OA 6-7-90

In the

Supreme Court of Florida

CASE NUMBER 74,793

In Re: Estate of

LESTER PLATT,

Deceased.

PATRICIA PLATT FAULKNER and BARBARA PLATT SWANSON,

Petitioners,

vs.

GEORGE A. PATTERSON and NCNB NATIONAL BANK OF FLORIDA,

Respondents.

Amicus Brief
The Real Property, Probate and Trust Law Section
of
The Florida Bar

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Note to the court: This brief is identical to that filed in case number 74,349 (Warwick)

Argument

Purpose

The reason the Real Property, Probate and Trust Law Section of The Florida Bar (in this brief, referred to as "the Section" or "this *amicus*") has appeared as *amicus* in these proceedings is to address the central issue to be decided in both cases, *In re: Estate of Lester Platt,* case number 74,793 and *In re: Estate of Harvey S. Warwick,* case number 74,349. That central issue is:

> ***Whether the case of* Florida Patient's Compensation Fund v. Rowe,[1] *applies or should apply to the determination of fees to be paid to the attorney representing the personal representative with regard to estate administration and (as to* Platt *only) paid to the personal representative, from the estate.***

This amicus believes there is a significant distinction relating to estate fees paid to an attorney representing a personal representative in regular administration and such fees paid to an attorney for a personal representative in matters involving litigation or other adversary matters. As to the former, it is the Section's belief that *Rowe* has no application; as to the latter (although not presented here for determination) *Rowe* may apply.

We do not intend to suggest to this court which party in these cases should prevail in this appeal since there are several additional issues which do not directly involve the application of *Rowe*, and which do not concern this *amicus*.

Rowe: Background and Rationale

The factual background and rationale in *Rowe* was that a statutory reasonable attorney's fee was awarded *against* a party who was not the attorney's client and did not participate in the original negotiation of the fee. There could be some difference between what was a reasonable fee to be charged to a client and what would be a reasonable fee to be charged against a losing party. The latter could not exceed the former.[2]

Added to this background and rationale was "the perceived lack of objectivity and uniformity in court-determined reasonable attorney fees."[3] In addition, *Rowe* directly addressed a fee statute which was recently enacted[4] and did not, therefore, have a history or heritage of fee determination. Certainly there was no "market level" applicable in this specific context

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1 *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985).

2 *Rowe* at page 1151.

3 *Rowe* at page 1149

4 "The subject statute, section 768.56, was adopted as a part of the Medical Malpractice Reform Act and became effective July 1, 1980." *Rowe* at page 1147. The *Rowe* case was decided by the court on May 2, 1985, however, section 768.56, did not long endure. It was repealed by Chapter 85-175 Laws of Florida.

since the right to an attorney fee award was first created by passage of section 768.56 of the Florida Statutes by the 1980 Legislature and was repealed 5 years later. Determination of reasonable attorney fees for probate administration has a history dating back to at least 1845 when Florida became a state and literally has a century and a half of heritage. Determination of personal representative fees changed in 1976 from a statute which required mandatory adherence to a statutory percentage schedule, to the reasonable fee basis also applicable to attorney fees, with the same heritage and precedent to draw upon.

Rowe also had the factor of "award [of] a 'reasonable attorney's fee' to the *prevailing party*"[5] (italics added), within an "us-against-them" context. A regular estate administration is non-adversarial and, in fact, the fiduciary who is being compensated actually "represents" the beneficiaries who are compensating him, her or it. In regular estate administration, the concept of a "prevailing party" has no application.

Rowe: Application to Regular Probate Administration

The "perceived lack of objectivity and uniformity" has not been demonstrated, nor does it exist in setting attorney fees or personal representative fees. Here, there is no "social malpractice that undermines the confidence of the public in the bench and bar ... [and] ... brings the court into disrepute and destroys its power to perform adequately the function of its creation."[6] For a century and a half, courts (including those members of this panel who ascended from the county judge's or circuit bench) have efficiently and with the confidence of the public determined reasonable fees for attorneys representing personal representatives in their regular estate administration. In fact, the two cases now on appeal, *Warwick* and *Platt* actually demonstrate significant uniformity in setting, at least, attorney fees. (Personal representative's fees are contested only in *Platt*.)

* Schedule of Fees *

	Warwick	Platt
Size of Estate	$1,890,000.00	$7,215,000.00
Personal Representative (percentage of estate)	$81,720.00 (4.32%)	$270,769.00 (3.75%)
Attorney (percentage of estate)	$54,000.00 (2.85%)	$144,300.00 (2.00%)

The greater percentage in *Warwick* reflects the community custom[7] that the applicable percentage decreases as the estate becomes larger. This same inverse relationship is also the community custom of published fee schedules of corporate fiduciary fees as reflected in the testimony of the experts testifying for the corporate fiduciary in *Platt*.

