OA 10-7-97

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLA. S.C. CASE NO. 90,074
4TH DCA CASE NO. 94-0411

(Consolidated with
FLA. S.C. CASE NO. 90,075)

STEPHAN BITTERMAN, et al.,

Petitioners,

v.

ANNETTE BITTERMAN,

Respondent.

STEPHAN BITTERMAN, et al.,

Petitioners,

v.

PATRICK R. WEIDENBENNER, et al.,

Respondent.

RESPONDENTS' BRIEF ON THE MERITS

PETER MATWICZYK, ESQ.
BENJAMIN P. BROWN, ESQ.
Heinrich Gordon Hargrove Weihe & James, P.A.
140 Royal Palm Way, Suite 206
Palm Beach, Florida 33480

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PREFACE

This brief is submitted on behalf of Respondents Peter Matwiczyk, Esquire, the Administrator Ad Litem appointed to resolve disputes between Petitioners herein, Stephan Bitterman and Howard Bitterman, as Co-Personal Representatives of the Estate of Irving Bitterman, and Matwiczyk's former law firm Mettler & Matwiczyk, in opposition to Petitioners' petition to review a decision of the Fourth District Court of Appeal. In Bitterman v. Bitterman, 685 So. 2d 861 (Fla. 4th DCA 1996), the Fourth District properly upheld the judgment of the Palm Beach County Probate Court requiring the estate to pay certain fees on statutory and equitable grounds.

In this brief, the Petitioners will be referred to both by name, as "Petitioners," and as "Personal Representatives." Mr. Matwiczyk will be referred to as "the Administrator".

The record in Fourth District Case No. 94-411 is referred to herein by the designation "R." followed by a page number. The transcript of the August 16, 1993 hearing is referred to herein by the designation "Tr." followed by the page number assigned by the court reporter.

STATEMENT OF THE FACTS

Respondents, Peter Matwiczyk, Esq. and Mettler & Matwiczyk submit the following statement of the case and facts, pursuant to Rule 9.210(c), **Florida Rules** of Appellate Procedure, as Appellees refuse to accept **Appellants'** Statement of the Facts contained in the Initial Brief on the Merits ("Brief"), because it incompletely states the **relevant facts, recites** irrelevant facts, makes allegations **unsupported by** record citations, and is partially based on improper argument.

On June 1, 1992, the Administrator was appointed administrator ad litem in the estate administration of Irving Bitterman, deceased. (R. 41-42). The identity and appointment of Matwiczyk **was** agreed **to by all parties,** including Stephan Bitterman. The Administrator **was appointed to, in** part:

> a) represent the **estate** in responding to or **settling** unresolved aspects of a claim and petition filed by the surviving spouse . . .
>
> b) review the facts and circumstances surrounding the lifetime transfer of $40,000 from decedent and spouse to one of the Co-Personal **Representatives and** make a report as to how **much, if any,** of said transfer he determines **to be a gift,** and how much if any, he **determines to be** an asset of the estate . . .
>
> (R. at 41-42).

The Administrator retained his then law firm, Appellee Mettler & Matwiczyk, to **act as** his counsel in connection with the **estate.** In a letter **dated** July 9, 1992, which counsel for the Personal Representatives received, the Administrator specifically stated the **terms under which** he and his law firm would render

services. (R. 680). In that letter, the Administrator set forth that he would charge the estate solely for time expended. The letter set forth the hourly rates for the Administrator, and other lawyers in his office. The letter also stated:

> If this proposal is not satisfactory to your client and to his brother, I would like each of you to let me know immediately so that I 'can withdraw as Administrator Ad Litem. I am not going to get myself into a position where I end up in a fee fight with Stephan and Howard over my time, my hourly rates or whether I will be compensated for any time I spend in getting Court approval for my fees.
>
> Please let me know whether the beneficiaries agree to the terms set forth in this letter. If they do not, I will immediately petition the Court to withdraw.

Neither of the Personal Representatives stated any objection to the terms of the letter.

