IN THE SUPREME COURT OF FLORIDA

Case No. 74,793

Fourth DCA Case No. 88-0436

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.

---/

PETITIONERS' BRIEF ON THE MERITS

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

SAMUEL S. SMITH, ESQUIRE
JAMES R. GEORGE, ESQUIRE

RUDEN, BARNETT, McCLOSKY,
SMITH, SCHUSTER & RUSSELL, P.A.
Counsel for Petitioners
701 Brickell Avenue, Suite 1900
Miami, Florida 33131
(305) 789-2700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

This is an appeal from a decision affirming a final Order awarding attorneys' fees and co-personal representatives' fees to GEORGE A. PATTERSON and NCNB NATIONAL BANK OF FLORIDA ("NCNB"). The Order awarded GEORGE A. PATTERSON an attorney's fee of $144,300 and a co-personal representative fee of $67,692. NCNB was awarded a co-personal representative fee of $203,077. (R. 630-631). The order was affirmed by the Fourth District Court of Appeal in In re Estate of Lester Platt, 546 So.2d 1114 (Fla. 4th DCA 1989). The Petitioners, PATRICIA PLATT FAULKNER and BARBARA PLATT SWANSON, are children of the deceased, LESTER PLATT, and are residuary beneficiaries of his estate. Petitioners bear the impact of a proportionate share of the awarded fees. References to the record are indicated by "R" and references to the trial transcript are indicated by "T".

STATEMENT OF FACTS AND CASE

LESTER PLATT died on March 4, 1985. (R. 464) The Last Will and Testament and Codicil were admitted to probate. (R. 484, 504). PATTERSON and NCNB were appointed co-personal representatives on March 15, 1985 (R. 485, 486). PATTERSON and NCNB advised the beneficiaries that the personal representatives' fees and attorneys' fees charged would equal 4.5% of

the gross value of the estate.[1/] (T. 360-361). Petitioner FAULKNER objected to the payment of a fee based upon a percentage of the estate. (T. 381). Petitioner requested that PATTERSON and NCNB maintain accurate time records of their services. (T. 385).

Two years later, PATTERSON and NCNB petitioned for co-personal representative's fees in the amount of $92,500 and $203,077, respectively. (R. 594-596). PATTERSON also petitioned for an attorney fee in the amount of $144,300. (R. 591-593). The total fees sought were 6% of the estate, in contrast to the originally proposed fee of 4 1/2%. NCNB later amended its fee petition to seek an additional $50,000 in fees for extraordinary services. (R. 597-599).

Petitioners answered the Amended Petitions, denying (1) that the fees sought were reasonable, and (2) that any extraordinary services were rendered. Petitioners requested that any fee awarded be reduced to reflect the inappropriate expenditure of attorney and personal representative time in connection with certain litigation and in connection with an attempt to preserve a highly questionable tax deduction. (R. 600-601; 602-603).

---

1. The gross value of the estate was approximately $7,000,000. The proposed fees totalled $315,000.

A trial was conducted before the Honorable William Clayton Johnson on December 7 and 8, 1987. At the trial, PATTERSON testified that he had expended 274 total hours as an attorney for the estate (T. 343-344).[2/] His office staff spent 155 hours. (T. 344). PATTERSON testified that his fee was calculated as two percent (2%) of the estate rather than upon the time and labor he expended. (T. 346).

Three experts on attorneys' fees testified. Both experts retained by PATTERSON testified that a percentage fee of 2% was customary. (T. 176-178; 225). Appellants' expert, Wilson Smith, Esq., testified that a reasonable attorney's fee based upon the time and labor expended was between $58,000 and $70,000. (T. 274).

PATTERSON also testified that he had expended 130 hours as a co-personal representative. (T. 343-344). This time was reflected in 532 separate entries of one quarter (.25) hours each between March 5, 1985 and November 29, 1986 spent checking stock prices. (T. 393). For that work PATTERSON requested a co-personal representative fee equal to one-half of NCNB's fee of $185,000. (T. 393).

---

2. The actual contemporaneous time slips admitted into evidence reveal that PATTERSON expended 235 hours. Of those, at least 16 hours were expended in his pursuit of the fees and are not compensable.

