

045

IN THE SUPREME COURT OF FLORIDA

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

Case No. 74,349

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JULIA W. CARSWELL,  
  
Petitioner,

vs.

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

Respondent.

FILED  
JUL 11 1979  
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PETITIONER'S BRIEF  
ON JURISDICTION

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

LOUIS L. HAMBY III, ESQ.  
ALLEY, MAASS, ROGERS,  
LINDSAY & CHAUNCEY, P.A.  
Attorneys for Petitioner  
321 Royal Poinciana Plaza  
Palm Beach, FL 33480  
407/659-1770

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STATEMENT OF THE CASE AND FACTS

Petitioner, JULIA W. CARSWELL, was a co-personal representative and beneficiary of the estate of Harvey S. Warwick, who died in 1984. In November, 1987, the estate was ready to be closed and a petition for discharge was filed by the other co-personal representative stating, among other things, that the attorneys' fees paid to Respondent were \$54,000.00. Petitioner objected to these attorneys' fees and a hearing was held on the objection on January 28, 1988. At the hearing, the attorney for the estate, Charles H. Warwick III, testified that he did not keep time records for the work he did for the estate and that his fees were not calculated on an hourly basis but were essentially the product of a percentage of the estate assets. The probate court approved the fees as reasonable and held that the lodestar method set forth in Florida Patient's Compensation Fund v. Rowe, 470 So.2d 1145 (Fla. 1985) did not apply.

Petitioner appealed the probate court's order to the Fourth District Court of Appeal. By opinion filed May 24, 1989, the Fourth District Court of Appeal affirmed the probate court's decision and held that the lodestar method stated in Rowe did not have to be applied in probate proceedings.

Petitioner then filed a Notice of Appeal on July 21, 1989, to invoke the discretionary jurisdiction of this Court to review the Fourth District Court of Appeal's opinion.

#### SUMMARY OF ARGUMENT

The issue in this case is whether the lodestar method articulated in the Rowe case applies to awards of attorneys' fees in probate proceedings. The decision by the Fourth District Court of Appeal in this case, by holding that Rowe does not have to be applied, conflicts with the holding in Rowe itself, and also conflicts with two cases decided by the Second District Court of Appeal, (De Loach v. Westman, 506 So.2d 1142 (Fla. 2nd DCA 1987), and Brady v. Williams, 491 So. 1160 (Fla. 2nd DCA 1966), which held that Rowe does apply to awards of attorneys' fees in probate proceedings.

#### JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision

of the Supreme Court or another district court of appeal on the same point of law. Art. V §3(b)(3) Fla.Const. (1980); Florida Rules of Appellate Procedure, 9.030(a)(2))A)(iv).

#### ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 470 So.2d 1145 (Fla. 1985).

In Florida Patient's Compensation Fund v. Rowe, 470 So.2d 1145 (Fla. 1985), the Florida Supreme Court recognized a "perceived lack of objectivity and uniformity in court determined reasonable attorneys' fees" and accordingly set forth "specific guidelines to aid trial judges in the setting of attorneys' fees". Rowe, 472 So.2d, 1149, 1150. Essentially, there were two parts to the Rowe decision. First, the Court in Rowe held that the criteria to be used in determining reasonable attorneys' fees should be those set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility. Second, the Court in Rowe held that in applying the criteria, the lodestar method (which requires a focusing on the hours reasonably expended and a reasonable hourly rate) should be used.

In a probate proceeding, the first part of the Rowe decision is adequately addressed by F.S. §733.617 which sets forth criteria virtually identical to those contained in the Disciplinary Rule. However, this still leaves the second part of the Rowe decision, namely the method of applying the criteria.

The District Court of Appeal held that the lodestar method set forth in Rowe did not have to be applied to these criteria, and thus its decision expressly and directly conflicts with this Court's decision in Rowe.

The goals of objectivity and uniformity referred to in Rowe will never be achieved if one trial court in applying the criteria set forth in Disciplinary Rule 2-106(b) must use the lodestar formula, but another court in applying virtually the same criteria set forth in a statute (such as F.S. §733.617) is not obliged to apply the lodestar method. There is a need for this Court to address this issue and render a decision stating whether or not Rowe applies to the determination of reasonable attorneys' fees in probate proceedings.


II. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN DE LOACH v. WESTMAN, 506 So.2d 1142 (Fla. 2nd DCA 1987) AND BRADY v. WILLIAMS, 491 So.2d 1160 (Fla. 2nd DCA 1986).

In De Loach v. Westman, 506 So.2d 1142 (Fla. 2nd DCA 1987), and Brady v. Williams, 491 So.2d 1160 (Fla. 2nd DCA 1986), the Second District Court of Appeal held that Rowe applies to the determination of reasonable attorneys' fees in a probate proceeding. In both cases the matter was remanded to the trial court with directions to make the findings required by Rowe. Accordingly, the Fourth District Court of Appeal's decision in this case expressly and directly conflicts with the decisions of the Second District Court of Appeal in De Loach and Brady.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

ALLEY, MAASS, ROGERS,  
LINDSAY & CHAUNCEY, P.A.  
Attorneys for Petitioner  
321 Royal Poinciana Plaza  
Palm Beach, FL 33480  
407/659-1770

By   
LOUIS L. HAMBY III  
Fla. Bar #282219

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief on jurisdiction has been furnished by mail to James E. Weber, Esq., Suite 502, Flagler Center, 501 So. Flagler Drive, West Palm Beach, FL 33401, this 7th day of July, 1989.

  
LOUIS L. HAMBY III