Shortly after the Administrator's appointment, the Administrator met with all other counsel in the case to determine whether the outstanding matters in the case could be resolved. (Tr. 125, 142, 143). At that point, "it became fairly clear" to the Administrator that he "was in the middle of a hornets' nest and that it was going to be very difficult to get an agreement among all three parties as to all of the issues." (Tr. 125). In short, the Administrator "had gotten a flavor for this case after 30 days and the flavor that (the Administrator) got was that even the smallest detail was worthy, in the parties' mind, of litigating over." (Tr. 135).

The Administrator's perception was based not only on his meetings with counsel, but also on evident family turmoil resulting

from a number of events that occurred prior to the Administrator's appointment. For example, Petitioner Stephan Bitterman, who is a practicing lawyer, in his capacity as co-personal representative, had instructed his counsel, Brian O'Connell, Esquire, to object to his own mother's Petition for Family Allowance, her claim for reimbursement of funeral expenses, her use of decedent's (Stephan's father and his mother's husband) cars and her Petition for Declaration of Homestead. (Tr. at 34-35; 49-51). Petitioner Stephan Bitterman also disputed that his only sibling, co-personal representative and Petitioner Howard Bitterman's ownership of the decedent's co-operative apartment, as well as a lifetime gift from the decedent of $30,000.00 to Petitioner Howard Bitterman. (Tr. at 49, 55). Petitioner Steven Bitterman had further raised the issue that any bequests to his mother and to Petitioner Howard Bitterman under the decedent's will should be voided on the theory that they had murdered the decedent (Petitioners Stephan and Howard Bitterman's father). (Tr. at 55). Finally, following the decedent's death, the mother, Annette Bitterman (decedent's widow), on one occasion called the police to remove Petitioner Steven Bitterman, her son, from her home. (Tr. at 33, 49).

Further, prior to the Administrator's appointment, co-personal representatives and Petitioners Stephan and Howard Bitterman had both been represented by John Seversen, Esquire, who subsequently withdrew from representation, advising Petitioners that he could not represent both of them anymore because a conflict had arisen between them as co-personal representatives. (Tr. at 41). The

Administrator further learned that Petitioners had each obtained separate counsel: Petitioner Howard Bitterman retained Patrick Weidenbenner, Esquire, while Stephan Bitterman retained Brian O'Connell, Esquire. (Tr. at 34).

The Administrator also discovered that Petitioner Howard Bitterman had signed a Petition for Removal of Co-Personal Representative (Petitioner Stephan Bitterman). In that Petition, Howard accused Petitioner Stephan Bitterman of improper acts in connection with the estate administration, including that Petitioner Stephan Bitterman:

> Caused the estate to incur excessive and unnecessary legal and other administrative expenses, and additionally, prior to settlementwiththe surviving spouse, exposed the estate to a claim for legal fees and costs incurred by the spouse.
>
> He has caused the estate to incur needless expenses by going on "witch hunts" to support a claim for malpractice against professionals dealing with the estate and decedent in his lifetime.
>
> He has made charges of improper actions against, or to, all professionals dealing with this estate, and exhibited such a hostile attitude toward heirs and other persons working with this estate that it has resulted in an atmosphere which makes it more difficult to achieve an orderly, efficient administration of this estate.
>
> As late as June 1992, he attempted to condition any settlement of disputed matters on all attorneys not being paid for legal fees after March 1992.
>
> After demanding a statement from the attorney for his co-personal representative, he refused to approve payment: then objected to it being heard at a specifically set hearing, saying he needed more time to review and perform discovery on the matter, but did not do so before the time it was next set for hearing.

(R. 718)'

Accordingly, upon meeting with counsel for all of the parties, "[i]t became clear to (the Administrator) in July of 1992 that the matter was not going to settle." (Tr. 125). Therefore, at or about that time the Administrator let counsel for the parties know he

> intended to charge his time as for services as fiduciary and intended to charge for lawyers time as hourly at (the Administrator's firm's) standard hourly rates. If any person, any party had a complaint about that (the Administrator) asked that they let (him) know so that (he) can petition the court to resign as Administrator ad litem because (he) didn't want to get into a fee fight . . . down the road. After (he) wrote that letter nobody complained, (Tr. 135-136; R. 680).

Thereafter, the Administrator

> determined that the most expeditious way to move this thing along would be to file appropriate responsive pleadings of the matterthatwere pending in accordance with the charge that (the Administrator) was given by Judge Rudnick and immediately be forced to address them and either given those matters their full attention and try to resolve them or else have them determined by the court. (Tr. 125).