One of PATTERSON's experts testified that a co-personal representative fee in the range of 1/3 to 1/2 of the institutional co-personal representative's fee was customary in the locality. (T. 218-219). PATTERSON's other expert testified that 1% of the estate was a customary co-personal representative's fee. (T. 226). Appellants' expert, Wilson Smith, Esq., testified that a reasonable co-personal representative fee based upon the labor performed would be $32,000. (T. 275)

NCNB's fee was based solely upon its scheduled percentage rates. (Pet. Ex. 7; T. 410-411). NCNB did not adduce any evidence of the hours expended or a reasonable hourly rate. NCNB testified that although it was requested to keep time records by the Appellant, FAULKNER, and was physically able to do so, it chose not to keep time records. (T. 420, 421, 422). NCNB's experts merely applied the rate schedules of other banks to the gross value of the PLATT Estate. The experts testified that such a fee was customary. (T. 19-20; 64-65).

On January 20, 1988, the trial court entered an Order that explicitly refused to apply Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), in the computation of the fees. (R. 630-631). The Order awarded a fee of $203,077 to the co-personal representative, NCNB, based upon its fee

schedule. The court awarded PATTERSON a co-personal representative fee equal to 1/3 of NCNB's fee, that is, $65,692. The court also awarded PATTERSON $144,300, 2% of the estate for his services as an attorney.

The Fourth District affirmed the percentage fees holding that the lodestar method was not applicable and that the fees awarded may be based upon any one of the factors set forth in §733.617 Fla. Stat. (1987). In re Estate of Platt, 546 So.2d 1114 (Fla. 4th DCA 1989).

SUMMARY OF THE ARGUMENT

The primary issue to be decided is whether the lodestar method is applicable to the calculation of a reasonable attorney fee pursuant to §733.617 Fla. Stat. (1987). The Fourth District Court of Appeal has concluded that the lodestar method is not applicable because the legislature provided "specific guidelines" in §733.617 for the determination of a reasonable attorney fee. In re Estate of Warwick, 543 So.2d 449 (Fla. 4th DCA 1989). In re Estate of Platt, 546 So.2d 1114 (Fla. 4th DCA 1989).

The lodestar method is applicable. Section 733.617 (1987) does not provide a specific guideline for the calculation of a reasonable attorney fee. The statute merely enumerated virtually the same criteria set forth in Disciplinary Rule 2-106 of the Code of Professional Responsibility. The unstructured application of virtually the same criteria caused the Court to adopt the lodestar method in Florida Compensation Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Therefore, the simple enumeration of these criteria cannot be considered a specific guideline that would relieve the trial court of its obligation to apply the lodestar method.

The decisions of the Fourth District in Platt and Warwick demonstrate the imperative need for the application of

the lodestar method in probate. In both cases, the trial court awarded attorneys fees based upon a percentage of the estate. The Fourth District affirmed. In re Estate of Warwick, 543 So.2d 449 (Fla. 4th DCA 1989), In re Estate of Platt, 546 So.2d 1114 (Fla. 4th DCA 1989). The confidence of the public in the bench and bar is impaired, and our system of justice is brought into disrepute, when trial courts award windfalls to attorneys who purport to represent large estates simply because a percentage fee is a custom of the local bar.

The attorney fee awarded to PATTERSON is also contrary to the manifest weight of the evidence. PATTERSON claimed to have expended 274 hours as an attorney. That number includes approximately 50 hours that were spent in pursuit of this fee which are plainly not compensable. PATTERSON testified that his usual hourly rate was $350 per hour. His experts testified that $200 to $300 per hour was reasonable. Even if PATTERSON were to be compensated for every hour at his claimed hourly rate of $350 his fee would only be $95,900 rather than the $144,300 awarded.

PATTERSON's co-personal representative fee was also contrary to the manifest weight of the evidence. PATTERSON expended 130 hours as co-personal representative. All of that time was spent checking stock prices. The amount of time spent checking stock prices was excessive and unnecessary because his

co-personal representative monitored the stocks daily. Even if he were to be compensated for every hour at his claimed hourly rate of $350 per hour, his fee would only be $45,500 rather than the $65,692 awarded.

Finally, the award of a percentage fee to NCNB was error. By enacting the Florida Probate Code, the Legislature eliminated the past practice of awarding fees based upon a percentage of the estate and substituted a reasonableness standard. By awarding a fee based upon NCNB's rate schedule the court has impermissibly resurrected percentage fees. NCNB's fees should have been calculated by reference to the criteria set forth in §733.617 Fla. Stat. (1987) rather than upon NCNB's fee schedule.