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5 *Rowe* at page 1146.

6 *Rowe* at pages 1149,1150 quoting from *Barauch v. Giblin*, 122 Fla. 59, 63 164 So. 831, 833 (1935).

7 Section 733.617(1)(c) Florida Statutes (1985), Section 733.617(1)(d) Florida Statutes (1988), Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility, Rule 4-1.5(b) of the Florida Bar Rules of Professional Conduct.

The "perceived lack of objectivity and uniformity" in *Rowe*, dealing with a newly enacted statute, has no application to the fee heritage literally spanning centuries as it relates to probate fees. The 1976 codification of factors to be considered in determination of probate fees significantly indicated that "***one or more***" of the enumerated factors could be used by the court to determine the reasonable fee. This meant that the court could, if appropriate, set the fee based solely on the time required (a lodestar approach) or based solely upon the amount involved (the percentage fee approach).

In both instances, the "fee customarily charged in the locality" is used. In the lodestar, that is the "market rate", in the percentage fee, that is the "market percentage". The use of the terminology "market" as applying to fees, whether hourly or percentage, suggests the reality of both attorney and fiduciary fees in a market society. Nearly all corporate fiduciaries publish fee schedules and there is significant competition in pricing as well as services. Some attorneys publish fee schedules and others have them available to clients on request and, again, the reality is that the "market" influences the rates, whether they are percentage or hourly. Probate attorneys (and corporate fiduciaries) daily experience "fee shopping" and are asked to quote fees or "bid" on legal or fiduciary business for a particular estate. When the trial court considers "the fee customarily charged in the locality for similar services" (as it did in *Platt* and *Warwick)* it is able to ascertain that fee with some degree of certainty. The "great concern" over "a perceived lack of objectivity and uniformity" does not exist in Florida with regard to determination of fees for probate administration.

Even examples of significant differences in fees charged or awarded, between one estate and another (each having equal asset value), or from one locality to another, do not reflect lack of uniformity, but rather differing factors extant in determining the fee as provided in Section 733.617 of the Florida Statutes.

That statutory section provides flexibility without rigid limitations. If a lodestar fee is determined in a particular estate to be appropriate, that fee can be adjusted up or down by consideration of other factors (for example diligence in the administration and results obtained). If a percentage fee is used as the starting point, that fee can be adjusted up or down by consideration of other factors (for example, an inordinate expenditure of professional time reasonably required, whether inordinately high or low). Flexibility is the keystone which supports the system.

Generally, the complaint by those objecting to percentage fees is that by applying a percentage alone to the determination of the fee, the attorney or the fiduciary is being overcompensated in relation to the time necessarily invested in the administration. Overcompensation is defined by such objectors as net realization in hourly fee terms in excess or substantially in excess of normal hourly rates charged by a lawyer or, in case of fiduciaries, hourly rates which would be reasonable. What these objectors actual mean is that the fee was too large. If the percentage calculation had produced a smaller result that a lodestar calculation would have produced it can readily be gleaned that no objection would exist, at least not by the beneficiary. So the objection we are really dealing with here is "the fee was too large", not "the fee should not be determined by reference by a percentage of the value of the assets". If the fee is truly too large, then the trial judge has erred in setting the fee. It is not a question of the wrong method. He should have considered or given more weight to other factors in the statute to determine a lower amount, even though one, or even the significant, factor in this particular fee determination was the value of the estate. It is, after all, the value of the estate which is the only efficient method to compensate an attorney in a large estate for the responsibility or risk factor.

It is not the position of the Section that fees must be set based upon a percentage of he

value of the estate in every estate, but that factor is and should continue to be a permissible factor (or even the only factor) to consider in the correct instance. In the same manner, the Section does not suggest that fees must be set based upon the hours expended in the administration, but that factor is and should continue to be a permissible factor (or even the only factor) to consider in the correct instance.

How should the risk/exposure factor be compensated?

Historically in Florida, compensation based on percentage of the value of the assets has been the method used to compensate personal representatives. The earliest reported case,[8] from 1857, discussed "a reasonable fee" payable for other services beyond those covered by the statutory fee, discussed "the value of the estate" as one of the factors used to set the fee.

It is argued that by amending the previous compensation statute[9] containing a specific percentage fee schedule for ordinary services, that the Legislature intended "to eliminate percentage fees". We believe that the legislature intended to delete the percentage fee as the *exclusive* method and to expand the number of factors used to determine the fee. Retained in the statute as one factor was the "amount involved" (which has since been amended to "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")[10] which certainly allows the estate value to be continued as a part of the compensation formula. It is basic statutory construction that setting a fee considering the "amount involved" or the nature and value of the assets of the estate and the amount of income earned" and either considering other statutory factors or not as appropriate, and thereby determining "a reasonable fee" as required by the statute, is a correct approach.