> In ensuing estate proceedings, the Administrator was really the focal point to move this matter along. (The Administrator) had to carry the laboring oar as far as complying with pretrial procedure (the Administrator) . . . had to organize the parties for purposes of trying to stipulate, to get exhibits, witness lists, etcetera . . . (the Administrator) spent a lot of time dealing with the various lawyers . . . (the Administrator was) dealing with six or seven different lawyers, it was not a routine task to try to get people to agree

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'Petitioner Howard Bitterman tried to explain away the statements he made in that Petition at trial, even though he had signed the document under penalty of perjury. (Tr. 289-299).

and meet and get their schedules straight. (Tr. 126-127).

Even given the hardships inherent in dealing with so many antagonistic parties, during the discovery period the Administrator tried to move the parties toward settlement. (Tr. 126). However,

> [t]he discovery phase of the litigation did not proceed smoothly. In almost every case, as would appear in the court file and . . . as reflected in (the Administrator's) time records, every time (the Administrator) propounded a discovery request to Stephan Bitterman (the Administrator) had to file a motion to compel . . . it was never easy. It was always a struggle trying to get the discovery (the Administrator) was entitled to. (Tr. 126).

During that time, the parties were exchanging settlement proposals. The Administrator did not review the settlement proposals personally, but his counsel did and reported their contents to the Administrator. (Tr. 142). A settlement agreement resolving the issues between the estate and Annette Bitterman (Petitioners Stephan and Howard Bitterman's mother and decedent's wife) was finally executed on October 22, 1992 (R. 317-397). Petitioners Stephan and Howard Bitterman were unable to resolve the dispute between them regarding the $40,000.00 lifetime transfer from the decedent to Stephan. (R. 321-22).

On December 8, 1992, the Administrator filed a Petition for Discharge, stating in part as grounds that Petitioner Stephan Bitterman had retained new counsel to dispute the Administrator's fee. (R. 419-425). The Petition explained that

> Although the Administrator has not completed his duties, it appears, under the circumstances that the co-personal representatives object to the Administrator's continued participation in these proceedings.

* * *

One of Stephan Bitterman's several lawyers has gone so far as to threaten that Stephan and his counsel will challenge the Administrator's fees and that they view any further participation by the Administrator as unnecessary, despite this Court's Order directing the Administrator to participate. The Administrator cannot effectively discharge its duties under these circumstances.

Stephan Bitterman currently has three separate lawyers. He is represented by Brian O'Connell of the law firm of Boose Casey in his capacity as personal representative. He is also represented by Patrick Gent of the law firm of Heinrich, Gordon & Batchelder in his individual capacity. Stephan is also represented by Neal Knight of the law firm Alley, Maass, Rogers and Lindsay in his capacity as co-personal representative. Mr. Knight has notified the Administrator that he has been retained to challenge the Administrator's fees, even though the Administrator has never disclosed his fees to Stephan Bitterman and accordingly, there would be no basis for Stephan Bitterman to challenge those fees, at least until he knows what they are. Moreover, it appears to be inappropriate for Stephan Bitterman, as personal representative, to question or challenge fees of an Administrator when the sole reason for the Administrator's appointment was the co-personal representatives' conflicts which this Court found prevented the efficient administration of the estate.

It is perfectly clear that Stephan Bitterman's tactics as reflected in the attached letter from Neil Knight are designed to frustrate this court's Order appointing the administrator ad litem by using the implied threat of a fee dispute to coerce the administrator ad litem into inactivity.

The Administrator is faced with a Hobson's choice of following this Court's directive and discharging its duties on the one hand, or on the other hand, acquiescing to pressure by the beneficiaries.

> Stephan Bitterman is a lawyer admitted to practice in New York State. He and his counsel are well acquainted with the Florida Supreme Court's decision in In re Estate of Platt, 586 so. 2d 328 (Fla. 1991). Stephan Bitterman is also familiar with the portion of the **Platt** decision which, under limited circumstances, will deny counsel fees for seeking fees. Stephan Bitterman now has three separate Florida lawyers working for him, two of which represent him in his capacity as personal representative. Once of those firms, it appears, is retained for the sole purpose of challenging fees.
>
> Under these circumstances, the Administrator requests that this Court discharge him and award the Administrator and his counsel a fee for their services. (R. 419-425).