ARGUMENT

I.

THE LODESTAR METHOD IS APPLICABLE TO THE CALCULATION OF A REASONABLE ATTORNEY FEE AWARDED PURSUANT TO §733.617

PATTERSON petitioned the court to determine and award a reasonable attorney's fee pursuant to §733.617, Fla. Stat. (1987).[3/] Petitioners contended at trial that the attorneys' fees should have been determined in accordance with the methodology set forth in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). The trial court refused.

The trial court's refusal to apply Rowe was premised upon two contentions. First, that Rowe only applies where fees are sought by a prevailing party against a losing party in an ancillary proceeding. The second premise appears to be that the criteria set forth in §733.617 constitute specific guidelines for the calculation of fees and, therefore, the lodestar method should not be applied. The District Court was silent on the first contention and appears to have adopted the second contention as its basis for rejecting the application of the lodestar method. Neither contention has any merit.

---

3. Section §733.617 has been amended. The amended statute does not apply to this proceeding. The amended statute is only applicable to estates of decedent's dying after July 1, 1988.

A.

SECTION 733.617 FLA. STAT. (1987) DOES NOT PROVIDE A SPECIFIC GUIDELINE FOR THE CALCULATION OF A REASONABLE FEE

The Fourth District Court of Appeal has construed §733.617 Fla. Stat. (1987) as containing a specific guideline for the calculation of a reasonable attorney fee. The court concluded, therefore, that the lodestar method need not be applied. In re Estate of Warwick, 543 So.2d 449 (Fla. 4th DCA 1989). The Fourth District relied upon Warwick in this case in reiterating that the lodestar method was not applicable. In re Estate of Platt, 546 So.2d 1114 (Fla. 4th DCA 1989). These decisions conflict with the decisions of the Second District Court of Appeal in DeLoach v. Westman, 506 So.2d 1142 (Fla. 2d DCA 1987) and Brady v. Williams, 491 So. 2d 1160 (Fla. 2d DCA 1986). Both decisions apply the lodestar method in probate proceedings.

The Fourth District's refusal to apply the lodestar method in Warwick was based upon What an Idea, Inc. v. Sitko, 505 So.2d 497 (Fla. 1st DCA 1987); Division of Administration, State Department of Transportation v. Ruslan, Inc., 497 So.2d 1348 (Fla. 4th DCA 1986) and Rivers v. SCA Services of Florida, Inc., 488 So.2d 873 (Fla. 1st DCA 1986). In Sitko and Rivers the courts held that the lodestar method is inapplicable in instances in which the legislature has provided specific guidelines for determination of attorneys fee awards. In both

cases, the attorney fee was awarded pursuant to §440.34 Fla. Stat. (1987). That statute contains a very specific method to calculate a fee that commences with a percentage fee that is either raised or reduced after consideration of a number of factors. The percentages are determined by the Legislature. Unlike §733.617, that statute provides a specific method for the calculation of attorneys fees that is inconsistent with the lodestar method.

Ruslan involved an award of attorneys fees in an eminent domain action pursuant to §73.091 Fla. Stat. (1987). The court also held that the lodestar method was not applicable because the statute provided a specific guideline for calculating a fee. That statute is more specific than §733.617 because it specifically forbids percentage fees and requires consideration of all enumerated criteria. More importantly, the precedential value of Ruslan is limited or nonexistent given this Court's decision in Standard Guaranty Insurance Co. v. Quanstrom, 15 FLW 523 (Fla. January 11, 1990). In that decision the court stated:

> Further, in eminent domain cases, the purpose of the award of attorney's fees is to assure that the property owner is made whole when the condemning authority takes the owner's property. Jacksonville Expressway Auth., v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958). In these cases, the attorney is

> assured of a fee when the action commences. Similarly, an attorney's fee is generally assured in estate and trust matters. 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.

Therefore, the court has indicated that, contrary to Ruslan, the basic lodestar method is an appropriate starting point for the computation of a reasonable fee in estate proceedings as well as in eminent domain proceedings.

