SUPREME COURT OF FLORIDA

STEPHAN BITTERMAN **and** HOWARD BITTERMAN, as co-personal representatives of the Estate of Irving Bitterman, deceased,

Petitioners,

vs.

ANNETTE BITTERMAN,

Respondent.
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S.C. CASE NO. 90,074
DCA CASE NO. 94-0411

PETITIONERS' JURISDICTIONAL BRIEF

Petitioners' Jurisdictional Brief on Review of a Decision of the Fourth District Court of Appeal

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioners, Stephan Bitterman and Howard Bitterman, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. John Beranek
   (counsel for petitioners)
2. Howard Bitterman
   (petitioner)
3. Stephan Bitterman
   (petitioner)
4. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell
   (Respondent)
5. Ronald Crescenzo
   (counsel for respondent)
6. Peter Matwiczyk
   (respondent and counsel)
7. Brian M. O'Connell
   (counsel for respondent)
8. Honorable James R. Stewart, Jr.
   (trial judge)

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STATEMENT OF THE CASE AND JURISDICTION

The focus of this jurisdictional brief is a conflict between appellate courts involving a Fourth District Court of Appeal opinion and its retroactive application of a new probate statute, resulting in a doubling of attorney fees for an estate opened in 1991. The estate merely exercised its rights to a hearing and under In re: Estate of Platt, 586 So. 2d 328 (Fla. 1991) and was assessed "fees on fees"[1] in direct contradiction of Platt and recent holdings of the Fifth District in a series of Williams College cases.[2]

The underlying decision is rooted in two appeals in the Fourth District Court of Appeal which were disposed of in a single opinion after denial of a Bitterman motion to consolidate. Petitioners now file the same brief under both case numbers along with a motion to consolidate. The Fourth District's decision was rendered January 23, 1997 and petitioners timely filed notices to invoke discretionary jurisdiction. Petitioners respectfully request that this Court acknowledge the important public policy implications of the Fourth District's opinion for all estate administrations and exercise its jurisdiction under Article V, section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) to review the case on the merits.

The opinion affirms imposition of attorneys' fees and "fees on

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[1] "Fees on fees" as used throughout this brief means additional attorney fees awarded for time spent by respondents establishing their underlying reasonable fees.

[2] Williams College v. Bourne, 670 So. 2d 1118 (Fla. 5th DCA 1996) (Williams III) and Williams College v. Bourne, 656 So. 2d 622 (Fla. 5th DCA 1995) (Williams II)

fees" for the time spent by two law firms in proving their underlying "reasonable" attorney's fees in a probate administration commencing in 1991. The services by both firms were all rendered in 1991 and 1992 while in 1993 any time was devoted to the establishment and proof of fees; that is "fees on fees". In conflict with the two Williams College cases, the Fourth District held that "fees on fees" were properly awarded against this 1991 estate, based upon a retroactive application of section 733.6171, recently enacted by the Florida Legislature effective October 1, 1993.[3] The District Court also assessed "fees on fees" under 57.105, Florida Statutes as a result of the estate's exercise of its rights to a reasonableness determination under section 733.6175 and contrary to Platt's requirement of a "lodestar" analysis of claimed fees against an estate.

The Fourth District's opinion is very critical of New York attorney Stephan Bitterman who served as a co-personal representative of his father's estate. Whether the opinion correctly states the history of the case and correctly characterizes Mr. Bitterman's litigation conduct goes to the merits and although strongly disputed[4] cannot now be addressed. The trial

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[3]The statute was again amended in 1995, but the "fees on fees provision was retained.

[4]Petitioners submit that the District Court's selective facts and criticism of Mr. Bitterman for being overly litigious were unwarranted. As an example, in resisting "fees on fees" Mr. Bitterman had to file a motion to obtain Boose Casey's final bill; and the bills of both law firms in early 1993 sought "fees on fees" as outlawed by the 1991 Platt decision, long before even the enactment of section 733.6171(7) in the spring of 1993, and which was not effective till October 1993. These and many other issues such as the material inaccuracy of footnote 3 of the opinion based on

court simply signed verbatim a judgment provided by opposing counsel and the District Court was unduly influenced by findings in that judgment which are simply not supported by documents in the record. With these preliminaries aside, we now proceed to the facts.

JURISDICTIONAL STATEMENT OF FACTS

The respondent Boose Casey law firm was retained as attorney for co-personal representative Stephan Bitterman in September **1991,** and in June of 1992 attorney Peter Matwiczyk became administrator ad litem and hired his own law firm as counsel. As a result of a deadlock between the co-personal representatives on interpretations of the will which incorporated language from the Internal Revenue Code, as well as issues complicated by Mrs. Bitterman's divorce action pending at the time of death, the administrator ad litem was appointed as to limited issues, with the consent of both personal representatives. The administrator ad litem responded to litigation brought by Mrs. Bitterman (decedent's spouse) and the litigation was settled by stipulation in October 1992.[5]

In late December 1992, Peter Matwiczyk was discharged **as**

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court docket sheets will be dealt with in detail if this Court accepts jurisdiction. On the merits, the record will be fully analyzed and Mr. Bitterman's conduct fully justified.

