IN THE SUPREME COURT OF THE STATE 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

RESPONDENTS' BRIEF ON THE MERITS

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

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STATEMENT OF THE CASE AND OF THE FACTS

In their Brief on the Merits on this Petition for review, the Petitioners, PATRICIA PLATT FAULKNER and BARBARA PLATT SWANSON, have set forth a statement of the case and of the facts which Respondents believe do not adequately set forth the testimony and evidence presented by the Respondents in the lower Court in support of their Petition for an award of fees by the lower Court. Respondents will therefore supplement the statement of facts in this Brief on review.

In the proceedings in the Probate Division of the Circuit Court, Broward County, Florida, Respondents, GEORGE A. PATTERSON and NCNB NATIONAL BANK, are the personal representatives of the Estate of Lester Platt, while Mr. PATTERSON is also the attorney for the estate. The Respondents were the Petitioners in the proceedings before the Circuit Court, while the Petitioners, PATRICIA PLATT FAULKNER and BARBARA PLATT SWANSON, were the Respondents.

In this Brief, the Petitioners will be referred to as "Petitioners" or "FAULKNER" and "SWANSON", while the Respondents will be referred to as the "Respondents" or "PATTERSON" and "NCNB", and the following symbols will be used:

"R" -- Record on appeal

"T" -- Transcript of testimony in lower Court

"EX" -- Exhibits admitted into evidence.

In the Circuit Court, the Respondents sought the sum of $345,577.00 as reasonable fees for their services as personal representatives of the Platt Estate (R 597-599, 594-596), and the sum of $144,300.00 to PATTERSON as reasonable attorney's fees for services rendered as attorney for the estate (R 591-593). In its Order awarding fees, the trial Court awarded the sum of $203,077.00 as personal representative's fee to NCNB and the sum of $67,692.00 to PATTERSON, for a total of $270,769.00 as fees for the personal representatives of the estate (R 630-631), while PATTERSON was awarded the sum of $144,300.00 as reasonable attorney's fees for services rendered the estate (R 630-631).

The Petitioners moved the Court for a rehearing of the Order awarding fees (R 632-634), which Motion was subsequently denied by the trial Court (R 635). Some two days after the Order, Petitioners filed a Petition with the lower Court to require that distribution be made to the beneficiaries (R 637-638), and shortly thereafter, they filed a Notice of Appeal and an Amended Notice of Appeal with the lower Court directed to the trial Court's award of fees in the case (R 638-639).

On July 7th, 1989, the Fourth District Court of Appeal affirmed the trial Court's award of fees on the basis of its

earlier decision in the case of In re: Estate of Warwick, 543 So.2d 449 (Fla.4th DCA 1989), in which the Court had previously held that Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla.1985) was not applicable to the determination of attorney's fees and personal representative's fees under Sec.733.617, Florida Statutes, 1987. The District Court further held that the testimony presented by the experts demonstrated the basis under that Statute for the attorney's and personal representative's fees and that the trial Court's decision would not be disturbed, in the absence of a showing that it was contrary to the manifest weight of the evidence. In re: Estate of Lester Platt, deceased, 546 So.2d 1114 (Fla.4th DCA 1989).

Petitioners' Motion for Rehearing and Motion for Rehearing En Banc were denied by the Fourth District Court of Appeal on August 22, 1989, and the Petition for Review was filed with the District Court on September 21, 1989. This Court accepted jurisdiction on the merits in an Order entered on January 24, 1990.

In the presentation of their case, Respondents PATTERSON and NCNB submitted the testimony of George A. Patterson (T 315-400), Carmine M. Figlilio, Vice-President and Trust Officer of NCNB (T 400-451), Constance Scott, Florida Tax Manager and Vice-President of NCNB (T 103-158), and Steven Battle, Investment Manager responsible for

monitoring and making investment recommendations for estates (T 158-171), as their fact witnesses. Respondents also submitted the testimony of Donald H. Norman, attorney (T 176-221) and Peter Friedrich, attorney (T 221-269), both of whom specialize in the probate of estates, and Lowell Charles Mott, Senior Vice-President of Sun Bank, in charge of estate and trust administration (T 15-62) and Patrick M. Burkett, Vice-President of Florida National Bank in charge of trust administration (T 62-102), as expert witnesses relating to services rendered by corporate personal representatives.

Petitioners presented the testimony of Wilson Smith, an attorney, as an expert witness on their behalf (T 270-314).

