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' REPLY BRIEF

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

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MISCELLANEOUS

RESPONSE TO STATEMENT OF FACTS AND CASE

Throughout their Brief, Respondents make repeated references to the fact that the Internal Revenue Service accepted decedent's Federal Estate tax return which contained an estimate of the fees to be paid to the personal representatives and the attorney for the estate. Whether the Internal Revenue Service accepted the fees quoted is not relevant. Moreover, in their Brief Respondents repeatedly threaten Petitioners with the prospect of amending the estate tax return (p. 7, 11, 29, 31) to reflect any reduction of their fees in the event Petitioners are successful. Respondents contend such an amendment would subject the estate to further taxes and further expense. These threats are improper. Excessive fees should not be countenanced simply because their reduction might result in the payment of lawful taxes. In any event the taxes would be less than the fees refunded and therefore the beneficiaries will receive a net benefit. Moreover the burden of the further administration, if any, should be borne by the persons who claimed the excessive fees in the first instance and not by the innocent beneficiaries who have exercised their statutory right to challenge the fees.

In an effort to justify his large fees, Respondent, Patterson, makes much of gifts that were made during Lester Platt's lifetime that reduced the taxable estate as well as other services he rendered to Mr. Platt during his lifetime.

(p. 8, 9, 31, 32). Respondent, however, was compensated for the services he rendered Mr. Platt during his lifetime and was compensated for his services in the Lester Platt guardianship. Those services cannot form the basis for further compensation after Mr. Platt's death.

Finally, both personal representatives claim credit for obtaining a "blockage" discount on the J.L. Clark common stock that constituted over 70% of the value of the estate. Neither Respondent mentions that the discount was easily obtained by writing a letter. Patterson also claims to have kept a daily record of the J.L. Clark stock. No such record was ever received into evidence nor was it even mentioned in the testimony. The reference to any such record is therefore clearly inappropriate.

ARGUMENT

I.

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

Petitioners and Respondents agree that the lodestar method is inapplicable in those instances in which the legislature has provided specific guidelines for the determination of attorney's fee awards. In Standard Guar. Ins. Co. v. Quanstrom, 15 FLW 23, 26 (Fla. Jan. 11, 1990), this Court wrote:

> We emphasize that the criteria and factors utilized in these cases must be consistent with the purpose of the fee-authorizing statute or rule. 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 (citations omitted). In this regard, the lodestar method is consequently unnecessary.

Thus, the inquiry in this case is whether § 733.617 Fla. Stat. (1987) sets forth a specific guideline for the determination of fees that renders application of the lodestar method unnecessary.

Petitioners demonstrated in their Initial Brief that the criteria set forth in § 733.617 Fla. Stat. (1987) are virtually identical to the criteria set forth in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Unable to meaningfully distinguish the criteria in the statute from those in Rowe, Respondents point to the revision of § 733.617 Fla. Stat. (1988) and argue that the revision is

indicative of a legislative intent not to apply the lodestar method in probate. (p.23). The revised § 733.617 (1988), however, is not applicable to this proceeding.[1/] Moreover, there is no logical basis upon which to infer a legislative intent that § 733.617 applies to this case.

The criteria enumerated in § 733.617 were originally adopted from Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility. The same criteria were later incorporated in Rule 4-1.5(b) of the Florida Bar Rules of Professional Conduct. Rule 4-1.5(b) was amended effective January 1, 1988. Not surprisingly, § 733.617 was amended effective July 1, 1988 to conform to the changes in Rule 4-1.5(b). Section 733.617, as revised, does not differ in any substantial respect from the prior statute. The only noteworthy change was in § 733.617(1)(e), which now provides:

> (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.

This change is consistent with the earlier revision of the ethical rule. Rule 4-1.5(b)(4) was amended to provide:

> (4) The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained.

[1/] Section 733.617 only applies to estates of decedents dying after July 1, 1988.