Our statute permits consideration of the risk factor which the strict application of a lodestar method would not do. "Risk" in this context is not the risk of prevailing and therefore being paid, since that does not normally apply in the solvent estate administration context, but rather the risk of liability; the exposure to malpractice or surcharge. This ***must*** be given effect if the compensation is to be "reasonable" as mandated by the statute. It is overly simplistic, as argued by appellant's counsel in the *Warwick* case, that large estates typically require greater expenditure of professional time and that should compensate the professional for the greater risk involved. Assume two hypothetical estates, each of which took 100 hours of professional time to administer, and in the first, there were time consuming efforts to marshall missing assets which eventually reached a total value of $100,000 and in the latter, there were significant tax considerations, which although not generally time consuming, involved significant responsibility and the probate asset value totaled $1,000,000. Under the lodestar approach, the compensation paid in each estate would be roughly equal.

Now, restoring reality, the hypothesis that the fee in the larger estate is somehow self adjusting to take the greater responsibility into consideration through compensation for increased hours in administration immediately fails if you consider the facts of the two cases now before this court. In *Warwick* (a $1,890,000 estate) the attorney testified that he spent 120-130 hours on the estate. In *Platt* (a $7,000,000 estate) the attorney testified he spent 274 hours on the estate, or slightly more than twice as much time on an estate which was nearly

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8 *Moore v. Felkel*, 7 Fla. 44 (Fla. 1857)

9 Section 733.01 Florida Statutes (1974)

10 See *infra*, section entitled "Then and Now".

four times as large. So many factors influence complexity in estate administration that professional time expended bears, at best, only a casual relationship to estate size (and professional responsibility).

One of the high profile surcharge cases of the recent past (the same year *Rowe* was decided) is *Reynolds v. First Alabama Bank of Montgomery, N.A.* In that case, after having (in prior reported opinions) surcharged the Bank as trustee, the Alabama court adopted the "English Rule" regarding assessing attorney's fees against the losing party, in instances where there was "fraud, wilful negligence or malice". The court assessed $1,000,000.00 in attorney fees against the bank. This well written opinion, which traces the English Rule and American Rule, indicates that the American Rule "... arose out of our colonial experience where lawyers were looked upon with suspicion and were considered characters of disrepute."[11]

While it is not wide know or recognized, the exposure of Florida personal representatives is significantly increased by the limited adoption of the English Rule by Florida Statute section 733.609 which applies even in the absence of "fraud, willful negligence or malice" if the exercise of the fiduciary power is "improper or in bad faith." This makes it all the more imperative that risk be somehow accounted for in the compensation formula.

Distinctions in award of attorney fees under F.S. 733.106 and 733.609

For the purposes of the determination which this court must make here, there must be a distinction recognized between fees awarded under Florida Statutes section 733.617 (for regular administration services) on the one hand and fees awarded under sections 733.106[12] or 733.609[13] on the other. The former relates to regular estate administration (for the most part) and the latter two relate to contested, adversary or litigated matters. As to awards in the latter two instances, your *amicus* agrees that the lodestar should apply, at least as a starting point. This is where the traditional winning party/losing party concepts apply.

For example, under F.S. 733.106(2), where a will is offered for probate in good faith, although denied probate for one of the legal reasons at the conclusion of a will contest, the attorney for the (losing) personal representative is entitled to have fees paid from the estate.

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11 *Reynolds v. First Alabama Bank of Montgomery, N.A.* 471 So.2d 1238 (Ala. 1985). See also Kelley, "Protecting the Corporate Fiduciary's Tender Backside" February 1988 *Trusts & Estates* page 62.

12 **733.106 Costs and attorney fees.–**

(1) In all probate proceedings costs may be awarded as in chancery actions.

(2) A person nominated as personal representative of the last known will, or any proponent of the will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive his costs and attorney fees out of the estate even though he is unsuccessful.

(3) Any attorney who has rendered services to an state may apply for an order awarding attorney fees, and after informal notice to the personal representative and all persons bearing the impact of the payment the court shall enter its order on the petition.

(4) When costs and attorney fees are to be paid out of the estate, the court may, in its discretion, direct from what part of the estate they shall be paid.

13 733.609 **Improper exercise of power: breach of fiduciary duty.**--If the exercise of power concerning the estate is improper or in bad faith, the personal representative is liable to interested persons for damage or loss resulting from a breach of his fiduciary duty to the same extent as a trustee of an express trust. IN all actions challenging the proper exercise of a personal representative's powers, the court shall award taxable costs as in chancery actions, including attorney's fees.