Mr. Figlilio testified in detail as to the services rendered by NCNB in connection with the probate of the estate, and the prior services it had rendered to the decedent. Commencing in 1978, NCNB began a relationship with the deceased, whereby it would deposit his various checks and pay his bills, and in 1983, it was appointed guardian of the property of the decedent, which guardianship continued until his death on March 4, 1985 (T 401-402). Mr. Figlilio testified as to the numerous departments in NCNB which were involved in the administration of the Platt Estate, including the departments involved in the preparation of the tax returns, investment securities,

accounting and security transfers (T 403-406). A synopsis of the various files and matters involving the services which were rendered by NCNB was submitted into evidence and considered by the trial Court (Resp.Ex.#6, T 406-410). Mr. Figlilio testified that between 50 to 75 persons provided services on behalf of NCNB in connection with the probate of the estate (T 409-410). He testified that the Respondents were seeking the total sum of $345,000.00 as fees for the personal representatives, which included extraordinary fees in the amount of $50,000.00 (T 411-412). He further stated that the fees NCNB were seeking were in accordance with its fee schedule (Resp.Ex.#7), which schedule is comparable to that charged by others in Broward and Palm Beach Counties, and which schedule is competitive and less than fees charged by most banking institutions for similar services (T 415). Among the assets of the estate was a substantial amount of stock in a company known as J. L. Clark, which stock was thinly traded in the over-the-counter market and the personal representatives were very concerned with the volatility of the stock and the effect of a sale of the stock would have upon its value (T 417-418). Because of these factors, the personal representatives were able to successfully argue before the Internal Revenue Service that the value of the stock should be discounted by 10% of its market value on the federal estate tax return, which

resulted in there being a lesser tax imposed on the estate (T 417-419).

Ms. Constance Scott testified as to the services rendered by NCNB in preparation of the federal estate tax return and the income tax returns for the estate (T 104-105). Ms. Scott was the person who was primarily responsible for the preparation of the estate tax return (Resp.'s Exh.#1), and she testified in detail with regard to the preparation of the estate tax return and the income tax returns (T 105-106,109). The estate was subject to an estate tax rate of fifty-five percent (55%) on the value of its assets (T 115) which resulted in the payment of the sum of $2,169,567.00 in federal estate taxes (T 112), and the sum of $464,760.00 in Florida state taxes, or the total sum of $2,634,327.00 in estate taxes (T 112). In the return, the Respondents excluded three different gifts of $170,000.00 made during each of the three years prior to decedent's death and they also reduced the value of the Clark Company stock based upon blockage (T 112-113). The estate tax return was audited by the Internal Revenue Service and the personal representatives were successful with the positions they had taken on the estate tax return, with the exception of the gift of $170,000.00 which was made by the guardian to the beneficiaries of the estate immediately prior to the death of the decedent (T 113-115).

The audit also excluded gifts made in the two earlier years, which gifts were not challenged by the Internal Revenue Service (T 112-113). Ms. Scott testified that securities usually have to be valued at the mean between their high and low on the date of death for estate tax purposes (T 117); however, the Respondents were successful in convincing the IRS that the value should be discounted by 10%, which resulted in a reduction of 50% of that value in tax dollars (T 117-118) for a tax saving of $163,000.00 in estate taxes (T 331). As of the time of the hearing, the estate tax return had been accepted by the IRS, including the acceptance of the amount of fees, and in the event there was a change in those figures, then it would be necessary that an amended return be filed with the IRS and the State of Florida, subjecting the estate to further audits (T 118), and it would have to obtain another closing letter in order to conclude the estate (T 118-119).

Mr. Steven Battle testified as to the problems connected with the securities held by the estate, and particularly, the 196,050 shares of common stock in J.L. Clark Company, which comprised over 70% of the value of the estate's assets (T 160-161). This stock was of particular concern to the personal representatives because it was such a large amount of stock held by the estate and because it was an over-the-counter stock which was a thinly traded

issue (T 161). The Respondents had to be concerned with a possible sudden decline in the stock market, such as occurred in October, 1987 on Black Monday (T 162), and they also had to be concerned with the fact that the estate would have to raise substantial cash by a sale of the stock for estate taxes (T 161-162). Because of the nature of the stock, the Respondents had to review the market everyday to determine whether to continue to hold or sell the stock in light of the fluctuations in the market (T 167). Furthermore, the Respondents had to be concerned with the fact that when they sold the stock, how this could be done without depressing the market, so as to depress the value of the remaining stock held by the estate (T 167).

PATTERSON has been an attorney since 1958 (T 315) and he had represented the deceased from 1970 until his death in 1985 (T 316). PATTERSON testified as to the services he had rendered to the deceased for some fifteen years prior to his death (T 316-319). As a result of those services, PATTERSON became quite familiar with the J.L. Clark stock held by the deceased and as to the various stock splits which resulted in an increase in the decedent's substantial holdings in the company (T 316-319). He represented the decedent's wife's estate following her death in 1977 (T 317-318), and he drafted the Wills and Codicils for the deceased (T 317). He also hired and fired the housekeepers who were necessary

to assist the deceased during his latter years (T 317-318). Prior to the decedent's guardianship, the deceased received some 99,420 shares of stock in the Clark Company (T 321), which were claimed by the decedent's housekeeper, Ms. Mary Lee Wainwright, as a gift made by the decedent to her; as as a result of PATTERSON's actions, PATTERSON obtained physical possession of the stock from Ms. Wainwright and turned it over to NCNB and then had guardianship proceedings instituted as to the decedent (T 323).

