prepare the plan for an expenditure of $1,500 and five hours of his time. He uses the five hours that he saves to prepare a second plan, and the second plan also requires expenditures of $1,500. If he

charges the same fee, $2,500, for each plan, he generates gross receipts of $5,000, or $500 per hour, costs of $3,000 and net income of $2,000, or $200 per hour. The changed mix of production factors increases the ratio of the lawyer's output to input (i.e., the lawyer's efficiency) and increases the lawyer's net income even though the lawyer increased his costs and even if the lawyer reduces somewhat his fee per plan. The change benefits both the consumer and the lawyer. Why should a court complain?

The market system can determine more efficiently and less intrusively than the judicial system the best mix of production factors and the best levels of outputs and fees. Whereas the market can accommodate two lawyers who produce different outputs and use different production factors but have the same efficiency (i.e., ratio of output to input), a fee-for-time ceiling that a court imposes will tend to prefer the producer who uses less cost per unit of his time or, stated more simply, less cost and more of his time. Since neither method is better than the other, the preference is arbitrary. Courts should not indulge it.

A legal fee that a court or an attorney decrees but that ignores the market will produce, ultimately, a misallocation of legal services compared to those that consumers would purchase if the edict did not exist. It also will produce a misallocation of production factors compared to those that lawyers would use if the edict did not exist. Any system that focuses solely upon a

lawyer's time, the one input that the lawyer cannot expand per unit of time, tends to distort the lawyer's use of all production factors.

The market inexorably is present even if a court or lawyer refuses to recognize it. Wise judges realize that they should defer to it.

> "Proceeding presumptively with the firm's own rates allows the court to avoid the essentially impossible task of selecting one rate over another from a wide range of 'market' rates, it limits the power of the trial judge arbitrarily to reward or punish attorneys by setting rates virtually at will, and it allows the parties and the court to avoid a 'second major litigation' over the rate-making process. The marketplace best measures 'market value'; appraisal by no other method has as much claim to veracity and objectivity." Laffey v. Northwest Airlines, Inc., 746 F. 2d 4, 18, (D.C. Cir. 1984)

In re Potts' Estate, 209 N.Y.S. 655, the court opinion included the following:

> "The standard by which the value of such services is measured is, however, the fair and reasonable value of the services rendered after considering the various elements referred to. I do not think items as to time actually employed in work on the case are of much importance. It is the ability of the attorney and his capacity and success in handling large and important matters and in commanding large fees therefor, the amount involved, and the result obtained, which are of prime importance in determining what constitutes a just and reasonable charge." (emphasis supplied)

(B) WHERE ALL INTERESTED PERSONS BEARING THE IMPACT OF THE FEES HAVE AGREED UPON THE FEE, THE COURT SHOULD NOT INTERFERE WITH THAT AGREEMENT UNLESS THE FEES ARE EXCESSIVE.

Pursuant to Section 733.617, Florida Statutes, specific guidelines are set forth to determine reasonable attorney's fees. The reasonableness of such compensation may be reviewed by the probate court and, in fact, is required to be done by notice to all affected interested persons pursuant to 733.6175, Florida Statutes.

Where there is an agreement to attorney's fees by the beneficiaries or where an interested party waives and/or consents to the amount of attorney's fees, the probate court will ordinarily not review the fees. Waiver is acknowledged by the Florida Rules of Probate and Guardianship Procedure and by the Florida Probate Code. Rule 5.400(b)(2)(D) requires a showing of attorney's fees in the petition for discharge. Rule 5.400(f) authorizes waiver of any portion of the petition for discharge. Section 731.302, Florida Statutes, allows an interested party to waive any right or notice or filing of any document and to consent to any action or proceeding permitted by the probate code. Waiver is somewhat restricted, but the objection to attorney's fees can clearly be waived or consented to by an interested party.