The are indirectly "assessed against" the other party, who, presumable, as the winner of the will contest, now is entitled to receive a part or all of the estate under either the laws of intestacy or under a competing will.

Under F.S 733.106(3), an attorney who has rendered services to an estate may apply in his or her own name for the award of a fee. Courts have construed an award under this subsection as requiring the attorney to have "benefited" the estate. An example is where two beneficiaries, neither of whom is the personal representative, dispute the construction of the will which has the result of increasing one estate bequest at the expense of the other. The fee is awarded to the attorney for the prevailing beneficiary under the theory that such attorney has benefited the estate by carrying out the wishes of the decedent. Then, the personal representative petitions the court to pay the fee awarded to the attorney for the successful beneficiary from the balance of the share due to the loosing beneficiary on the theory that the residuary beneficiaries should not be required to bear the impact of this fee. F.S. 733.106(4) permits the court the discretion to make this allocation.

In each of these examples, the winning party/loosing party rationale, which was significant in *Rowe,* is present. In these instances, it would seem that a lodestar fee, as a starting point would be applicable.

Another hybrid situation is where a residuary beneficiary objects to the final accounting of the personal representative. The personal representative retains special counsel, other than his regular estate administration counsel, to represent him in defending the objection. The court eventually rules in favor of the personal representative on the objection and the personal representative's special counsel is entitled to compensation under F.S. 733.617. (He or she might alternatively be entitled to compensation under F.S. 733.106(3) or F.S. 733.609.) Even though the fee was authorized under F.S. 733.617, it is in the nature of a fee for litigation awardable *against* the residuary beneficiary. Again, that should not preempt the lodestar considerations. It is only the fee for *administration* (which is not awarded *against* anyone and where there is no winning and losing party) which should not be limited to lodestar considerations.

Even fee awards under F.S. 733.609(3) [benefit to the estate] when decided under *Rowe*, may not always reach a satisfactory result. In *Tillman v. Smith*[14] the attorney for the surviving spouse, who elected against the will, during the controversy and litigation over that election, gave "unsolicited but admittedly valuable tax advice" to the accountant for the estate that he (the accountant) had failed to take certain discounts to which the estate was entitled. The accountant amended the estate tax return based on that advice, and obtained a refund of taxes paid in the amount of $70,000. The advice given took only 15 to 20 minutes. By that time, the *Rowe* formula was the law of the case (with regard to the litigation) and the trial court's award of $20,000 to the attorney who benefited the estate was reduced to $125.

Within this context, Messrs Weber (in *Warwick)* and Carrat (in *Platt)*, neither of whom represented their respective personal representative in the probate administration, should be paid, (if their fee is allowed from the estate) based on the lodestar value of their services. They would be paid after directly opposing a position advanced and argued by a person now bearing the impact of their fee. This is like compensating Lena Rowe's attorneys under *Rowe*. Her attorneys never represented Florida Patients Compensation Fund, who hired and compensated its own attorneys.

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14 15 FLW D1139, (5th DCA April 26, 1990).

Although in *dicta,* in a recent decision[15] this court suggests that estate matters may be grouped with family law, eminent domain and trust matters, for application of *Rowe* principles, there are still the distinctions mentioned above. In family law and eminent domain, there is a winning adversary and a losing adversary. The losing adversary "has not participated in the fee arrangement between the prevailing party and that party's attorney".[16] Even in estate and trust litigation, the concepts are similar. It is only estate *administration*, which is distinct, and to which the lodestar should have no application.

We see it as *most significant* that the court in the *Quanstrom* case in suggesting that the lodestar might be a starting point for the fee determination in estate matters, cited directly to Florida Statute section 733.106, which, as noted above, is generally a "litigation fee" section, and which previously in this brief, this *amicus* has suggested that fees allowable *against* a party should be determined using the lodestar as a starting point. The cases here on appeal involve the award of a non-adversary fee under F.S. 733.617.

There are significant distinctions from the foregoing examples when setting fees for estate administration services, both for fiduciaries as well as their attorneys.

Compensating NCNB and Mr. Patterson (the joint personal representatives) in *Platt* and First Union National Bank, the personal representative in *Warwick* (although First Union's fees are not in issue in this appeal) is different than compensating counsel for the opposing side in a lawsuit. The personal representative owes affirmative duties to and actually represents the beneficiaries in a limited capacity. It is not adverse to but rather serves the beneficiary. Its fees should not be determined with the same limitations extant as fees to be awarded *against* a losing party in litigation.