On January 21, 1993, the Administrator and his counsel submitted a bill for their fees. (R. 681; Tr. 136). Thereafter, on April 14, 1993, the Administrator submitted a detailed statement of his and his counsel's fees to George Ord, Esquire, counsel for Appellants. (R. 683; Tr. 136-137).

Before the Administrator submitted the detailed statement, on March 5, 1993, Petitioner Stephan Bitterman, individually and as co-personal representative, filed a Petition for Determination of Reasonable Compensation of Administrator Ad Litem, and Attorneys employed by estate. (R. 499-505). On April 16, 1993, Petitioner Stephan Bitterman filed an affidavit in connection with an application to be admitted pro hac vice to participate int he matters before the court. (R. 560-561). In the affidavit, Petitioner Stephan Bitterman alleged that the administrator had committed "a gross breach of fiduciary duty." (Tr. 25). The Administrator believed that the affidavit constituted an accusation

of malpractice by Petitioner Stephan Bitterman against the Administrator. (Tr. 25).

By the time of the hearing on fees, Petitioners Stephan and Howard finally could agree on one thing: that they did not want to pay all of the Administrator's and his counsel's fees. The Petitioners became co-petitioners in order to challenge the Administrator's and his counsel's fees.

At trial, the court heard testimony from the Administrator regarding the statements he and his counsel submitted for their fees. (Tr. 137-138). Petitioners argued at trial that "[t]he primary concern we have with (the Administrator's) fees as of the time he was discharged, he had not submitted a bill which detailed what his services were." (Tr. 20). Petitioners further argued that "the problem with (the Administrator's) services is that there was never a time when he submitted a bill to the estate which said these are the services I rendered for the estate, if you pay me these, these are listed in detail, we're done with it. Every time the services were detailed there was some kicker on the charges." (Tr. 21). Petitioners concluded that "[w]ith regard to the actual services, what we contend the actual services that (the Administrator) rendered to the estate, some $20,000.00, we don't believe that is too far off from what he is entitled to." (Tr. 21).

Petitioners further stated that the Administrator's "services could have been more efficiently rendered." (Tr. 21). However, Petitioners added that they did not "think (the Administrator's)

basic number is too far off. The primary concern we have is charges he has for services beyond the services he rendered to the estate when he was through." (Tr. 22).

The Administrator and his expert witness detailed the time spent following discharge. According to that testimony, the post discharge time for the fiduciary and his counsel fell into four categories: 1) transition to shift legal authority from Administrator, back to personal representatives (four hours); 2) time spent to successfully extricate the Administrator from Stephan's attempt to include the Administrator in his petition under Section 733.6175, to determine fees (approximately 10 hours); defending against Stephan's threats of surcharge and allegations the Administrator was guilty of a gross breach of fiduciary duty (34 hours); and 4) preparing for the fee hearing which led to the final judgment (40 hours). (Tr. 167-175). The majority of post discharge time was spent defending against Petitioner Stephan Bitterman's allegations and assuring an orderly transition from the Administrator to the personal representative. Stephan did not offer any evidence to counter the allocation of post discharge time. Petitioners presented no expert testimony, nor did they ever explain what fees -- other than those post-discharge -- the Administrator was not entitled to.

Therefore, at trial Petitioners' main complaint was directed in general terms to the Administrator's post-discharge time, without any specifics, as well as the manner in which he rendered bills. Notwithstanding Petitioners' objections to the method by

which the Administrator rendered bills, the amount of any so called "kickers", and the inclusion of post-discharge time, the trial court found that the amount the Administrator and his counsel were requesting was reasonable and awarded that amount to the Administrator and his counsel. (R. 663-668).

Petitioners appealed the judgment to the Fourth District Court of Appeal. That court affirmed "the trial court in all respects." Bitterman v. Bitterman, 685 So. 2d 861, 867 (Fla. 4th DCA 1996). In considering the Administrator's fees, the Fourth District quoted extensively from the July 9, 1992 letter (R. 680), noting that "[n]o one objected to the terms as contained in the correspondence". Id. at **863.**

The Fourth District next determined that Section 733.6171, Florida Statutes (1993) was applicable to the dispute. Id. at **865.** Applying the statute, that court expressly found no abuse of discretion in the trial court's finding that "the attorneys' hourly rates and total hours expended on behalf of the estate were necessary and **reasonable."** Id.