The difference between the two provisions is not significant. The language difference occurs only because § 733.617 is confined to probate fees while the ethical rule governs attorneys' fees generally. Neither revision can be reasonably construed to indicate an intent by the Florida Supreme Court or by the legislature to abandon the lodestar method. Certainly the revisions do not create specific guidelines for determining fees that are inconsistent with use of the lodestar method.

Respondent relies heavily upon § 440.34 Fla. Stat. which has been construed as containing a specific guideline for the award of an attorney fee inconsistent with the use of the lodestar method. What an Idea, Inc. v. Sitko, 505 So.2d 497 (Fla. 1st DCA 1987); Rivers v. SCA Serv. of Florida, Inc., 488 So.2d 873 (Fla. 1st DCA 1986); Standard Guar. Ins. Co. v. Quanstrom, 15 FLW S23 (Fla. Jan. 11, 1990). Respondents represent at pages 18, 21 and 22 of their Answer Brief that §§ 733.617 and 440.34 are similar. Respondents' representations are deceptive at best. Respondents omit any mention of the most crucial portion of § 440.34 regarding the calculation of fees. The pertinent portion of § 440.34 provides:

> Except as provided by this subsection, any attorney's fees approved by a deputy commissioner shall be equal to 25 percent of the first $5,000 of the amount of the benefits secured, 20 percent of the next $5,000 of the amount of the benefits secured, and 15 percent of the remaining amount of the benefits secured. However, the deputy commissioner shall consider the following factors in each case and may increase or decrease the attorney's fee if, in his judgment, the circumstances

> of the particular case warrant such action:
>
> (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (b) The likelihood, if apparent to the claimant, that the acceptance of the particular employment will preclude employment of the lawyer by others or cause antagonisms with other clients.
>
> (c) The fee customarily charged in the locality for similar legal services.
>
> (d) The amount involved in the controversy and the benefits resulting to the claimant.
>
> (e) The time limitation imposed by the claimant or the circumstances.
>
> (f) The nature and length of the professional relationship with the claimant.
>
> (g) The experience, reputation, and ability of the lawyer or lawyers performing services.
>
> (h) The contingency or certainty of a fee.

Section 440.34 specifically mandates that the attorney fee be calculated as a percentage of the award and then increased or diminished by consideration of the other factors. The lodestar method, therefore, cannot be consistently applied to this statute. Accordingly, in Rivers and Sitko, the Court correctly declined to apply the lodestar method. Section 733.617 bears no similarity to § 440.34 with respect to the calculation of attorney fees. Section §733.617 sets forth

no specific method for the calculation of attorney's fees at all. Thus, there is no bar to the use of the lodestar method.

Respondents also rely upon Division of Admin. v. Ruslan, 497 So.2d 1348 (Fla. 4th DCA 1986) and Division of Admin. v. The Ideal Holding Co., 480 So.2d 243 (Fla. 4th DCA 1985). In Ruslan, the Court declined to apply the lodestar method to an award of attorney's fees in an eminent domain proceeding because §§73.091-.092 Fla. Stat. contained "specific guidelines for determining an appropriate fee". Ruslan, 497 So.2d 1349.

As noted in our Initial Brief, but ignored by the Respondent, the precedential value of Ruslan is highly suspect. In Quanstrom, this Court held that in eminent domain matters and estate and trust matters, payment of an attorney's fee is generally assured and therefore, under ordinary circumstances, no contingency multiplier should be applied although the basic lodestar method is an appropriate starting point. This Court wrote:

> 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. 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.

Quanstrom, 15 FLW S26 (citations and footnotes omitted). Therefore, it appears that the lodestar method should be

applied in eminent domain proceedings and Ruslan should be overruled.

Notwithstanding the Quanstrom opinion, § 73.092 is distinguishable from § 733.617. Section 73.092 Fla. Stat. provides:

> In assessing attorney's fees in eminent domain proceedings, the court shall consider:
>
> (1) Benefits resulting to the client from the services rendered. However, under no circumstances shall the attorney's fees be based solely on a percentage of the award.
>
> (2) The novelty, difficulty, and importance of the questions involved.
>
> (3) The skill employed by the attorney in conducting the case.
>
> (4) The amount of money involved.
>
> (5) The responsibility incurred and fulfilled by the attorney.
>
> (6) The attorney's time and labor reasonably required adequately to represent the client. The condemnee's attorney shall submit to the condemning authority and to the court complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred at least 30 days prior to a hearing to assess attorney's fees under this section.