Compensating Mr. Patterson as attorney for the personal representative in *Platt* and Mr. Warwick in *Warwick*, is similar to considerations regarding compensation of the fiduciary. Although the attorney represents the fiduciary, he (or she) like his client (where there is no conflict between the fiduciary and the beneficiary), owes an indirect duty to the beneficiary. In those instances, although representing the personal representative, the attorney is required to advise his client, the personal representative, what is in the best interests of the beneficiaries so his client may properly discharge his fiduciary duties. To illustrate that concept, the Legislature, by adopting section 733.610[17] of the Florida Statutes, lumped both the fiduciary and its attorney into the same conflict of interest status making any purchase of estate assets voidable under most circumstances. Just as there is no adversary status between the fiduciary and the beneficiary, there is no such adversary status between the fiduciary's attorney and the beneficiary. By payment of fees to the attorney from the estate, the person bearing the impact of the fee is not compensating his adversary as Florida Patient's Compensation Fund was.

A lodestar fee can not accurately compensate for responsibility

No one suggests that the fee should not be rational, reasonable and reviewable. The only issue presented is whether the trial judge has the freedom to consider the application of

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15 Quanstrom v. Standard Guaranty Insurance Co., 555 So.2d 828 (Fla. 1990)

16 *Rowe* at page 1145

17 **Sale, encumbrance or transaction involving conflict of interest.**--Any sale of encumbrance to the personal representative or his spouse, agent or attorney ..... is voidable by any interested person .....

all factors set forth in section 733.617(1) and then filter and blend those factors based on the trial judge's experience and sound judgment to (1) discard those having no application in the instant determination and (2) give greater weight to some over others as the facts of the particular determination may suggest. If this procedure (which the statute seems to mandate) is permitted by this court, under some circumstances a straight percentage fee may be awarded, in others a strict lodestar amount may be appropriate, and in still others, both of those approaches may be modified to result in fees both greater or less than would be awardable under strict application of either alone. None of these methods would be sufficiently remote or unusual to be deemed an exception to usual practice.

Carried to the greatest extreme, if an attorney fee must be determined exclusively on a percentage of the value of the estate, a client would find it most difficult to retain an attorney to probate an estate having as its only asset a swampy lot in the Everglades worth $5,000 with serious title problems. Conversely, if an attorney fee must be determined exclusively on a lodestar amount, a client would be unable to find an attorney to probate a $10,000,000.00 estate consisting solely of a single bank account, but where the will has serious generation-skipping tax problems or significant elections available.

Examples of such tax problems or significant elections might include a so-called "reverse QTIP election" under section 2652(a)(3) of the Internal Revenue Code[18] or the implementation of a document-conferred power or authority to segregate a partially exempt trust into two shares, one having an inclusion ratio of 0 and the other having an inclusion ratio of 1 as defined by section 2642(a) of the Internal Revenue Code.[19] This level of responsibility and

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[18] SEC. 2652 OTHER DEFINITIONS.

(a)(3) SPECIAL ELECTION FOR QUALIFIED TERMINABLE INTEREST PROPERTY.--In the case of--

(A) any trust with respect to which a deduction is allowed to the decedent under section 2056(b) by reason of subsection (b)(7) thereof, and

(B) any trust with respect to which a deduction to the donor spouse is allowed under section 2523 by reason of subsection (f) thereof,

the estate of the decedent or the donor spouse, as the case may be may elect to treat all of the property in such trust for purposes of this chapter as if the election to be treated as qualified terminable interest property had not been made.

[19] SEC. 2642. INCLUSION RATIO.

(a) INCLUSION RATION DEFINED.---For purposes of this chapter---

(1) IN GENERAL.---Except as otherwise provided in this section, the inclusion ration with respect to any property transferred in a generation-skipping transfer shall be the excess (if any) of 1 over---

(A) except as provided in subparagraph (B), the applicable fraction determined for the trust for which such transfer is made, or

(B) in case of a direct skip, the applicable fraction determined for such skip.

(2) APPLICABLE FRACTION.--For purposes of paragraph (1), the applicable fraction is a fraction--

(A) the numerator of which is the amount of the GST exemption allocated to the trust (or in the case of a direct skip, allocated to the property transferred tin such skip), and

(B) the denominator of which is---

(i) the value of the property transferred to the trust (or involved in the direct skip), reduced by

(ii) the sum of--

(I) any Federal estate tax or State death tax actually recovered from the trust attributable to such property, and

(II) any charitable deduction allowed under section 2055 or 2522 with respect to any such property.

exposure will require the attorney to frolic through the enchanted forest where there are no clear answers and things are rarely as they appear. Neither fee setting method is correct in every instance. That is why the statute allows the flexibility to consider of "one or more" of the factors.