Section 733.617 does not contain a specific guideline for the calculation of a reasonable attorney fee that precludes the use of the lodestar method. The criteria set forth in that statute are substantially identical to the criteria set forth by this Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985): This Court stated in Rowe at pp. 1151-1152 that:

> In determining reasonable attorney fees, courts of this state should utilize the criteria set forth in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility.
>
> (1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitation imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

Section 733.617 incorporates the very same factors. The statute provides in pertinent part:

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

The minimal differences between the factors set forth in Rowe and §733.617 occur to conform the Disciplinary Rule 2-106(b) criteria to all professionals hired by a personal

representative. The omission of the contingency factor reflects that payment of fees are generally assured in probate proceedings. Standard Guranty Insurance Co. v. Quanstrom, supra.

The lodestar method is nothing more than an objective framework to apply the factors that are set forth in DR 2-106(b), now Rule 4-1.5 of the Rules Regulating the Florida Bar.[4/] The lodestar method was adopted because of the lack of objectivity and uniformity in court determined reasonable fees. The lodestar method also ensures reviewability of awards by requiring the trial court to enunciate specific findings. Rowe at 1149, 1152. The lodestar method was adopted because of the crucial importance of attorneys fees in the administration of justice. Rowe at 1149.

Section 733.617 provides no objective guideline for the calculation of a fee. It merely rehashes the very same criteria that are applied in the lodestar method. The application of the lodestar method is not inconsistent with the criteria enunciated in the statute. The same needs for objectivity, uniformity and reviewability exist for fees

---

4. The amendments to Rule 4-1.5 parallel in many respects to the amendment of §733.617. Neither the amendment of Rule 4-1.5 by this Court nor the amendment of §733.617 by the Legislature reflect an intention by either to abandon the lodestar method.

awarded in probate proceedings as in any other proceedings. Therefore, the lodestar method should apply to probate proceedings as well.

The fact that these criteria are not specific guidelines is obvious in this case. While simultaneously adopting Warwick's rationale that §733.617 contained a specific guideline for the award of attorney's fees, and therefore the lodestar method was not applicable, the District Court approved the award of fees based solely upon the local custom of charging a percentage. Presumably, the percentage will change from locality to locality and will probably change from lawyer to lawyer and judge to judge. At least the percentage fee schedules that were abolished by the adoption of the Florida Probate Code had the advantage of certainty and uniformity. This very award evidences the lack of objectivity and uniformity that caused the adoption of the lodestar method in the first instance.

B.

THE LODESTAR METHOD IS APPLICABLE WHENEVER A COURT IS REQUIRED TO DETERMINE A REASONABLE ATTORNEY FEE

The trial court's contention that Rowe only applies when fees are "sought by a prevailing party in an ancillary matter against an unsuccessful party ..." is simply wrong. The plain language of Rowe requires that the lodestar methodology

be utilized whenever there is a court-determined reasonable fee. There is no basis in the language of Rowe to suggest its application is limited to the prevailing party situation. Moreover, the purpose of Rowe, to provide an objective and uniform method of determination of reasonable attorney's fees, is equally applicable to any court-determined reasonable fee.

Stabinski, Funt and De Oliveira P.A. v. Alvarez, 490 So.2d 159 (Fla. 3d DCA 1986), although cited by the trial court, does not stand for the proposition that Rowe only applies when fees are sought by a prevailing party against a losing party in an ancillary matter. In Stabinski, the court simply held that Rowe only applies where fees are assessed against a non-client, either pursuant to statute or pursuant to common law principles. In this case, fees are being imposed upon a non-client, the Appellants, pursuant to a statute, §733.617 Fla. Stat. (1987). Therefore, Stabinski requires the use of the Rowe formula.

Any contention that the application of the lodestar method is limited to an award to a prevailing party has been laid to rest in this Court's decision in Standard Guaranty Insurance Co. v. Quanstrom, supra. In that decision the court reviewed the applicability of the lodestar contingency multiplier in a variety of situations many of which did not include awards to prevailing parties.

There is no reason or policy why the lodestar method should not be applied in probate. There has been no suggestion or argument before either the trial court or the appellate court that suggests that attorneys employed by a personal representative cannot be fairly and appropriately compensated by application of the lodestar method. Objectivity, uniformity and reviewability can only be achieved through application of the lodestar method in probate.

II.

THE ATTORNEY FEE OF $144,300 IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE

Notwithstanding the trial court's refusal to apply Rowe and the failure to make specific findings as required by Rowe, it is evident that the awarded attorney fee of $144,300 was contrary to the manifest weight of the evidence. The trial court awarded a fee of 2% of the gross estate. That fee bears no relationship to the labor performed and is based solely upon a custom in the locality to charge a fee based upon a percentage of the gross estate. (T. 359).