In connection with the guardianship, gifts were made to the Petitioners and their children of $170,000.00 for each of three years, 1983, 1984 and 1985, for the purpose of saving estate taxes (T 323-327), and PATTERSON and NCNB were successful in saving estate taxes, with the exception of the 1985 gift transfer made immediately prior to decedent's death. PATTERSON testified as to the services he rendered as attorney for the estate and as a co-personal representative (T 328-358). Respondents were able to save the estate some $163,000.00 in estate taxes as a result of the discount of the Clark Company stock (T 331). PATTERSON was quite concerned with the risk involved in holding such a thinly traded stock and he kept a daily record of the value and fluctuations of the stock (T 330-333). Everytime there was a decline of a dollar or two in the stock, it would affect the value of the estate by almost $200,000.00 (T

331), and he and NCNB made early distribution of the stock so as to reduce the risk of a substantial decrease in the stock price (T 331-333). If the estate had owned the stock on Black Monday, when the stock market collapsed, the estate would have lost $1,600,000.00 in value on that date (T 334-335). PATTERSON testified that his total time was four hundred four and twenty minutes, of which approximately one hundred thirty hours related to his work as personal representative, while the balance represented services as attorney (T 343-344).

In connection with the probate of the estate, PATTERSON was concerned with the claim that Ms. Wainwright might make as to the shares of stock which she said were given to her by the decedent, and as a result, a settlement was negotiated with Ms. Wainwright, whereby she was to receive 12,000 shares of stock under the Codicil of the deceased and release any claims as to the other shares of stock, and she agreed to pay her proportionate share of estate taxes (Resp.'s Ex.#3, T 339-340). However, PATTERSON and NCNB were unable to obtain payment of the proportionate share of taxes from Ms. Wainwright, and it was necessary that a petition to construe the Will be filed. After a final hearing in that regard, an appropriate Order was entered by the Circuit Court, requiring Ms. Wainwright to pay her share of the estate taxes (R 587-589).

About that same time, Petitioners filed a Petition to surcharge the Respondents as personal representatives of the estate (R 580-582) as to any sums which would be required to satisfy Ms. Wainwright's claim. The Petition to surcharge was subsequently dismissed by the Court on Respondents' Motion to dismiss as being premature (R 583-586,590).

It will be necessary for the personal representatives to determine whether an amended estate tax (Form 706) will have to be filed if the fees awarded to Respondents are less than those claimed on the estate tax return, since additional taxes would have to be paid to the IRS because there would be less deduction than as shown on the estate tax return (T 356-357). If this is required, it would take two years or more for the probate of the estate to be concluded (T 357).

Donald H. Norman, Esq. and Peter Friedrich, Esq. testified as experts with respect to reasonable attorney's fees and personal representatives' fees in the case. Mr. Norman, an expert in the field of probate and estate planning for some 32 years (T 176-177), testified that an amount which would constitute reasonable fees under F.S. 733.617 (1987), considering all the various criteria set forth in the Statute, would be $144,300.00 (T 177-182). Mr. Norman testified he did not believe the decision in Florida Patients Compensation v. Rowe, supra, was applicable because

there was a specific Statute involved in the setting of such fees (T 182-183). However, he further testified that should the Rowe decision apply in this particular case, then in his opinion reasonable attorney's fees under Rowe would be in the sum of $164,000.00 (T 182). Mr. Friedrich, also an expert in the probate of estates and estate planning, testified that the attorney's fees should be computed in accordance with F.S. 733.617 (1987) (T 223). Mr. Friedrich testified that considering the various standards set forth in the Statute, that a reasonable attorney's fee would be in the amount of $210,000.00 (T 226).

With regard to fees as personal representatives, Mr. Norman testified that a reasonable fee for PATTERSON as co-personal representative would be in the amount of $92,000.00 under the provisions of said Statute (T 180-181). Mr. Friedrich testified that a reasonable fee for PATTERSON as co-personal representative would be in the amount of $70,000.00, for a total fee of attorney and personal representative of $280,000.00 (T 226-227).

Both witnesses testified that these were the fees customarily charged in Broward County, Florida (T 229).

Mr. Lowell Mott testified that a reasonable fee for the services of NCNB for services as co-personal repreesentative, would be in the amount of $271,702.89 (T 19-20) for the usual services in connection with the estate

and that, in addition, a fee of $30,000.00 would be reasonable for the extraordinary services rendered in connection with the estate (T 20-22). He also testified that a reasonable fee for PATTERSON as co-personal representative would be in the sum of $108,000.00 (T 22).