Relative exposure and responsibility, especially in tax matters in larger estates, is something that hourly charges cannot accurately compensate. For example, election of an alternate valuation in an estate must be made on a timely filed return. Thus filing a 706 estate tax return that is one day late will result in the loss of ability of the estate to elect a (lower) alternate valuation and also subject the estate to the payment of a penalty equal to 5% of the tax which continues as an additional 5% penalty for each month up to a total penalty equal to 25% of the tax. This is in addition to interest on the unpaid tax. Undervaluation of an asset on a tax return by an amount greater than 50% of the value ultimately determined will incur an undervaluation penalty of 20%. The penalty is doubled if the undervaluation is only 25% of the value ultimately determined.

If George Patterson or NCNB in *Platt* had overlooked the opportunity for a blockage discount on the stock, the estate's loss would have been $163,000 which would properly have been charged back to the attorney or the fiduciary. This type of exposure is not compensated by reasonable hourly charges alone. Clearly they shouldn't have overlooked it, however, when they accept the responsibility of acting as fiduciary or as attorney, they also accept that exposure. This type of exposure is why, for more than a century, fiduciaries and attorneys have frequently used a percentage of the value of the assets as a starting point in determining compensation.

If the argument is made that the "reasonable hourly rate" could be adjusted to compensate for the risk factor, logic and experience both indicate that trial courts are unable to make the transition from "normal hourly rates" to an amount which could be two or (under some circumstances) even three times as much. Hourly charges exclusively are not adapted to compensate for some of the services furnished, because some services should bear a very high rate and others actually have a more modest value. Examples are the time it takes to "hand hold" for the widow, especially where she is the personal representative has a certain value to the estate (probably a much greater value to the widow) but the reverse QTIP decision has fully another. It is just not practical to comb through the attorney's time records and assign separate hourly rates for each service performed, further complicating the court's duties. Furthermore, this would require a separate evaluation of the risk factor in each hourly service performed.

In 1976, when carryover basis became a part of the estate tax law and each fiduciary was then required by law to advise beneficiaries of the decedent's tax basis in every estate asset, which basis was carried forward into the hands of the devisee, numerous experienced attorneys simply declined to accept employment to probate estates to avoid the substantial risk. The slack was taken up by less experienced attorneys who didn't realize the risk inherent in counseling a fiduciary with such responsibility when such a task was impossible in many instances, and the public was ill-served by the bar. Carryover basis was subsequently repealed as unworkable, but some of the experienced attorneys didn't return to this area of the practice.

Also in 1976,[20] a new tax was imposed on transfers which skipped a generation for tax purposes.[21] Under the law as originally written, it could even be imposed on one who was not an actual transferror but was identified by the law as a "deemed transferror". That complex tax proved unworkable and in 1986 was repealed retroactively (and with it the concept of a deemed transferror) but was replaced by a "simplified" generation skipping tax, now Chapter 13 of the Internal Revenue Code. There are continuing efforts to have this tax repealed, but these efforts may not be successful. In the meantime, this special tax is imposed at the maximum marginal estate tax bracket, 55%. There are certain bizarre circumstances requiring imposition of a gift or estate tax and a generation skipping tax resulting in imposing a tax equal to more than 100% of the amount transferred. Wending one's way through this maze, where there are not yet clear regulations issued, cannot be adequately compensated only through payment of reasonable hourly fees. These questions are faced by estate planners and estate and trust fiduciaries wherever the estate or the trust exceeds 1 million dollars, the exempt amount for generation skipping tax purposes.

Applying the "golden rule" logic to estate attorneys readily illustrates the responsibility and personal exposure faced by the attorney and the fiduciary in each estate.

It is significant to note contextually that the "percentage fee" objection is only made in large estates. In fact, many attorneys are not compensated by a percentage in small estates. Corporate fiduciaries normally decline to accept small estates or so structure their fee schedules to provide for a high minimum fee. So it is only the large-responsibility, large-risk estates where anyone objects to a percentage fee and where the attorney and the fiduciary are most entitled to it.

Like estate fees, real estate sales commissions have historically been based on a percentage of the value of the property being transferred. One wonders what application *Rowe* might have to real estate sales commissions. Should the broker and the salesman keep accurate records of their time in locating a buyer and closing the sale? A broker owes many of the same responsibilities to his principal that an attorney or fiduciary owes to his client or his beneficiary. One significant difference is that the broker apparently assumes little risk in his undertaking other than to deal fairly with his principal. Where a corporate fiduciary is the personal representative, frequently ten to 20 persons may directly deal with the estate administration. Similarly, in a real estate listing, ten to twenty salesmen may show their prospects this property and probably several others, even though only one (or perhaps none) will eventually sell it. No doubt the public would loudly protest any attempt by the professional real estate community to change to a lodestar determination for each of the unsuccessful salesmen because the certainty factor regarding the amount of the fee would be lost.