The Fourth District further held that the fees the Administrator incurred in establishing his fee were awardable on two grounds: First, under Section 733.6171; second, under the authority of In re Estate of Duval, I74 So. 2d 580 (Fla. 2d DCA 1965). Id. **at 866. That** court held "that it was in the trial court's discretion to award such additional fees to (the Administrator) for the inordinate legal effort required in obtaining a contested judgment for attorney's fees." Id.

ARGUMENT

POINT I - BITTERMAN AND WILLIAMS COLLEGE DO NOT CONFLICT, AND THIS COURT SHOULD AFFIRM BITTERMAN BECAUSE SECTION 733.6171 FLORIDA STATUTES (1993) WAS NOT APPLIED RETROACTIVELY, AND IT WOULD NOT BE UNCONSTITUTIONAL TO SO APPLY THE STATUTE

Section 733.6171 does not require retroactive application.[2]

Section 733.6171, is applicable to this case, but its application does not result in the retroactive operation of the statute. Instead, the statute recognizes that proceedings to determine compensation "are a part of the estate administration process", which does not conclude until the court enters an order of discharge. Florida Statutes §733.6171(7) and (8). Thus, while in some cases courts refuse to apply statutes retroactively where such application imposes "a new or increased obligation, burden or penalty as to a set of facts after those facts have occurred,"[3] applying 5733.6171 in this case does not present such a situation.

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[2] Respondents have organized the arguments in this brief as they appear for two reasons. First, the arguments correspond to Petitioners' argument order. Second, this Court exercised its discretionary jurisdiction, to review this case in light of the Williams College line of cases. But for, the two foregoing reasons, Respondents would have ordered argument in this brief with its equitable arguments first because those arguments are dispositive here, without regard to Section 733.6171.

[3] L. Ross, Inc. v. Roberts Construction Co., 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985); See also, St. John's Village I, Ltd. v. Department of State, 497 So. 2d 990, 993 (Fla. 5th DCA 1986) (retroactive application invalid because statute imposes "a new obligation . . . in connection with previous transactions").

Section 733.6171 recognizes that a proceeding determining compensation is **part of** the estate administration process. **The** statute further **recognizes** that the cost of proceedings to determine compensation **are** likewise a cost of the estate administration process, **and** therefore should be paid from the assets of the estate as an expense of administration. Because proceedings to determine compensation are part of the estate administration process themselves, a statute which provides that attorneys fees are costs recoverable as costs of that process cannot constitute imposition of a penalty as to a set of facts after those facts have occurred. In short, 5733.6171 calls for compensation for fees expended as part of the estate administration process while the facts giving rise to the fees are occurring. **In** fact, once **a court proceeding** to determine compensation has been commenced, an **estate is** not obligated to pay a fiduciary, or his or her attorney, any amount until after the procedure - which is part of the **estate** administration process -is completed and the reasonableness of the fees has been determined. Because the occurrence of the **facts are** ongoing as part of the **estate** administration process, §733.6171(8) does not call for the retroactive application of the statute, but rather calls for prospective application to an ongoing estate administration process. **AS** such, because 733.6171 cannot be applied retroactively, its application in this case cannot be unconstitutional.

Even if 1733.6171 were retroactively applied, such application is not unconstitutional.

Clearly "[a] statute which is either remedial or procedural can be applied retroactively." Nassau Square Assoc. v. Insurance Commissioner, 579 So. 2d 259 (Fla. 4th DCA 1991). A remedial statute is one that is "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." This Court further recognized that a remedial statute gives "a party a mode of remedy for a wrong, where he had none, or a different one, before." Id.; St. Johns Village I Ltd. v. Department of State, 497 So. 2d 990, 993 (Fla. 5th DCA 1986) ("[b]y definition, a remedial statute is one which confers or changes a remedy; a remedy is the means employed in enforcing a right or redressing an injury"). If a statute is remedial, it operates "retrospectively in the sense that all pending proceedings, including matters on appeal, are determined under the law in effect at the time of decision rather than that in effect when the cause of action arose or some earlier time." Fogg v. Southeast Bank, N.A., 473 So. 2d 1352, 1353 (Fla. 4th DCA 1985).