Unlike § 733.617, the eminent domain statute specifically forbids percentage fees. Unlike § 733.617, the eminent domain statute requires the attorney to submit complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services and

costs 30 days prior to hearing. Unlike § 733.617, the eminent domain statute requires the court to consider every one of the factors. Had § 733.617 contained such provisions Respondents would never have been awarded their outrageous fees.

Respondents also rely upon Division of Admin. v. Ideal Holding Co., 480 So.2d 243 (Fla. 4th DCA 1985) for the proposition that Rowe is not applicable in probate. However, that case does not stand for the proposition cited. Rowe is not even discussed in that opinion. Similarly, Respondents' reliance upon Sheffield v. Dallas, 417 So.2d 796 (Fla. 5th DCA 1982), for the same proposition is improper. Sheffield was decided three years before Rowe and the adoption of the lodestar method.

Respondents have apparently abandoned their argument that the lodestar method only applies when fees are "sought by a prevailing party in an ancillary matter." Although Respondents successfully advanced that position in the trial court and presented the argument to the District Court of Appeal, Respondents have not responded to a discussion of that argument set forth in Argument I B of our Initial Brief.

Respondents have offered no policy or principal that militates against the application of the lodestar method in probate. There has been no suggestion or argument that attorneys cannot be fairly compensated through the lodestar method. The lack of objectivity and the difficulty of review that caused this Court to adopt the lodestar method is amply evidenced in this case. Because the impact of probate fees are

typically borne by non-clients, the confidence of the public in the bench and bar is impaired by the subjective and excessive award of fees in probate.

II.

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

Even if the lodestar method does not apply in probate, a reasonable attorney's fee must bear some relationship to the time and labor expended. Respondents disagree. Respondents seem to contend that a fee based solely upon the size of the estate is a reasonable fee and that time and labor need not be considered at all. Evaluation of the time and labor expended by Mr. Patterson compels the conclusion that the award of a fee of $144,300.00 was contrary to the manifest weight of the evidence.

Notwithstanding Respondent's self-congratulatory recitation of his services, the undisputed fact is that the Lester Platt estate was exceedingly simple to administer. The vast majority of the assets consisted of one stock that was monitored daily by NCNB. All the assets of the estate had already been marshalled in the Lester Platt guardianship. The few creditors were known because NCNB had been paying Platt's bills prior to his death. The minimal litigation that occurred resulted from Mr. Patterson's failure to properly estimate Mrs. Wainwright's tax liability. That this was an exceedingly simple estate to administer is best evidenced by the fact that Mr. Patterson expended a maximum of 270 hours as an attorney.

Petitioners' contention is simple. The award of $144,300, 2% of the estate, is contrary to the manifest weight of the evidence because the evidence indisputably demonstrated that: (1) Mr. Patterson properly expended only 220 hours; and (2) that the highest rate he charges for his services was $350.00 per hour. Therefore, giving Patterson the benefit of every conceivable doubt, the most he would be entitled to is $77,000 rather than the $144,300 awarded.

Respondent does not even attempt to justify his fee on the basis of the time and labor expended. Respondent argues that under § 733.617, time and labor need not ever be considered because the court need consider only <u>one</u> of the enumerated criteria. Petitioner respectfully submits that Patterson, as a member of the Florida Bar, is bound by the Rules of Professional Conduct, including Rule 4-1.5(b). Pursuant to Rule 4-1.5(c), time and labor, although not controlling, are factors that <u>must</u> be considered in determining a reasonable fee.