The other financial partner in the estate administration team is the IRS. Their charges are always based on a published schedule of rates. The public has come to expect each person adding value to this proceeding to receive a percentage of the value of the assets transferred, although many would argue that the IRS does not add value.

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[20] 1976 was a difficult year for estate lawyers. Not only did the most significant overhaul of the estate tax system in many years become effective, but the Florida Probate Code also became effective that year. The entire arena for estates and trusts lawyers was redefined.

[21] A simple example of such a transfer would be a devise to a grandchild or to a trust providing income to a child and upon the child's death, the remainder to a grandchild.

What about the IRS and how are they interested in this decision?

When considering the IRS and inevitable taxes, it must always be kept in mind that reasonable fees charged by the attorney and the fiduciary are tax deductible.[22] The fees in the Platt estate, for example, were "paid" 45% by the beneficiaries and 55% by the IRS, yet the IRS did not object to the fees reported on the 706 estate tax return.

It is ***most significant*** to recognize what the court does here by way of setting policy will also impact the methodology of the taxing authorities. In the district office where the Warwick estate was required to process its estate tax return, a pilot project was undertaken several years ago to scrutinize fees charged by attorneys and fiduciaries and deducted on the estate or estate income tax returns. If this court decides that the only proper fee payable to an attorney representing an estate is a lodestar amount or a lodestar derivative amount, the IRS will necessarily be required to determine that lodestar amount in reviewing each attorney's or fiduciary's fees in each estate for purpose of determining the total allowable deduction. This will be true even, as is the situation in 95% of the estates, where the beneficiaries either agree to the fees or fail to object to them. Absent court determination of a reasonable fee, the IRS may take the position that unless it is furnished with contemporary time records indicating the amount of time reasonable expended in the estate administration, no deduction for fees will be allowed. The IRS will then have assumed the role of the court (but without judicial impartiality) to determine the lodestar amount. Potentially, every attorney must prove to the IRS the amount of time reasonably expended and a reasonable hourly rate. The impact of this court's determination in these cases ranges *far beyond* the courtroom.

One significant factor which this court must consider, since it has undertaken the task of supervising prompt administration of estates through the lower court system (as well as the prompt movement of all forms of matters through the judicial system) is the impact that a lodestar fee mandate would have on the probate court. It is submitted that such a precedent would require that a court hold a hearing to make a lodestar determination in every estate, with its related expert witnesses and time records. Without such a record determination of the lodestar, no deduction of "reasonable" attorney fees or personal representative fees on a tax return could have any validity. One fundamental philosophical change in the Florida Probate Code in 1976 was to take the court out of the fee determination loop unless there was a dispute. Prior to this change, the court was required to take a proactive role in estate administration and approve nearly every action taken by the personal representative, including the determination of the amount of fee to be paid to his attorney. [The amount of the fee to be paid to the executor was set by statute.] We believe that if a lodestar fee calculation were mandatory in every probate administration, it would be severely counter-productive to the swift

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[22] Sec 20.2053-3(b) of the Estate Tax Regulations allows deductions for executor's (the tax term) commissions if all of the following conditions are met:

> *(ii) The amount claimed as a deduction is within the amount allowable by the laws of the jurisdiction in which the estate is being administered; and*
>
> *(iii) It is in accordance with the usually accepted practice in the jurisdiction to allow such an amount in estates of similar size and character.*

Subsection (c) of that same section allows a corresponding deduction for attorney's fees if the amount claimed "does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice."

administration of estates and would significantly increase the cost of probate.

This *amicus* does not suggest that percentage fees are the proper method to use in every instance any more than we believe that lodestar is the proper uniform method. The existing statute ("one or more") is sufficiently flexible to allow the trial court to weight the appropriate factors. We note that some attorneys, either in response to market forces or personal preferences, advertise or otherwise charge for estate administration using an hourly fee. We are presently unaware of any lodestar corporate fiduciaries. For a stimulating discussion of *laissez faire* economics as it relates to attorney's fees, see pages 11 through 16 of Mr. Weber's brief in Warwick.

How do other states handle this matter?

Even though it is not evidence in either case, nor even a part of the record, attached as an appendix to this brief (with permission) is a copy of a study done by the American College of Trusts and Estates Counsel (formerly American College of Probate Counsel) surveying fiduciary fees relating to law and custom through the 50 states and the District of Columbia. Unfortunately the topic and the coverage (with some exception) does not extend to attorney's fees. However, since our statute prescribes the same factors to be considered in setting fees for both attorneys and fiduciaries, the limited scope of the study should still be useful. Although each justice may read and interpret the study for him or herself, we have compiled statistics from the study as follows. ("Statutory" should be read as set by statute or rule.):

23 States with Statutory Percentage Fee

California, Delaware, Georgia, Hawaii, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Vermont, Virginia, Wisconsin, Wyoming

5 States with Statutory Percentage as Cap on Fee

Arkansas, Iowa, Kentucky, New Hampshire, North Carolina

14 States with No Statutory Percentage but with Customary Percentage Fee

[Most states on this list have a "reasonable fee" statute].

