IN THE SUPREME COURT OF FLORIDA

CASE NOS. 90,074 and 90,075

STEPHAN BITTERMAN, et. al. ,
petitioners,

v.

ANNETTE BITTERMAN
respondent.

STEPHEN BITTERMAN, et. al.,
petitioners,

v.

PATRICK R. WEIDENBENNER, et.al.,
respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF THEREALPROPERTYPROBATE&TRUST LAW SECTION OF THE FLORIDA BAR, AS *AMICUS CURIAE*

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The Real Property Probate & Trust Law Section ("RPPTL") appreciates the Court and the parties allowing it to appear and address the applicability of section 733.6171, Florida Statutes, to estates where attorneys' fees for representing personal representatives have not already been determined either by contract or court order.

RPPTL's purpose is not to choose a side in this litigation and advocate it. Instead, our concern is with bringing certainty to a currently muddled area of the law in a way consistent with the intent of the legislature in adopting and amending section 733.6171 and in a manner that will prove effective, efficient, and fair at the circuit court level.

However it may impact the litigants in this particular case, the following statements are true and cannot be reasonably challenged:

(1) For at least the past 20 years, counsel for the estate has only been entitled to a reasonable fee, however that fee might be calculated.

(2) Prior to 1991, it was customary in many communities to base the fee of counsel for the personal representative on a percentage of the estate assets.

(3) This Court's decision in Estate of Platt, 586 So. 2d 328 (Fla. 1991), changed the way in which reasonable fees are calculated when awarded by courts. That decision applied to counsel fees in then pending estates where fees were not yet determined.

(4) In response to Estate of Platt, RPPTL, led by the late William S. Belcher, drafted legislation intended to meet the concerns of the Court in reviewing the prior legislation on fees of counsel to the personal representative and the concerns of the practitioner and public that compensation reflect the work done and risks involved. This legislation was adopted by the legislature as section 733.6171, Florida Statutes (1993). 93-257, Laws of Fla., §4.

(5) Subsequently, based on its own study of the impact of section 733.6171, Florida Statutes (1993), RPPTL redrafted the statute to cure perceived defects in the calculus of the fee and the evidentiary presumption provided in the statute. This proposal was adopted by the legislature. 95-401, Laws of Fla., § 2.

(6) Both pieces of legislation manifest the people's intent that the legislation apply to pending estates in which there is no court order determining the fee of counsel to the personal representative.

(7) Section 733.6171, Florida Statutes, does not impair existing, binding contracts, regarding the fee for counsel to the personal representative. The statute specifically provides that any such contract is binding even if it establishes a method for calculating the fee different from that provided in the statute.

(8) Section 733.6171 does not permit the reopening of estates or vacating of orders determining fees in pending estates in order for fees to be reconsidered under the new law.

(9) Attorney's fees not determined by contract are subject to issues of entitlement and amount until subsequent approval by the beneficiaries bearing the impact of the fee in an accounting proceeding, or a court order determining fees in a section 733.6175 proceeding or accounting proceeding.

Based on these sound premises and the analysis on the subsequent pages, the legislature's decision to apply section 733.6171 to existing cases in which the reasonableness of the fee is still an open issue, is within the legislature's authority. The law, as amended, should be applied by courts determining a reasonable fee for counsel to the personal representative in pending estates. To the extent the Williams College trilogy of cases contravene this position, they should be overruled by this Court.

ARGUMENT

THE HISTORY OF SECTION 733.6171, FLORIDA STATUTES, AND HOW IT WORKS IN ESTATE PROCEEDINGS

Since at least 1974, an attorney for an estate, whose fee is decided by the court, has been entitled to no more than a "reasonable fee". See $733.617, Fla. Stat. (Supp. 1974). In 1975, the legislature amended the statute by adding factors for the courts of Florida to use in those cases where they would be called upon to establish a reasonable fee. In 1976, the statute was amended again to provide that courts could utilize "one or more" of the factors listed in the statute. See $733.617, Fla. Stat. (Supp. 1976). In 1988, the statute was amended again simply to "tweak" and clarify the wording of the factors. See Estate of Platt, 586 So. 2d at 332-33.

In Estate of Platt, this Court reviewed these amendments to the predecessor statute to section 733.6171. The Court focused on two primary points. First, against the argument that it was customary to use percentages of the estate to calculate the attorney's fee, this Court emphasized that if the legislature wanted the fee to be calculated on a percentage scale, it could have said so in the statute. Estate of Platt, 586 So. 2d at 335. Second, the Court noted that a "reasonable" fee should be one consistently applied in similar cases. Id. at 336.