Mr. Patrick Burkett testified that in his opinion, a reasonable fee for the usual services of NCNB would be in the sum of $401,785.00, which amount would be that charged by Florida National Bank if it were handling the estate (T 64), and that an additional $50,000.00 in fees would be reasonable for the extraordinary services rendered in probating an estate (T 65-66).

SUMMARY OF THE ARGUMENT

The lodestar method of awarding attorney's fees is not applicable to an award of attorney's fees under F.S. 733.617, for the reason that the Statute sets forth the criteria for awarding fees under the Statute, and it further provides that it shall be based on one or more of those criteria. In this Court's recent decision in Standard Guaranty Insurance Co. v. Quanstrom, 15 FLW S 23 (Fla.Jan.11, 1990), the Court stated that the lodestar method is not applicable where there is a Statute that sets forth the criteria for awarding fees. The Court's decision confirms similar decisions of District Courts of Appeal which have reached the same conclusion.

With respect to Petitioners' second issue, the trial Court's award of fees is not contrary to the manifest weight of the evidence. Petitioners' argument rests on their position that the trial Court had to limit the attorney's fees to an hourly award. The testimony before the trial Court supports the attorney's fee award and F.S. 733.617 does not limit the amount to an hourly rate.

Under Issues III and IV, Petitioners contend that the award of personal representatives' fees must be calculated pursuant to the lodestar method and the trial Court's award is contrary to the manifest weight of the evidence.

The Court's decision in Rowe, supra, was applicable to an award of attorney's fees under a Statute authorizing an award of attorney's fees in favor of a successful party litigant as against the losing party. There was no reference or discussion in the case with respect to fees other than attorney's fees. The trial Court considered the criteria of F.S. 733.617 (1987) and the testimony it had before it and determined the amount of fees the personal representatives should receive from the estate. One of those criteria was the amount involved, and in 1988 the Legislature amended said Statute to make it clear that one of those criteria is "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."

The trial Court's decision is in accordance with the Statute and its decision is supported by the evidence.

ISSUES PRESENTED FOR REVIEW

ISSUE I

WHETHER THE LODESTAR METHOD IS APPLICABLE TO THE CALCULATION OF REASONABLE ATTORNEY'S FEES AWARDED PURSUANT TO FLORIDA STATUTE 733.617.

ISSUE II

WHETHER THE ATTORNEY FEE OF $144,300.00 IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

ISSUE III

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

ISSUE IV

WHETHER THE PERSONAL REPRESENTATIVE'S AWARD TO NCNB WAS IN ERROR.

ARGUMENT

ISSUE I

WHETHER THE LODESTAR METHOD IS APPLICABLE TO THE CALCULATION OF REASONABLE ATTORNEY'S FEES AWARDED PURSUANT TO FLORIDA STATUTE 733.617.

Petitioners argue that attorney's fees and personal representatives' fees which are awarded under F.S. 733.617, (1987) must be determined in accordance with the decision of the Florida Supreme Court in Florida Patients Compensation Fund v. Rowe, supra, and that the Fourth District Court of Appeal's decision affirming the trial Court's award of attorney's fees and personal representatives' fees is in conflict with Rowe, supra. Respondents respectfully suggest that the Fourth District Court properly applied the law in its decision. The Fourth District Court held that the lodestar approach of Rowe is not applicable to those cases where there is a Statute which sets forth guidelines for determining attorney's fees. 546 So.2d 1114 (Fla.4th DCA 1989). In doing so, the Fourth District Court followed similar reasoning of the First District Court of Appeal in the case of What An Idea, Inc. v. Sitko, 505 So.2d 497 (Fla.1st DCA 1987), in which the Court held that the lodestar approach did not apply to the award of attorney's fees under the Statute governing an award of fees in

workman's compensation cases. In that case, the First District Court of Appeal stated as follows:

> "We dispose of appellants' argument for the application of the 'lodestar' approach of Rowe by noting that this Court has considered and rejected this contention in Rivers v. SCA Services of Florida, Inc., 488 So.2d 873 (Fla.1st DCA 1986). The Fourth District has also found Rowe inapplicable in instances in which the Legislature has provided specific guidelines for determination of attorney's fee awards. Division of Administration, et al. v. Ruslan, Inc., et al., 497 So.2d 1348 (Fla.4th DCA 1986) (award of attorney's fees in condemnation cases is governed by section 73.091-.092, Florida Statutes, rather than Rowe)." (P. 498)

The Florida Supreme Court denied review in the Sitko case at 513 So.2d 1064 (Fla.1987).

In What an Idea, Inc., supra, the District Court considered the following elements which are set forth in the Statute:

> (a) The time and labor required,
> (b) Novelty and difficulty of questions involved,
> (c) Skill required to perform the legal service properly,
> (d) Likelihood that acceptance of the particular employment will preclude employment of the lawyer by others,
> (e) The fee customarily charged in the locality for similar legal services,
> (f) The amount involved in the controversy and the benefits resulting to the claimant
> (g) The time limitation imposed by the claimant or the circumstances,

(h) The nature and length of the professional relationship with the claimant,

(i) The experience, reputation and ability of lawyer or lawyers performing the services,

(j) The contingency or certainty of the fee.