Arizona, Connecticut, Florida, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Pennsylvania, Rhode Island, Tennessee, West Virginia

2 States with No Statutory Percentage - Some Hourly Component to Fee or Mixed

Maine, Utah,

3 States with No Statutory Percentage Fee - Silent on Customary Fee

Alaska, Colorado, Idaho

4 States with Hybrid Approach considering both Hourly and Percentage Fee

Alabama, District of Columbia, North Dakota, Washington

Then and Now

Heretofore in this brief, we have addressed section 733.617 of the Florida Statutes (1987) as it existed when these two case were tried. That statute was subsequently amended to apply to estates of decedent's dying after July 1, 1988. Among the changes were:

> *(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly.*

became

> *(a) The time and labor required.*
>
> *(b) The novelty and difficulty of the questions involved, and the skill requisite to perform the service properly.*

and

> *(d) The amount involved and the results obtained.*

became

> *(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.*

In summary, the statutory changes separated the factor(s) of time and labor from novelty, difficulty and skill. "Amount involved" became "nature and value of the assets". For the first time, explicit recognition of "responsibilities and potential liabilities assumed" were added ***and were bonded indefeasibly to "the nature and value of the assets"***. Previously, the risk factor was an implicit a consideration in fee determination; is now it is an explicit consideration. If there was any doubt under the prior statute that attorney's and fiduciary's fees could (not must) be determined (in whole or in part) as a percentage of the amount involved or of the value of the estate assets, that doubt has been laid to rest by this amendment. If previously there were an issue, that issue no longer exists. Certainly, the instant litigants may argue that point and its effect on their position, but this court, even if in dicta, should pronounce the issue now dead with this statutory amendment.

The law, stated as we believe it to be, is that a court is free to apply "one or more" of the factors set forth in section 733.617 to determine the amount of reasonable compensation payable to an attorney for the personal representative in the normal administration of an estate, or to determine the amount of reasonable compensation payable to the personal representative or persons employed by the personal representative in the administration of the estate. This would permit a court to determine that a fee based solely on a percentage of the value of the estate assets may be awarded in the proper circumstance in the same manner that a lodestar fee may be determined by that same court under different circumstances, so long as both were reasonable in amount, independent of the method used for determination. Similarly, that court could blend and consider multiple factors and reach a hybrid determination based on the value of the estate assets and income and the time expended, applied against a market rate, as well as other factors mentioned.

Where do we go from here?

It is the overriding concern of the Real Property Probate and Trust Law Section of the Florida Bar and its member attorneys that the practice of probate law and its reasonable compensation continue in a format similar to what has proved historically successful since the middle of the last century and should continue to be successful into the next. The alternative may cause an unnatural reallocation of competent and experienced legal talent away from the estate practice, to the detriment of the public.

We believe the opinion of this court should make it clear that one proper, but not the exclusive, method of determining fees for the personal representative and its attorney for the regular administration of an estate is a fee based on the percentage of the value of the assets of the estate.

The Section appreciates this court's indulgence in permitting it to file this brief after the normal briefing schedule had closed.

Oral Argument

We are advised that the court has now ordered that oral argument is set on June 7, 1990 in both cases. We respectfully request to be afforded the opportunity to participate in that oral argument.

Respectfully Submitted,

The Real Property Probate and Trust Law Section of The Florida Bar

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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 A. Boggs, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; Stephen N. Zack, Esquire, Courthouse Center, 26th Floor, 175 N.W. 1st Avenue, Miami, Florida 33128; James Fox Miller, Esquire, Miller and Schwartz, 4040 Sheridan Street, Hollywood, Florida 33021; Ben L. Bryan, III, Esquire, Post Office Box 1000, Ft. Pierce, Florida 34954; Samuel S. Smith, Esquire; Ruden, Barnett, et. al., 701 Brickell Avenue, Suite 1900, Miami, Florida 33131; James R. George, Esquire, Ruden, Barnett, et. al., 701 Brickell Avenue, Suite 1900, Miami, Florida 33131; Harry G. Carratt, Esquire; Morgan, Carratt and O'Conner, P.A., 2601 E. Oakland Park Blvd., Suite 500, Fort Lauderdale, Florida 33306; Robert J. Friedman, Esquire, Post Office Box 129, Hallandale, Florida 33009; and J. Thomas Cardwell, Esquire, Post Office Box 231, Orlando, Florida 32802 this 24th day of May, 1990.

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APPENDIX