Carswell was the only party to object to the fee. In fact, she was the only party that could have objected to the fee, other

than the bank, which had previously agreed upon the fee. This was because the decedent's will distributed the property to the bank, as trustee, for the benefit of Carswell during her lifetime and upon her death, it would go to contingent remaindermen. Based upon the evidence, the trial court held that there was an implied agreement. Also, the trial court held that Carswell was estopped to challenge the fee.

There was substantial evidence to support the trial court. In reply to Carswell's inquiry about fees, Warwick wrote her a letter stating that the fees would be based on several factors and would be in a range between 2-1/2 to 3 per cent of the probate assets. (T 84). The fee of $54,000 was within that range and disclosed on the Federal estate tax return which Carswell signed without objection and under penalties of perjury. According to the trust officer of the corporate personal representative, Carswell discussed fees with the trust officer, did not object to the attorneys' fees and signed the return. All of this was done in 1985. Over two years later, Carswell objected after the attorneys' fees had been deducted as an expense on the Federal estate tax return. Also, Carswell allowed Warwick to proceed for over two years without objection. Carswell was a co-personal representative and did, in fact, speak by signing the return. She received a copy of the return and should not be allowed to renege.

11 Florida Jur. 2d, Contracts, Section 3 at page 294, states the following:

> "It is said that to create a contract by implication there must an unequivocal and unqualified assertion of the right by one of the parties, and such silence by the other as to support the legal inference of his acquiescence."

If there was not an agreement, at least there was a waiver or consent which is authorized not only by the probate rules and code, but also by general principles of law.

11 Florida Jur. 2d, Contracts, Section 206 at page 511, states the following:

> "Failure of one party to object to the performance of the other party for a lengthy period of time constitutes a waiver."

11 Florida Jur. 2d, Contracts, Section 206 at page 510, states the following:

> "Waiver may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived."

The question of waiver is a question of fact to be decided by the trier of fact. Rutig v. Lake Jem Land Co., 20 So.2d 497 (Fla. 1945).

There were conflicts in the testimony between Carswell and the trust officer, Carol Gainer. As to factual conflicts, it is clear that the appellate court should not re-evaluate the testimony and evidence. In Shaw v. Shaw, 334 So.2d 13 (Fla. 1976), the Florida Supreme Court stated:

> "It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the the testimony and evidence from the record on appeal before it. The test, as pointed out in Westerman, supra, is whether the judgment of the trial court is supported by competent evidence."

It is the function of the trial court, not the appellate court, to resolve conflicting evidence. An appellate court will not second-guess the trial court's findings on issues of fact where there is conflicting evidence in the record. Crum v. United States Fidelity and Guaranty Company, 468 So.2d 1004 (Fla. 1st DCA 1985) and Peacock v. Farmers and Merchants Bank, 454 So.2d 730 (Fla. 1st DCA 1984).

The appellate court cannot substitute its judgment for that of the trial courts where there is evidence in the record to support the trial court's finding even though there exists contradictory evidence which may be convincing to the appellate court. Moring v. Levy, 452 So.2d 1069 (Fla. 3d DCA 1984).

Once the probate court has exercised its discretion in setting reasonable compensation of the attorney for the personal representative, that decision will be disturbed on appeal only upon clear showing by appellant that it is contrary to the manifest weight of evidence. Sheffield v. Dallas, 417 So.2d 796 (Fla. 5th DCA 1982).

The trial court held that the fees were not excessive. (T 85).

The District Court was silent on the issue under this subpoint B. However, even if this Court would not agree with Respondent on the issue raised on his subpoint A, nevertheless, the trial court's award of attorney's fees in this case should be affirmed.

CONCLUSION

Respondent requests that the Court affirm the decision of the Fourth District Court of Appeal and the order of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by hand delivery to Louis L. Hamby III, Esq., Alley, Maass, Rogers, Lindsay & Chauncey, 321 Royal Poinciana Plaza, Palm Beach, FL 33480, this 8th day of March, 1990.

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