The Deputy Commissioner found that the amount of hours involved in the case was 651.75 hours of productive time. The Deputy Commissioner awarded attorney's fees of $1.75 million dollars in that case where the amount of recovery was approximately $17,600,000.00. The amount of the award was approximately $2,685.00 per hour if the fee were based on an hourly rate.

In this case, the trial Court determined that the lodestar method of determining attorney's fees under Rowe supra is inapplicable to the fees in this case (R 630), and the Court stated as follows:

"1. That contrary to the argument of respondents Patricia Platt Faulkner and Barbara Platt Swanson, the fees herein sought are not subject to the Lodestar Method of calculation pursuant to Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 but are governed by the criteria of F.S. 733.617. The fees herein are not sought by a prevailing party (said term used 10 times in Rowe case), in an ancillary matter gainst an unsuccessful party in an adversary proceeding (Stabinsky, et al. v. Alvarez, 490 So.2d 159) and (Weber v. Imperato, 4DCA, 12 FLW 131)".

It should be observed that Respondents' expert witness, Wilson Smith, as well as Petitioners' experts, all testified that they did not believe the Rowe decision would apply to probate proceedings (T 297). The rationale of all involved was that there was a Statute enacted by the Legislature which set forth the specific criteria for determining attorney's fees and personal representatives' fees in probate matters. Said Statute (1987) provides as follows:

> "733.617 Compensation of personal representatives and professionals.--
> (1) Personal representatives, attorneys, accountants, and appraisers and other agents employed by the personal representative shall be entitled to reasonable compensation. Reasonable compensation shall be based on one or more of the following:
> (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."

It will be observed that the Legislature set forth specific criteria to be set by the Court in setting such

fees, which Statute is similar to Sec. 440.34, Florida Statutes, 1987, which provides for attorney's fees in a workmens compensation case and which Statute was involved in What An Idea, supra.

In this Court's recent decision in Standard Guaranty Insurance Co. v. Quanstrom, 15 FLW S23 (Fla.Jan.11,1990), the Court stated that different types of cases require different criteria to achieve the legislative or court objective in authorizing the setting of reasonable attorney's fees (S25). The Court further stated that

> "We have identified these categories to illustrate that different criteria for different types of cases must be considered in calculating attorney's fees. We emphasize that the principles to be utilized in computing these fees must be flexible to enable the courts to consider rare and extraordinary cases with truly special circumstances. Palma." (S26).

In its decision in Quanstrom, supra, the Court stated that the trial Court must use the criteria and factors in setting fees as is consistent with the purpose of the statute or the rule authorizing fees. In that regard, the Court referred to the First District Court's decision in the What an Idea case, supra, and stated as follows:

> "In this category, the legislature may be very specific in setting the criteria that can be considered. For example, deputy commissioners must apply specific criteria to determine attorney's fees in workers' compensation cases. See, e.g.,

> What An Idea, Inc. v. Sitko, 505 So.2d 497 (Fla.1st DCA), review denied, 513 So.2d 1064 (Fla.1987); Rivers v. SCA Services, Inc., 488 So.2d 873 (Fla.1st DCA 1986; 2 J. Hauser, Attorney's Fees in Florida, ch. 18, p.32 (1988). In this regard, the lodestar method is consequently unnecessary. It is not our intent to change the law in these instances." (P. S26).

Thus, the Court noted that the lodestar method was unnecessary in the cases where the Legislature has set forth the criteria for setting fees. Comparing F.S. 733.617, (1987) with Sec. 440.34, Florida Statutes, 1987, it will be observed that the criteria in both statutes are similar and it is indeed difficult to understand how the Petitioners can argue that the lodestar method is not applicable under Sec. 440.34, but is applicable to F.S. 733.617, particularly in light of the Legislature's statement that "reasonable compensation shall be based on one or more of the following criteria of said Statute". The Supreme Court's reasoning in Quanstrom, supra, would seem to be even more applicable to F.S. 733.617 for the reason that the Legislature amended the Statute in 1988, as to those criteria, to state as follows:

> "(a) The time and labor required.
> (b) The novelty and difficulty of the questions involved, and the skill requisite to perform the service properly.
> (c) The likelihood that the acceptance of the particular employment will preclude other employment by the person.
> (d) The fee customarily charged in the locality for similar services.

(e) The nature and value of the assets of the estate, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person.
(f) The results obtained.
(g) The time limitations imposed by cirsumstances.
(h) The experience, reputation, diligence, and ability of the person performing the services."

It is to be assumed that the Legislature was familiar with the Court's decision in Rowe, supra, and yet it did not limit the Statute with respect to the award of fees, but instead, it clarified the Statute with respect to the consideration and nature of the value of the assets of the estate so as to make it abundantly clear that the size of the estate, the income earned and other elements were to be considered in setting reasonable compensation.