Applying these principles to the argument that the statute was akin to the attorney's fee provision in the workers' compensation law, section 440.34, Florida Statutes (1987), this Court distinguished that law.

The Court pointed out that in section 440.34, **the legislature** did provide a percentage as a starting point for the deputy commissioner and, rather than letting a court apply different factors to similar cases, as allowed in 733.617 (1989), a deputy commissioner was required to consider

all of the factors in each case in which it might increase or decrease the percentage fee. Id. at 334. Given that the legislature did not provide similar language in 733.617 (1989), this Court determined that the lodestar method of calculating fees was mandated.'

As is obvious from the 1993 changes to section 733.617, amending the attorney fee aspect of the statute and placing it in section 733.6171, the precise concerns emphasized by this Court in Estate of Platt were intended to be addressed. **Sticking to the reasonable fee** entitlement, the legislature specifically provided a rebuttable presumption to be used by the courts if they were called upon to establish the reasonableness of the fee. The rebuttable presumption included a percentage component. And, the statute required courts to consider **all of the factors** set forth in the statute if called upon to determine whether the presumptive fee was appropriate in a particular case. See 5733.6171 (Supp. 1994); 93-257, Laws of Fla., §4.

In 1995, at the behest of RPP&TL, the legislature revisited section 733.6171 and further modified the method for considering the reasonableness of the fee, while maintaining the core intent of the legislature and the requirement that the court consider "all factors" set forth in the statute in similar fashion to the requirements of the workers' compensation law. See 8733.6171

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[1] Interestingly and significantly, the change in the customary method of awarding fees and the court-imposed change to the legislative provision allowing a court to use just some of the factors listed in the fee statute were applied to **then pending estates** where the fee would be established by the court and no order determining fees had been entered. See Moyle v. Moschell & Moschell, 582 So. 2d 11 (Fla. 3d DCA 1991); State Farm v. Jo 4 0 , 9 4 2 (Fla. 1st DCA 1989) ("...the supreme court has recently held that Rowe' does not constitute a judicial change in the law which is retroactively inapplicable because it impairs vested rights. Instead, the court explained that Rowe merely implements the statutory provision which authorizes an attorney's fee award to the prevailing party. No contractual rights exist between the prevailing party and the opposing party, therefore no vested right is impaired. Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988)."); Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla.1988).

(Supp. 1996); 95-401, Laws of Fla., § 2.

Both versions of section 733.6171 also made clear that no contract, past , present, or future, regarding fees, regardless of the manner in which the fee was calculated, would be impaired by the statute. §733.6171(2), Fla. Stat. (Supp. 1994); §733.6171(2), Fla. Stat. (Supp. 1996). Further, the legislature specifically and expressly provided in both versions of the law that it would not apply to closed estates or to pending estates where the fees of the attorney for the personal representative were already determined. §733.6171(8), Fla. Stat. (Supp. 1994); §733.6171(10), Fla. Stat. (Supp. 1996)

With all of these changes, an attorney for the personal representative is still only entitled to a reasonable fee for legal services properly performed on behalf of the estate. The fee is not a gift to which the attorney is entitled simply because he or she is hired by the personal representative. First, productive services must be rendered. Second, at anytime during the course of the estate administration, an interested person may bring a section 733.6175 proceeding to challenge the hiring of the attorney for the personal representative, much less the amount of the fee. §733.6 175, Fla. Stat. (1991). The fee of the attorney may even be imperiled by the actions of the personal representative before the attorney-client relationship commenced, however innocent the attorney may be. See, e.g. , Estate of Mary Hand, 475 So. 2d 1337 (Fla. 3d DCA 1985). Third, the amount of the fee may also be challenged as part of an accounting proceeding and discharge proceeding at the close of the estate. See $733.901, Fla. Stat. (1991).

From these authorities, it is manifest that, absent a binding contract for fees, the amount of the fee of an attorney for the estate is in doubt and is unsettled until he or she has a specific court order approving the fee or a court order approving an accounting or petition for discharge on which the fee and method of calculating the fee are stated. There is no valid support for the

court's holding in Williams College v. Bourne, 670 So. 2d 1118, 1120 (Fla. 5th DCA 1996) that the entitlement to a fee, much less the amount of the fee, somehow vests upon the opening of the estate. Indeed, even the Williams College court's analogy of an estate to a typical civil cause of action is insupportable. Unlike a typical civil action, interested persons may not even be known at the time the estate is opened. For instance, creditors may join the proceeding at some point after receiving notice of the administration, see §733. 212(4), Florida Statutes, or a beneficiary may be located at a later date. These persons, if likely to be affected by the attorney's fee, are interested and able to attack even the hiring of the attorney. §733.201(21), Fla. Stat.; §733.6175, Fla. Stat. The attorney may be well into rendering services with no aspect of his fee having vested.