[5]**The actions of the attorneys, including the administrator ad litem between June 1992 and late October 1992, when a stipulation of settlement was signed were the subject of the 733.6175 proceeding brought by petitioners. It was appellants' contention below that counsel for all parties during the summer of 1992 continued to litigate and ignored numerous settlement documents that were virtually identical to the document signed at the courthouse steps in late October 1992. These settlement documents of June through September were in evidence, are a part of the record but were disregarded by the courts below.**

administrator ad litem. Boose Casey was discharged as attorney for co-personal representative Stephan Bitterman on January 4, 1993. In March 1993, after a motion had been made to compel production of Boose Casey's final bill, a petition was filed by the co-personal representatives seeking a judicial determination of respondents' reasonable fees under 733.6175. This reasonableness determination was set for an August 1993 hearing.

Subsequent to the commencement of the 733.6175 reasonableness proceeding, the 1993 Florida Legislature modified the law as this Court had announced it in the 1991 Platt decision. Specifically, Platt had held at p. 336 that "fees on fees" were not allowed under the then existing probate statutes. Effective October 1, 1993, the Legislature enacted section 733.6171, a new statute which, among other things, arguably provided for imposition of "fees on fees" in subsection (7) thereof under limited circumstances.

In December of 1993, the trial court rendered a judgment imposing attorneys' fees against the estate resulting from the August hearing. Between the August hearing and the December judgment, the new section 733.6171 had become effective and the trial court, in a proposed judgment signed verbatim, held that it should be retroactively applied and granted respondent's "fees on fees". The trial court also awarded additional "fees on fees" to Boose Casey only, based on section 57.105 and under In re Estate of Duval, 174 so. 2d 580 (Fla. 2d DCA 1965) .[6]

On appeal to the Fourth District, the judgment was affirmed on

[6] **No section 57.105 or Duval fees were awarded to Matwiczyk.**

every issue. The appellate court expressly ruled that section 733.6171 should be retroactively applied and that "fees on fees" were properly assessed under sections 733.6171(7) and 57.105. The court also awarded appellate fees apparently under both statutes. The appellate fees along with all "fees on fees" will exceed the total amount of the underlying fees of approximately $100,000.

SUMMARY OF THE ARGUMENT

A direct conflict exists between decisions on the issue of "fees on fees" in probate matters and whether a new probate attorney fee statute has retroactive effect. See Williams College II and III.

ARGUMENT

THE DECISION OF THE DISTRICT COURT CONFLICTS WITH OTHER DECISIONS ON THE IMPOSITION OF "FEES ON FEES" AND THE RETROACTIVE APPLICATION OF THE NEW ATTORNEY FEE STATUTE FOR ESTATE ADMINISTRATION.

There is absolutely no question that the Fourth District's opinion expressly imposed "fees on fees" against the Bitterman estate based on an announced retroactive application of the 1993 version of section 733.6171. This statute did not exist prior to October 1, 1993 and the Fourth District specifically rejected application of section 733.617, Florida Statutes (1991), which was the previously existing statute in effect when the attorney's services at issue were rendered. The Fourth District Court of Appeal opinion is in express and direct conflict with Williams College II and III.

As to "fees on fees", the analysis necessarily begins with this Court's landmark decision of In Re: Estate of Platt, which

thoroughly analyzed probate practice and attorneys' fees. Platt required use of a "lodestar" analysis as a starting point and expressly ruled at page 336 that "fees on fees" could not be recovered against an estate in a probate proceeding. This ruling was at the very heart of the decision and **was** based on section 733.617 **as** it existed at that time. In 1993, the Florida Legislature circumvented certain aspects of Platt by passing section 733.6171 authorizing "fees on fees" in limited circumstances to the personal representative's attorney in any case before the order of discharge.

In the Bitterman opinion, the Fourth District posed the question as to "fees on fees"; "whether section 733.617, Florida Statutes (1991) or section 733.6171(7), Florida Statutes (1993), is applicable to this case." The Court held that the recently enacted subsection (7) allowed "fees on fees" and that it had retroactive effect as a result of subsection (8) of the new statute.

The Fourth District decision is in direct and express conflict with the two Williams College v. Bourne decisions from the Fifth District; Williams II and Williams III. Both cases hold that section 733.6171 cannot be constitutionally applied in **a** retroactive fashion to allow "fees on fees". More general conflict also exists with the entire line of case law barring retroactive application of statutes which change vested substantive rights. See: Young v. Altenhaus, 472 So. 2d 1152, (Fla. 1985) L. Ross, Inc. v. R. W. Roberts Constr. Co., 481 So. 2d 484 (Fla. 1986) (dealing with a new attorneys fee statute); and State Farm Mutual Auto Insurance Co. v. LaForte, 658 So. 2d 55 (Fla. 1995).