PATTERSON testified that he expended 274 hours as attorney. (T. 343-344). If he were to be compensated for every hour at the highest hourly rate ever mentioned in the testimony, $350 per hour, his fee would only be $96,900. Even if every hour of staff time, which is clearly not compensable, were compensated at the highest hourly rate of $75 per hour, that would only be an additional $11,625. (T. 344). Therefore, compensating every hour worked by every person at the highest hourly rate ever mentioned in the testimony, the total fee would only be $108,525 rather than the $144,300 awarded.

Many of the hours claimed by PATTERSON are not properly compensable. Approximately 50 hours of the time expended by PATTERSON were expended in the pursuit of his fee. Discovery established that PATTERSON had expended only 235

hours. (T. 359-360). The records reveal that approximately 16 of the 235 hours were expended in petitioning for a fee. (R. 360). Moreover, the additional 39 hours accrued between November 2, 1987 and December 8, 1987 were expended in preparing for and attending the trial on the petitions for fees. None of that time is compensable. Estate of Rayhill, 516 So.2d 26 (Fla. 3d DCA 1987); Barr v. Pantry Pride, 518 So.2d 1309 (Fla. 1st DCA 1987); see also, Rowe, at 1150 ("Counsel is expected, of course, to claim only those hours that he could properly bill to his client"). Therefore, PATTERSON had only approximately 220 hours of time that is properly compensable.

Awarded fees that exceed the number of hours multiplied by a reasonable hourly rate are routinely reversed. For example, in Estate of Rayhill, 516 So.2d 26 (Fla. 3d DCA 1987), the District Court of Appeal reduced an attorney fee award of $80,000 to $33,000 because the hours expended multiplied by the highest hourly rate reflected in the testimony equaled only $33,000. Similarly, in Estate of Simon, 402 So.2d 26 (Fla. 3d DCA 1981), an award of $25,000 was reversed because it exceeded the amount of hours expended multiplied by the attorney's hourly rate.

The time expended by PATTERSON's staff prior to October 1, 1987, the effective date of § 57.104, Fla. Stat., is

also not compensable. Lemoine v. Cooney, 514 So.2d 391 (Fla. 4th DCA 1987); Bill Rivers Trailers, Inc. v. Miller, 489 So.2d 1139 (Fla. 1st DCA 1986); ABD Management Corporation v. Robert L. Turchin, Inc., 490 So.2d 202 (Fla. 3d DCA 1986); James P. Driscoll v. Gould, 521 So.2d 301 (Fla. 3d DCA 1988); Pine Top Insurance v. Fleck & Associates, Inc., 513 So.2d 708 (Fla. 3d DCA 1987). See Exhibits 4 and 5. Only two hours were expended after October 1, 1987. In any event PATTERSON's claimed hourly rate of $350 per hour should include overhead that would cover the typing and proofreading services that make up the bulk of the "legal assistant's" time.

PATTERSON's expert testimony does not provide a basis for the court's award. The testimony of an expert is neither conclusive nor binding, and the court is not bound to make an award in the range set by expert testimony. In re Ryecheck's Estate, 323 So.2d 51 (Fla. 3d DCA 1975). Mr. Fredrick merely gave lip service to the factors set forth in § 733.617 in determining that 3% of an estate was a reasonable fee. However, Fredrick plainly testified that $300 per hour was a reasonable hourly rate for PATTERSON. (T. 236-237). Fredrick also believed that PATTERSON had expended 580 hours. (T. 257-258). Fredrick testified:

> Q. Did you find the time expended by Mr. Patterson in this case to be reasonable, his hours?

A. I didn't really find his hours to be excessive, particularly in its combined hours, as to PR work co-PR work and attorney. I felt the hours were rather low.

Q. Did he tell you that he had had approximately 130 hours as a personal representative?

A. Let me see if I can find that in my notes. I think that was estimating an extra 100 hours to complete the estate was 580.

Q. 580?

A. I think his hours came out at 480 and he estimated there was an additional 100 hours to conclude the estate.

This is a letter addressed to Mr. Smith from Mr. Caratt dated July 27, 1987.

Second page, third paragraph, 'With respect to the attorney's fees for Mr. Patterson, his time record as of this time are approximately 480 hours and you say it is anticipated that approximately another 100 hours would be necessary to conclude the estate.'

That, sir is where I got the 580 total.