SECTION 733.6771, FLORIDA STATUTES, DOES NOT APPLY RETROACTIVELY

Like many phrases in our language, and in the law specifically, "retroactive" easily glides off the lips or pen, but we rarely stop to analyze its true meaning and application to the issue before us. In this case, RPP&TL submits that the Court should begin its review by addressing the fundamental question of whether section 733.6171 (Supp. 1994) and section 733.6171 (Supp. 1996), by their terms, apply retroactively, before addressing the, perhaps unnecessary, question of whether its retroactive application is impermissible.

A statute does not operate retroactively merely because it is applied to conduct that occurred prior to the law's enactment or because it draws on antecedent facts in its operation. Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994). The test, as stated in L. Ross, Inc. v. R.W. Roberts Construction, 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985), affirmed, 481

So. 2d 484 (Fla. 1986), is simply whether the statute will impair or substantially change a vested right or obligation. 466 So. 2d at 1098.

The error of the court in Williams College v. Bourne, 656 So. 2d 622 (Fla. 5th DCA 1995) was to overlook this fundamental question and to simply assume the law operated retroactively. On page 623, the court takes the concept of "retroactive" beyond changing an already vested obligation to changing a law and applying it to a "set of facts after those facts have occurred. " The court cites its own decision in L. Ross for this proposition, but that case makes no such holding. And, imagine if our law could not change simply because the facts on which it might operate already exist. Even obviously prospective laws imposing increases in property tax or changes in zoning apply to existing **facts** and are likely to unsettle expectations that led to the purchase of the property on which such legislation is imposed. See 5 11 U.S. at **269,** ft.n. 24.

With respect to the real question of whether section 733.6171 changes already existing rights or obligations, the answer is no. Section 733.6171(2) avoids any impairment of contract. And, the effective date language in both the 1993 and 1995 versions of the statute specifically state that the law does **not** apply to the only situations where an obligation to pay a fee has been settled: order determining fees or order of discharge, which approves the administration and closes the estate.

For these reasons, "retroactive application" is simply not an issue with respect to section 733.6171.

THE RETROACTIVE APPLICATION OF SECTIONS 733.6171 (SUPP. 1994) AND 733.6171 (SUPP. 1996) IS PERMISSABLE

Assuming the Court decides that retroactivity is a real issue in this case, we note the presumption that section 733.6171 was intended to apply prospectively does not apply, since sub-paragraph (8) of the 1993 version of the statute and sub-paragraph (10) of the 1995 version state the legislature's intent specifically and clearly--with no room for construction. See Fogg v. Southeast Rank, N.A., 473 So.2d 1352, 1354 (Fla.App. 4 Dist. 1985) (whether the statutory change is substantive or procedural, a clear statement of legislative intent may, under appropriate circumstances, determine whether the amendment is to have retroactive effect)

The clarity of the legislature's expressed intent with respect to the temporal application of the statute, coupled with its specific, thoughtful avoidance of any impairment of contract, seem to have been the deciding factors for the District Court of Appeal of Florida, Third District, when, contrary to the Williams College cases, it determined that the legislature was within its authority in adopting section 733.6171 and the statute properly applied to estates where the amount of fees had not yet been determined. See Berger v. Brooks, 657 So.2d 1281, 1282-83 (Fla.3d DCA 1995).

Further, this Court should recognize that the underlying right to receive, and obligation to only pay, a reasonable fee, was not changed by either version of section 733.6171. Section 733.6171 merely varied the method of determining the amount of the fee. The statute does not change the amount of the fee in any fixed way. Indeed, it merely creates a rebuttable presumption from which the process of the court determination begins and establishes a uniform system of analysis of specific factors that all courts must use. Thus, this case is different from

those fee cases decided by this Court where existing fee obligations or caps on fees would change. See L. Ross, 481 So. 2d at 485.

In its slavish adherence to L. Ross, the court in the Williams College cases missed this distinction between our statutory changes and those it reviewed in J . Ross, which went far beyond mere changes to the method of calculating a fee. This distinction, however, was actually recognized in L. Ross. There, the court noted that the right affected by the legislation was not merely a "new or different remedy to enforce an already existing right". 466 So. 2d at 1098. As an example of distinguishable legislation for which retroactive application would be appropriate, the court cited to Empire State Insurance v. Chafetz, 302 F.2d 828, 831 (5th Cir. 1962) (new statute merely varied method for determining attorney's fee). Id. at 1099, ft.n.4.