The same rationale has been followed in the award of attorney's fees in condemnation proceedings.

In the case of Division of Administration v. Ruslan, 497 So.2d 1348 (Fla.4th DCA 1986) and the case of Division of Administration v. The Ideal Holding Co., 480 So.2d 243 (Fla.4th DCA 1985), the Fourth District Court of Appeal held that the lodestar method of determining attorney's fes was inapplicable to eminent domain proceedings for the reason that there was a Statute which set forth specific guidelines for determining the fee in those cases. In rejecting the state's position that the trial Court had failed to apply

the lodestar method in awarding attorney's fees, the Fourth District Court stated as follows:

> "The award of attorney's fees in condemnation proceedings is governed by the provisions of §73.091-.092, Florida Statutes (1985), rather than Rowe. Both statutes contain specific guidelines for determining an apporpriate fee to a landowner and the record reflects that the trial court followed those standards here." (P. 1349).

Similar reasoning was used by the Fifth District Court of Appeal in Sheffield v. Dallas, 417 So.2d 796 (Fla.5th DCA 1982) where the District Court affirmed the trial Court's award of attorney's fees in a probate case under F.S. 733.617.

The lodestar method of computing attorney's fees is not applicable to the award of attorney's fees under F.S. 733.617 (1987), and there is no conflict between the decision of the Fourth District Court of Appeal in this case and the decision of this Court in Rowe, supra.

In rejecting Petitioners' arguments in this case, the Fourth District noted in the footnote as follows:

> "1. Section 733.617, F.S. 1987 provides that reasonable compensation shall be based upon 'one or more of the following' criteria set forth in the statute. Appellant contends that the trial court must look at all the criteria before setting the fee. However, it appears that the legislature specifically rejected that approach when it passed Chapter 76-172, adding the quoted language to the statute."

Similarly, in 1988, the Legislature rejected that same approach when it passed Chapter 88-340 of the General Session Laws of 1988 and expanded the provisions relative to consideration of the assets, income and possible liability of the attorney and the personal representative of an estate in the award of fees.

ISSUE II

WHETHER THE ATTORNEY FEE OF $144,300.00 IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

Petitioners' argue that the lodestar formula must be applied to an award of attorney's fees under F.S. 733.617. If there is no conflict under this Court's decision in Rowe, supra, and the lodestar formula does not apply, then there is no basis for Petitioners' request that the Court review the evidence to determine whether the evidence supports the attorney's fee award made by the trial Court. The Fourth District Court found that the testimony presented by the experts authorized the fees awarded by the trial Court and that Petitioners had not shown that the trial Court's decision was contrary to the manifest weight of the evidence.

In this Brief, Petitioners' argument is based on their position that the trial Court should have awarded attorney's fees on an hourly basis. Petitioners' expert, Mr. Wilson Smith, testified that a reasonable fee would be equal to the total number of hours multiplied by the rate of $200.00 an hour to arrive at his lower computed fee and that he would take the same hours and apply a charge of $250.00 an hour to arrive at the higher fee at the range in which he was testifying as to reasonable fees (T 289-290). He did not apply any other factors in testifying as to reasonable

attorney's fees to be allowed in the case (T 289-290). In having their expert witness testify solely on the basis of an hourly rate, the Petitioners ignored the criteria set forth in the Statute. Mr. Norman testified that a reasonable fee would be in the amount of $144,300.00 and that he considered all of the factors and in that regard. He testified as follows:

> "Q In determining that as being a reasonable fee, would you tell the court about your consideration of the factors set forth in 733.617?
> Did you consider all those factors?
>
> A Yes, I did.
>
> First of all, just briefly I considered the time involved. And the time as presented to me was for Mr. Patterson, a total of 404 hours up today, which broke down at two hundred seventy odd hours as attorney work and one hundred thirty hours as a co-personal rep- resentative.
> I took into account that was a seven million dollar estate, that there were a number of problems involved in it which were all handled in a skillful manner by Mr. Patterson, not the least of which was a blockage discount on the 706 or a closely held or a large block of stock in a corporation.
> The fact that there was litigation in the estate, a will contest and other matters. The fact that the services were performed, I had thought, well.
> That the conclusion was good, and that he had done a good job.
> Also, I felt that the fee customarily charged in Broward County for such work would be approximately $140,000."
> (T 179-180)

Mr. Norman further stated:

> "The amount involved, seven million dollars imposes a substantial responsibility on the attorney and co-personal representatives handling the estate. A slip of any kind in an estate that large could be very disastrous, and there is very big exposure in handling it and handling it right.
>
> I thought that the time he expended was reasonable. He had to do it within the time he had.
>
> I thought, in fact, he spent probably a modest amount of time doing the work that other people less able might have spent more time.
>
> I noted that my discussion with him that he had been representing the decedent for a number of years, approximately ten, and had performed several things for the decedent's well-being, not the least of which was accepting [intercepting] a gift of a substantial amount of stock to a housekeeper, which, if it had gone unchallenged would have depleted the estate by some three million dollars.
>
> And I know that he is a good lawyer. He has worked here very well, long, and he does a competent job in the work he does. And because of all these things, applying 733.617, I felt that the fee was a reasonable fee." (T 180-181).