Q. Did you believe, sir, that those 480 hours were all George Patterson's?

A. I believe it was, if this was his time sheet ....

(T. 257-258).

Obviously, Fredrick's testimony was predicated upon the erroneous assumption that PATTERSON had expended or would expend 580 hours. If PATTERSON were compensated for <u>every</u> hour

he actually worked at the hourly rate Fredrick thought was reasonable, that is $300 per hour, his fee would be $82,200, rather than $144,300.

PATTERSON's other expert, Donald Norman, testified that a reasonable and customary fee was 2% of the estate. Norman also testified using the lodestar method. In applying the formula, he took the 274 hours PATTERSON expended, multiplied by a reasonable hourly rate of $200 per hour to arrive at a lodestar of $54,800. Then, Mr. Norman multiplied the lodestar by a factor of 3 to reach a fee of $236,000. (T. 182). Norman's application of the lodestar is fine until the multiple of 3 is awarded. The application of a multiple of 3 was improper. Standard Guaranty Insurance Co. v. Quanstrom, 15 FLW 523 (Fla. January 11, 1990). Therefore, rather than assisting PATTERSON, his own expert establishes that an appropriate fee would be $54,800.

The trial court's failure to set forth specific findings in accordance with Rowe renders review of the order awarding attorneys' fees difficult. Nonetheless, it is apparent that PATTERSON only had approximately 220 hours of regularly compensable time, and his legal assistant, only two hours. A fee of $144,300 for that amount of labor is contrary to the manifest weight of the evidence.

III.

PATTERSON'S CO-PERSONAL REPRESENTATIVE FEE IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD HAVE BEEN CALCULATED BY THE LODESTAR METHOD

The trial court awarded PATTERSON a co-personal representative fee equal to one-third (1/3) of NCNB's fee on the basis that the fee was customary in the locality. The District Court appears to have affirmed on the basis that the compensation awarded need only be based on only one of the criteria enumerated in §733.617 Fla. Stat. (1987). Presumably, the court relied upon §733.617(1)(c).

The fee of $65,692 is contrary to the manifest weight of the evidence. PATTERSON testified that he expended only 130 hours as co-personal representative. All 130 hours were expended "checking stock prices". (T. 393). PATTERSON's claim that he expended 130 hours is highly questionable. The time records admitted into evidence reflect that he "checked" stock prices for 15 minute periods on 532 occasions between March 5, 1985 and November 16, 1986. There are less than 430 weekdays during that period on which stocks are traded.

The evidence also demonstrated that PATTERSON's co-personal representative, NCNB, monitored stock prices daily. (T. 161-162). Thus PATTERSON's claimed labor as co-personal representative, even if it was performed, was redundant and unnecessary.

Even assuming that PATTERSON expended 130 hours, the awarded fee of $65,692 compensates PATTERSON at an hourly rate

in excess of $520 per hour for labor that was being performed by the other co-personal representative. Such a fee is contrary to the evidence and constitutes an abuse of discretion. See In re Estate of Maxcey, 240 So.2d 93 (Fla. 2d DCA 1970). If Mr. Patterson were compensated at his claimed rate of $350 per hour for checking stock prices, he would still only be entitled to $45,500.

The lodestar method should have been utilized in calculating PATTERSON's co-personal representative fee. PATTERSON is a member of the Florida Bar. Although he may not have been rendering legal services in checking stock prices, this court has previously stated that an attorney is bound by its rules and professional ethics even when acting as a trustee or personal representative. The Florida Bar v. Della-Donna, 14 FLW 315, (Fla. June 22, 1989). PATTERSON should not be permitted to collect excessive compensation merely because he was acting as a co-personal representative rather than an attorney. Such a result tarnishes the professional image of the bar. Moreover, because the same criteria govern the award of personal representative's fees, the lodestar method should be utilized. The important concerns that caused the adoption of the lodestar method to attorneys fees are equally applicable to personal representative's fees awarded to an attorney.

IV

THE AWARD OF A PERCENTAGE FEE TO NCNB WAS ERROR

NCNB's co-personal representative fee was based upon its published fee schedule. (T. 410-411). The schedule imposes a fee based upon a percentage of the estate. The award of a percentage fee to NCNB was error for two reasons. First, percentage fees were abolished by the adoption of the Florida Probate Code in 1975. Therefore, the award of a percentage fee was error. Second, the lodestar method should also be used in the calculation of a co-personal representative fee.