The distinction we are making is not new regarding attorney's fee statutes in probate here in Florida and in the application of the lodestar to other Florida statutes involving reasonable fees. In those cases, this Court and other district courts have recognized that the change in method for calculating the reasonable fee was not an invasion on the right to a reasonable fee or the expectation of the public to pay a reasonable fee. See Moyle v. Moschell & Moschell, 582 So. 2d 111 (Fla. 3d DCA 1991); State Farm v. Johnson, 547 So.2d 940, 942 (Fla. 1st DCA 1989) ("... the supreme court has recently held that Rowe does not constitute a judicial change in the law which is retroactively inapplicable because it impairs vested rights. Instead, the court explained that Rowe merely implements the statutory provision which authorizes an attorney's fee award to the prevailing party. No contractual rights exist between the prevailing party and the opposing party, therefore no vested right is impaired. Miami Children's Hospital v. Tamayo, 529 So.2d 667 (Fla. 1988)."); Miami Hospital v. Tamayo, 529 So.2d 667

(Fla.1988). All that section 733.6171 has done is to make another such change. Therefore, the same rules of application, plainly stated by the legislature, should apply.

Finally, in Schick v. Department of Agriculture and Consumer Services, 599 So. 2d 641, 643 (Fla. 1992), this Court held:

> We agree that where the legislature has set forth specific criteria for determining attorney's fees to be awarded pursuant to a fee authorizing statute, the trial judge is bound to use only the enumerated criteria.

RPPT&L simply desires a uniform rule recognizing this principle, so that all judges are following the same criteria set forth in section 733.6171. If the interested persons contract for something different, that is their business. But, when courts are involved, one rule of law is best, applied statewide. Does section 733.6171 give a "second bite at the apple" to those whose fees have been determined or change anyone's appropriate expectations? No. Contrary to the Williams College cases, section 733.6171 does not change a $63,000 fee to a larger or smaller fee.

CONCLUSION

For these reasons, the Court should determine that section 733.6171, Florida Statutes (Supp. 1996) applies as set forth in the terms of the legislation, all courts must be governed by the legislation, and, to the extent the Williams College cases are inconsistent with this holding, they are overruled.

Respectfully submitted,

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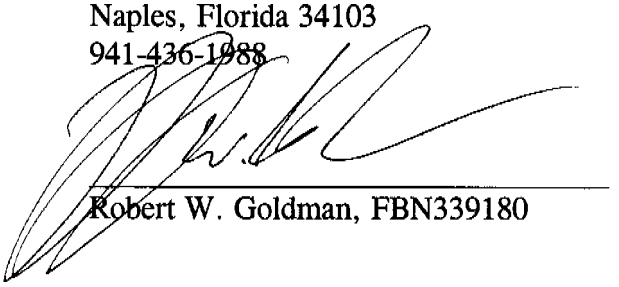

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served by mail on John Beranek, Ausley & McMullen, counsel for petitioners, P.O. Box 391, 227 S. Calhoun Street, Tallahassee, Florida 32302; Nancy Little Hoffman, Nancy Little Hoffman, P.A., 4419 West Tradewinds Avenue, Ft. Lauderdale, Florida 33308; Brian B. Joslyn, Boose, Casey, Ciklin, et.al., counsel for respondent, Boose Casey, 5 15 North Flagler Drive, Northbridge Tower-l 8th Floor, West Palm Beach, Florida 33401; John R. Hargrove, Heinrich, Gordon, et.al., counsel for Respondents, Peter Matwiczyk and Mettler & Matwiczyk, 500 East Broward Boulevard, Broward Financial Center, 10th Floor, Ft. Lauderdale, Florida 33301, on this 5th day of September, 1997.

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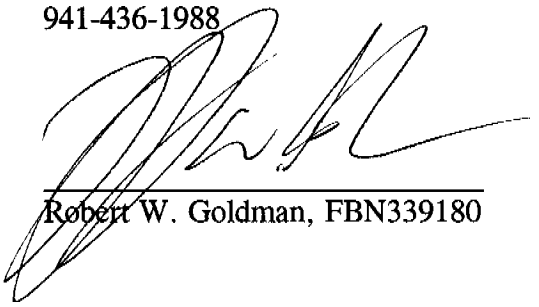

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