In Williams II, the Fifth District expressly held that the 1993 version of section 733.6171 could not be applied retroactively to an estate which had been opened and the attorney's services rendered to the estate before the effective date of the statute. In Williams III, decided in 1996, the Court again analyzed whether the 1993 statute could be applied retroactively and further whether it allowed "fees on fees" when a different attorney spent time litigating to recover the fees of another attorney.

The Court expressly ruled that: (a) the statute did not authorize fees for one attorney representing another, and (b) the statute could not be constitutionally applied in a retroactive fashion. The court stated:

> The first question is whether the statute, by its terms, authorizes fees for an attorney representing the attorney seeking fees. The answer to this question is plainly no.[7]
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> * * *
>
> We agree with Williams College, . . . that section 733.6171(7), Florida Statutes (1993), 'cannot be applied to award attorney's fees to Roby for defending Ward's fee request. The school correctly contends that application of the statute serves to increase the fees the estate must bear over those which existed prior to the effective date of the statute. Such fees would not have been taxable to the estate under Platt.

Further, in Williams III, the Fifth District ruled in reliance on L. Ross that "fees on fees" for services actually rendered after the statute became effective could not be awarded because the estate's liability for attorney's fees and the legal formula by

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'The court recognized an exception in Williams III because the attorney suffered a stroke so representation by other counsel became necessary. This ruling is also a conflict.

which such fees would be calculated was "legally fixed" as of the moment such representation was commenced and that "these rights were inextricably bundled at the moment Ward began his representation of the estate." The Court expressly held that the attorney was not entitled to receive fees under the new statute for time expended in determining the amount of his fees or another's fees. Thus, here the Bitterman estate liability for the fees was fixed in 1991 when Boose Casey was retained and in 1992 when Matwiczyk was appointed and retained his own firm. That law at that time was as stated in Platt.

The Bitterman opinion from the Fourth District and the Williams II and III opinions from the Fifth District are facially at odds and conflicting. In the Fourth District, section 733.6171(7) has retroactive effect while in the Fifth District the statute does not have retroactive effect. Further, in the Fifth District the estate's obligation to pay fees and the attorney's right to recover those fees is determined by the law existing as of the date counsel begins his representation while in the Fourth District the key date is when the litigation ends. The Fourth District wrongly stated that the new statute applied because: "Clearly, it falls within the preview of section 733.6171(8) [on retroactivity] ." The reason given was that the fee proceeding "was concluded in . . . December 1993."

In addition to the very specific conflicts with Williams II and III, there is also direct conflict with Platt, L. Ross, Inc., Altenhaus and Laforte, all of which hold that substantive rights cannot be adversely affected by subsequent legislation after those

rights are already vested. Florida courts have consistently held that even an expressed statement of retroactive effect by the Legislature will not be applied by the courts if the statute impairs vested substantive rights, and that attorney's fees fall within this classification. See Altenhaus at 1154 and Williams College III at 1120. Under pre-1993 law, when these lawyers were hired, they were not entitled to "fees on fees" and that law continued to apply notwithstanding the 1993 legislation.

In addition, conflict clearly exists with the Fifth District's holding that the new statute does not apply to one attorney who represents another attorney in his fee application.

Fees Under 57.105

The Fourth District also affirmed a ruling under section 57.105 that additional "fees on fees" were properly found. This ruling is in direct and irreconcilable conflict with Eisman v. Ross, 644 So. 2d 1128 (Fla. 3d DCA 1995) expressly holding that "fees on fees" cannot be recovered under section 57.105. The Third District Court stated:

> We must, however, reverse that portion of the award which represents both costs and attorney's time spend litigating the amount of fees because there is no statutory basis [under section 57.1051 for the same.

Again, the conflict is striking. In the Fourth District, "fees on fees" can be recovered under section 57.105 while in the Third District such fees are prohibited. It is also in conflict with Platt's holding that the starting point for a reasonable fee determination is the "lodestar". This is an important conflict which this Court should resolve.

The Fourth District also relied on the Second District's 1965 In Re: Estate of Duval opinion as an alternative basis for awarding additional "fees on fees" for the legal effort required in obtaining a judgment for attorney's fees. Duval predates Platt and all current probate law and Platt and the more recent statutes have rendered Duval totally obsolete. Again, Platt requires a "lodestar" approach to fees -- such an approach was unknown in Florida law at the time of Duval.

The beneficiaries and personal representative of an estate have the right to petition for a determination of what fees are reasonable. This is all that Mr. Bitterman did in this case, and the heirs of an estate should certainly not be subjected to the risk of fees based on Duval or section 57.105 fees in a section 733.6175 proceedings to determine a reasonable fee against the estate.

CONCLUSION

Direct and irreconcilable conflicts with several decisions exist, and this Court should accept jurisdiction and review the matter on the merits. These issues are being presented in almost every contested estate matter on the trial and appellate level and this Court's guidance is necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by Mail to the following this 17th day of March, 1997.

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