Section 733.6161 is clearly a remedial statute, so that any retroactive application of the statute would be proper. While 5733.6171 does not deal with a "cause of action" in the usual sense, it nonetheless provides a mode of remedy for a wrong and redresses an existing grievance. In In re Duval's Estate, 174 So. 2d 580, 587 (Fla. 2d DCA 1965), the Second District recognized that "those performing services on behalf of the estate" could "be put to unnecessary expense and labor in order to be compensated

therefore," The court further recognized that professionals performing services **on behalf** of the estate are:

> **All too often . . .** unwittingly confronted with **an unctuous** attitude on the part of professional administrators and executors who make **a great pretense of** service to the estate by taking exception to the amount of the fee allowable **as** reasonable compensation for the services . . . while being careful to insist on the last ounce of flesh so far as their own fees **are concerned.** Id.

The court further held that "the extraordinary services required of (administrator's counsel) in consequence of the nature of (administrator's) **steps** in resisting (administrator's counsel's) petition for compensation, affords a proper and adequate basis for the award of attorney's fees and court costs to (administrator's counsel) as provided **by"** the trial court's order. Id. Because in Duval the administrator failed to establish that his counsel's fee should be reduced, fees for seeking fees were permitted. Id.[4]

Petitioners base their attack, in part, on the award of "fees on fees" on this **Court's** statement in In re Estate of Platt, 586 so. 2d 328, 336 **(Fla. 1991),** in dicta, that the hours that the co-personal representative's attorney spent collecting his fee were not compensable. **First, Platt** did not specifically address whether the fees that the co-personal representative's attorneys expended in collecting the co-personal representative's fee were awardable. Thus, Platt did not prohibit the trial judge here from awarding the

[4]The court also rejected the administrator's claims that he was denied due process of law. Id. at 589.

Administrator's counsel their fees incurred in collecting the Administrator's fee.

Moreover, Platt actually only considered the issue of "whether Section 733.617 allows 'reasonable compensation' for attorneys and personal representatives to be computed solely on the basis of a fixed percentage of the amount of the probate estate." Id. at 331. (emphasis in original). However, parties such as Petitioners have seized on language in Platt which is clearly not essential to this Court's holding. Thus, the legislature, by enacting 733.6171, sought to remedy the inequitable situation described in DuVal and the general confusion that Platt created, whereby professionals employed to perform services on behalf of the estate could be subjected to expensive, protracted litigation in attempting to collect their fee, without any compensation for the time expended in collection.

In fact, the trial court considered just such a situation below. Here, the Administrator spent a great deal of time attempting to collect his and his attorney's fees, even though Petitioner did not have a serious objection to the fees in the first instance. Petitioner recognized his ability to require professionals to litigate the amount of their fees and he used the Platt decision as an offensive weapon against the Administrator. The conclusion is inescapable since Petitioner hired a lawyer to question the Administrator's fees before he even knew the amount the Administrator would request. Petitioner's fee dispute with the Administrator was not brought in good faith. Clearly, the concerns

the Second DCA expressed in Duval remain a concern for individuals such as the Administrator. Obviously, 5733.6171 was enacted by the legislature in an attempt to remedy a situation like this one.

The Williams College cases do not dictate a different result in this aase.

The decision in Williams College v. Bourne, 670 So. 2d 1118 (Fla. 5th DCA 1996) (Williams College III) is distinguishable from Bitterman. Specifically, in the Williams College line of cases the personal representative petitioned for discharge on June 29, 1990 and requested $125,175.54 in attorneys' fees for his counsel. Williams College III at 1119. Williams College, the residuary beneficiary named under the will, objected to the fee request. Id. The basis of the objection was that the personal representative's requested fee was calculated pursuant to a percentage fee contract, which Williams College's attorney had maintained throughout the proceeding was not binding. Williams College v. Bourne, 625 So. 2d 913, 914 (Fla. 5th DCA 1993) ("William College I"). In May 1991, the probate court overruled the objection and awarded the requested fee. Williams College III at 1119. Williams College appealed that order, which the Fifth District reversed by decision dated October 15, 1993 - 15 days after the effective date of §733.6171.