Respondent's contention that his experts considered time and labor is contradicted by the expert's own testimony. Although claiming to have considered all the factors set forth in § 733.617, Mr. Frederich and Mr. Norman plainly testified that a fee equal to 2% of an estate is customary and, therefore, a reasonable fee. (T. 176-178, 225). That is the fee that was awarded by the court. Whether or not the fee is customary, the fee is not reasonable.

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

Respondent, Patterson, does not dispute that he expended only 130 hours as co-personal representative for which he received a fee of $65,692. Respondent does not dispute that all 130 hours consist of 532 entries, of one quarter hour each, consisting of "checking" stock prices. Respondent offers no explanation as to why this task took one quarter hour nor does he explain why it was necessary at all given the fact that the stocks were monitored on a daily basis by a specialist at NCNB. Moreover, Respondent does not offer any explanation to justify his checking stock prices 532 times in a period in which there were less than 430 business days. In short, Respondent does not dispute Petitioners' contention that the labor was unnecessary and duplicative.

In lieu of any explanation or justification for his fee, Respondent repeatedly refers to the responsibility of owning the one stock that comprised the bulk of the estate, the possibility of surcharge, and the services he rendered as an attorney for which he was separately compensated. Respondent simply avoids the issues presented. Respondent neglects to mention that the stock was distributed to the beneficiaries at an early stage of the probate. Therefore, the responsibility was minimal and for a limited period of time. Moreover, Respondent's liability was limited because NCNB, a specialist, was employed as his co-personal representative.

There is no justification for the personal representative's fee other than that it is customary for an individual co-personal representative to charge a fee equal to one-third (1/3) of an institutional co-personal representative's fee. A customary fee, however, is not necessarily a reasonable fee as is evidenced in this case. PATTERSON has been paid $65,692 for 130 hours of labor that are of highly dubious validity and that were utterly unnecessary and duplicative. NCNB has been paid a handsome fee. There is no reason why the innocent beneficiaries who objected to percentage fees at the inception of the estate should pay twice for the same services.

There can be no clearer demonstration that the award was contrary to the manifest weight of the evidence. By awarding PATTERSON a percentage fee that bore no relationship to his efforts, the trial court, in effect, reinstated the personal representative's commissions that were abolished by the adoption of the Florida Probate Code in 1974.

IV.

THE AWARD OF A PERCENTAGE FEE TO NCNB WAS ERROR

Respondent, NCNB, seems to contend that its fee was somehow based upon the factors set forth in § 733.617. It was not. As demonstrated in the Initial Brief, NCNB's fee was solely based upon its published fee schedule. The Respondent's experts merely applied the fee schedules of other institutions to the Platt estate.

Respondent attempts to justify this return to the pre-probate code system of personal representative commissioners by arguing that § 733.617 authorizes the court to consider only one of the enumerated factors and that one of those enumerated factors is the size of the estate. However, Section 733.617 does not authorize the use of fee schedules in lieu of a reasonable fee. In fact, the legislative purpose in adopting § 733.617 was to eliminate percentage fees and substitute a reasonableness standard. Fenn and Koren, "The 1974 Florida Probate Code - A Marriage of Convenience", 26 U.Fla.L.Rev. 674 (1975) ; Estate of Painter, 39 Colo. App. 506, 567 P.2d 820 (Colo. 1977); Estate of Davis, 509 A.2d 1175 (Me. 1986).

Respondents attempt to distinguish Estate of Painter, and Estate of Davis on the flimsy basis that § 733.617 allows the court to consider only one of the enumerated criteria while the Maine and Colorado statutes required the consideration of all criteria. That minimal difference is irrelevant. Painter and Davis confirm that by enacting Uniform Probate Code § 3-721 (upon which § 733.617 Fla. Stat. is predicated) the legislatures intended to abolish percentage fees. Therefore, the award of a percentage fee by NCNB was error as a matter of law.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief has been furnished by U.S. Mail to HARRY G. CARRATT, ESQ., Morgan, Carratt & O'Connors, P.A., 2601 East Oakland Park Boulevard, Suite 500, Fort Lauderdale, Florida 33306 on this 9th day of April, 1990.

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