Likewise, Mr. Friedrich considered all the criteria set forth in said Statute and he testified that in his opinion a reasonable attorney's fee under the Statute would be in the amount of $210,000.00 (T 226-233).

The attorney's fee of $144,300.00 was accepted by the IRS as a reasonable fee. It is to be observed that the IRS

was not bound by the fee set in the return or by the award made by a State Court, and it was free to challenge the attorney's fee award and the personal representatives' fees, particularly in light of the fact that approximately 55% of the fees were borne by the U. S. U.S. v. White, 853 F.2d 107 (2d Cir.1988). It is also to be observed that the estate proceedings have not been concluded and that additional services will be required before the probate is concluded.

In the trial Court, and in the proceedings before the District Court, the Petitioners' position have always simply been that attorney's fees in probate proceedings are to be set strictly on an hourly basis, without any enhancement or other factors in setting the fees. Petitioners' position is contrary to the provisions of F.S. 733.617, and the only basis for Petitioners' argument that the trial Court's award is contrary to the manifest weight of the evidence is their position that an attorney's fee award can only be made on an hourly basis in probate proceedings.

The evidence before the trial Court amply supported the trial Court's award and there is no basis for Petitioners' argument that the trial Court's award was against the manifest weight of the evidence.

ISSUE III

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

In their argument under this issue, Petitioners argue that the fees of a personal representative should be based on the lodestar method, that is, solely on an hourly basis. In so arguing, Petitioners can hardly contend that the Rowe case applies to the award of fees of a personal representative under F.S. 733.617 (1987). The Rowe case was limited in its decision to an award of attorney's fees to the prevailing party in a lawsuit, as against an unsuccessful party, pursuant to a Statute which authorized such an award in favor of the prevailing party. Petitioners cannot suggest that there is conflict in the Court's decision in Rowe and the decision by the District Court of Appeal with respect to the amount of the award of personal representatives' fees in this case. There is simply no conflict between the Rowe decision and the instant decision by the District Court.

Furthermore, the trial Court properly considered the testimony given by the expert witnesses in this case in accordance with the criteria established by said Statute in awarding the amount of the co-personal representatives' fees; consequently, the award was not against the manifest

weight of the evidence as suggested by the Petitioners. Petitioners argue that based upon PATTERSON's spending 130 hours for the award of $65,692.00, the hourly rate is in excess of $530.00 per hour (P. 23-24). As set forth earlier, it is to be observed that the probate proceedings have not been concluded and that as a result of the challenge to the awards, it will be necessary that an amended estate tax return be filed with the IRS and the estate proceedings will not be concluded for approximately another two years.

In the first instance, it should be observed that the decedent desired to have the services of PATTERSON as a co-personal representative, together with the Bank, to act as personal representatives of his estate which was in excess of $7,000,000.00. It should be further noted that PATTERSON had represented the deceased from 1970 until 1985, and as a result thereof, he was intimately familiar with the affairs and assets of the estate. He represented the wife's estate following her death in 1977 (T 317-318) and assisted the deceased with respect to many matters prior to his death (T 317-318). It is to be observed that as a result of PATTERSON's actions prior to the decedent's death, the estate was able to avoid a claim by the decedent's housekeeper, Ms. Mary Lee Wainwright, that she had been given some 99,420 shares of the stock of the Clark Company

as a gift by the decedent. Furthermore, as a result of that situation, PATTERSON had guardianship proceedings commenced, and thereafter, was responsible with NCNB for having gifts made to the Petitioners' and their children of $170,000.00 in each of the years, 1983, 1984 and 1985, and the gifts for 1983 and 1984 were successfully excluded from the estate tax return for the estate. As a result of this action, the tax savings as to the gifts alone would have amounted to $187,000.00 (55% of $340,000.00), while the savings to the estate as a result of the discounted value of J.L. Clark Company stock was another $163,000.00 in estate tax, for a total savings to the estate of $350,000.00, or an amount almost equal to the total fees awarded by the trial Court in the estate.

One of the factors to be considered with respect to fees to be awarded to personal representatives is the extent of their responsibilities and possible liabilities. Both personal representatives were faced with claims of liability by the Petitioners as beneficiaries of the estate. This is reflected by the fact that a Petition for surcharge was filed early-on, on April 21, 1987, with the Petitioners seeking to impose liability on the basis of breach of fiduciary duties, negligence or malpractice by the Respondents as personal representatives and as attorney (R 580). Consequently, even though Respondents were successful

in thwarting a claimed gift to the decedent's housekeeper of 99,420 shares of stock of the Clark Company and they had made annual gifts of $170,000.00 in three different years in an attempt to save estate taxes, which resulted in substantial savings of taxes, and were successful in discounting the stock for a tax savings to Petitioners, they were always faced with a claim of a surcharge against them for breach of fiduciary duty, negligence, or similar charge as set forth in the Petition for surcharge.