Prior to the adoption of the Florida Probate Code, Florida law provided for the compensation of the personal representative based upon the value of the estate. See §734.01 Fla. Stat. (1973). These percentage fees were abolished by the legislature in 1974. Section 733.617 Fla. Stat. (1974). From that time forward a standard of reasonable compensation for personal representatives was in effect. The trial court and the appellate court have resurrected the percentage fee under the guise of the fee customarily charged in the community. This was error. The reasonableness of a fee depends on the labor performed and not the size of the estate.

Other courts have rejected attempts to award percentage compensation under the guise of customary practice. Colorado adopted a probate code which also abolished percentage

compensation for personal representatives and substituted a reasonable compensation statute. Colorado's statute is virtually identical to §733.617 Fla. Stat. (1987). The Colorado Court of Appeals reversed an award of personal representative fees that were based upon a percentage even though the percentage fee was customary in the locality. The court held that the legislature had intended to abolish percentage fees when it adopted the reasonable compensation standard and that reasonable compensation must be based upon the services performed and not the size of the estate. In re Estate of Painter, 39 Colo.App. 506, 567 P.2d 820 (Col. 1977).

Similarly, in 1979, Maine adopted a probate code which abolished percentage compensation of personal representatives and substituted a reasonableness standard. Maine's statute authorizing reasonable compensation of the personal representative is also virtually identical to §733.617 Fla. Stat. (1987). The Supreme Court of Maine reversed a personal representative fee based upon a percentage of the estate in Estate of Davis, 509 A.2d 1175 (Me. 1986). The court held that by adopting Uniform Probate Code §3-721 (upon which §733.617 is based) the legislature intended to abolish percentage fees.

Davis and Painter are indistinguishable. By reviving percentage fees under the guise of the fee customarily charged in the community, the trial court and the appellate court have

thwarted the intention of the legislature to provide only reasonable compensation to personal representatives.

A fee schedule is not a satisfactory substitute for reasonable compensation. The use of the fee schedule makes the criteria set forth in §733.617 Fla. Stat. (1987) superfluous. NCNB and its experts testified that use of a fee schedule eliminates consideration of the time and labor performed (T. 433, 434, 74, 41); the nature of the assets of the estate (T. 449); the nature and length of the professional relationship (T. 41, 74-75); the difficulty of the administration of the estate (T. 44); or the other criteria in §733.617 (T. 41-42, 43). NCNB's experts merely applied the percentage fee schedule of their employers to the value of the estate to arrive at their opinion of a reasonable fee. (T. 19-20; 64).

The trial court and the appellate court erred in permitting the personal representative to be awarded a percentage fee. Any fee awarded to NCNB should be predicated upon the actual time expended and labor performed. In re Estate of Goodwin, 511 So.2d 609 (Fla. 4th DCA 1987).

Finally, Petitioners contend that the lodestar method should be extended to personal representatives of estates. A personal representative, like an attorney, is a fiduciary. The fees of the personal representative and attorney are determined

by consideration of the same criteria in §733.617 Fla. Stat. (1987). The lodestar method is a structured application of the §733.617 criteria. The same need for guidance, objectivity, uniformity and reviewability that caused the adoption of the lodestar method for attorneys fees exist in the award of personal representative fees.

CONCLUSION

Petitioners request that the Court reverse the decision of the Fourth District Court of Appeal and the order of the trial court and remand the proceeding for calculation of attorneys fees and personal representatives fees in accordance with the lodestar method. Alternatively, Petitioners request that the court reverse the decision of the Fourth District Court of Appeal and the order of the trial court as being contrary to the manifest weight of the evidence and remand the proceeding for calculation of reasonable attorneys fees and personal representative fees pursuant to §733.617 Fla. Stat. (1987).

Respectfully submitted,

RUDEN, BARNETT, McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
Attorneys for Petitioners
701 Brickell Avenue, Suite 1900
Miami, Florida 33131-2801
Tel: (305) 789-2700

By: James R. George
JAMES R. GEORGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Brief on the Merits has been furnished by U.S. Mail to HARRY G. CARRATT, ESQ., Morgan, Carratt & O'Connor's P.A., 2601 East Oakland Park Boulevard, Suite 500, Fort Lauderdale, Florida, 33306, on this 19th day of February, 1990.

By: James R. George

1610P
2/19/90