These are some of the factors which were recognized by the Legislature in F.S. 733.617 (1987), as amended in 1988.

If the estate continued to own the Clark Company stock on Black Monday, October, 1987, instead of having made an earlier distribution to the beneficiaries, the estate would have lost approximately $1,600,000.00 of its $7,000,000.00 in value on that date (T 334-335). Petitioners would surely have filed a Petition for surcharge against Respondents for that loss in value of the stock.

As the District Court observed in its decision below, the Legislature in 1976 rejected the approach of all the criteria set forth in F.S.733.617 which had to be considered by the trial Court, but instead, provided that compensation could be based upon one or more of the criteria set forth in the Statute. Similarly, in 1988 when amending the Statute, the Legislature again provided that compensation would be

based upon one or more of the criteria set forth therein. The testimony presented by Respondents' witnesses as to reasonable compensation is in accordance with the provisions of the Statute and they testified to a reasonable fee in excess of the amount awarded by the lower Court in favor of PATTERSON as co-personal representative, and the trial Court's awards were not against the manifest weight of the evidence, as suggested by the Petitioners.

ISSUE IV

WHETHER THE PERSONAL REPRESENTATIVE'S AWARD TO NCNB WAS IN ERROR.

In their argument under Issue IV, Petitioners suggest that the basis of awarding fees to a banking institution as a co-personal representative is on the lodestar method, that is, on an hourly basis. Petitioners' argument should be directed to the suggested change in the provision of the Statute, and not to a construction of the Statute, contrary to its provisions. By the 1988 amendment to F.S. 633.617, it is abundantly clear that fees of a personal representative are to be based upon any one of the eight criteria set forth therein and one of those criteria is "the nature and value of the assets of the estate, the common amount of income earned by the estate, and the responsibilities and potential liabilities assumed by that person."

The testimony of the personnel of NCNB established that considerable services were performed by 50 to 75 persons employed by NCNB (T 409-410), and a synopsis of the various files and matters involved in the services which were rendered by the Bank was submitted into evidence before the trial Court (Resp.'s Ex.#64, R 410). The trial Court had before it the testimony of Mr. Lowell Mott that a reasonable fee for NCNB would be a total of $301,702.89 (T 19-22) and

the testimony of Mr. Patrick Burkett that a reasonable fee would be in the sum of $401,785.00 (T 64), while the trial Court's award was in the amount of $277,000.00, which amount is well within the evidence presented to the Court.

In their argument, Petitioners refer to the decisions of the Colorado Court in the Estate of Painter, 39 Colo.App. 506, 567 P.2d 820 (Colo.1977) and the Maine Court in the Estate of Davis, 509 A.2d 1175 (Me.1986), as support for their position under this issue. A review of both of those cases would suggest the cases do not support Petitioners' position, but instead, support Respondents' position that the trial Court must apply the legislative criteria.

In the Painter case, supra, the Colorado Court simply stated that the trial Court must set a fee in accordance with the criteria established in the Statute. At P. 823, the Court held as follows:

> "We hold that, in setting fees under the C.P.C, the trial court must consider and weigh all of the factors which the code enumerates. (emphasis added) P. 823.

Likewise, in the Davis case, supra, the Maine Court stated that the Legislature had intended to and had set forth certain criteria which are to be considered by the trial Court in setting fees and that only those criteria are to be considered in setting fees in probate cases.

Similarly, in this case, the trial Court considered the provisions of the Florida Statutes, as did the District Court, and the trial Court's decision is amply supported by the evidence it had before it.

CONCLUSION

For the reasons set forth in this Brief, it is respectfully submitted that the decision by the Fourth District Court below is not in conflict with this Court's decision in Florida Patients Compensation Fund v. Rowe, for the reason that the Court's decision in Rowe does not apply when a Statute sets forth criteria which are to be followed in the setting of fees.

Consequently, the Court should discharge the Petition it previously granted on the basis that the Court's decision is not in conflict with Rowe supra, and furthermore, that the trial Court's award as to attorney's fees and personal representatives' fees was in accordance with the provisions of F.S. 733.717 (1987), which provides the criteria for the award of fees in probate proceedings.

Respectfully submitted this 15th day of March, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by mail to SAMUEL S. SMITH, Esq., 701 Brickell Avenue, Suite 1900, Miami, Florida 33131, and to ROBERT J. FRIEDMAN, Esq., P. O. Box 88, Hallandale, Florida 33309, this 15th day of March, 1990.

Harry G. Carratt