On remand, the attorney for the personal representative amended his petition for fees and calculated his fee based on the portion of 5733.6171 that permitted an award to be based on the value of the probate estate. Williams College v. Bourne, 656 So. 2d 622, 623 (Fla. 5th DCA 1995) ("Williams College II"). Although

Williams College objected to the constitutionality of the statute, the probate court applied the new statute in awarding fees. Id. Williams College again appealed, and the Fifth District reversed once again noting that "[a]ll of the services involved in this appeal were rendered prior to the enactment of §733.6171." Id.

While Williams College II was on appeal, the attorney for the personal representative moved for payment of the fees of the attorney representing the personal representative's attorney in connection with his fee petition. Williams College III, 670 So. 2d at 1119. The probate court granted the personal representative's attorney's motion, and Williams College once again appealed. Id. at 1119-1120. The Fifth District reversed again. Id. at 1121.

Obviously, the facts in the Williams College cases are not even remotely similar to those in Bitterman. While in Williams College II, the Fifth District found that the retroactive application of 5733.6171 would "substantially effect the rights of the residuary beneficiary", there the probate court's application of §733.6171 resulted in calculating the fee based on the value of the estate, not on time charges. Obviously, such is not the case here.

Moreover, as Williams College I reflects, the initial award of fees occurred prior to the effective date of the statute. Therefore, §733.6171(8) by its explicit terms precluded the application of 5733.6171 (including the so called "fees on fees" provision of subsection (7)). Here, the probate court awarded the

fees after the statute went into effect, squarely within the legislature's contemplation as evidenced by subsection 733.6171(8).

In Williams, it was only after the case went up on appeal only to be twice remanded that the attorney for the personal representative's attorney sought and obtained fees incurred in establishing the attorney's fee. Again, that is not what happened here. The trial court awarded fees pursuant to Section 733.6171 as authorized under subsection 733.6171(8).

Accordingly, the Administrator does not disagree with Petitioners' statement that "Williams is correct." On the facts of the Williams Collese line of decisions, 5733.6171 should not have applied to provide for an award of "fees on fees", because the attorneys' fees had previously been determined before the effective date of 5733.6171, by order of court after notice. Pursuant to subsection 733.6171(8), the legislature expressly excluded the Williams College situation from the operation of subsection 733.6171(7).

Platt does not preclude recovery of attorneys fees expended in establishing the **Administrator's** fee.

As noted above, even if this Court holds that the Platt decision and 5733.6171, Florida Statutes (1991) govern in this case, Platt nonetheless would not bar an award of "fees on fees" for establishing the Administrator's fee. The statement in Platt that certain fees were "not compensable," Platt, 586 So. 2d at 336, specifically referred to attorneys fees incurred in establishing a fiduciary's attorney's fee - not the fee of the fiduciary.

Notably, the Williams College decisions likewise dealt only with the fees of the fiduciary's attorney - including those incurred in establishing the attorney's fee.

In Bitterman, the Fourth District considered a different set of facts. The Administrator was seeking to establish two different fees: his own, and those of his counsel. Bitterman, 685 So. 2d at 864. In Bitterman, the Fourth District did not reach the question of whether the probate court erred in awarding the Administrator attorneys fees incurred in establishing his own fee, because the issue was not raised. Accordingly, the Williams College decisions are not in conflict with Bitterman on that issue.

POINT II

THE TRIAL COURT'S FINAL JUDGMENT SHOULD BE UPHELD ON EQUITABLE GROUNDS

Bitterman should be upheld because Petitioners are equitably estopped from challenging the award of fees on fees and because Petitioners entered into an implied contract that the Administrator was entitled to seek "fees on fees".

As noted infra, the Fourth District cited to a July 9, 1992 letter from the Administrator to Petitioners' counsel, stating that if any beneficiary was inclined to litigate over his and his counsel's fees, he would seek the fees incurred in establishing his fee. (R. 680). The letter further specifically stated that "[i]f this proposal is not satisfactory to your client and to his brother, I would like each of you to let me know immediately so that I can withdraw as Administrator Ad Litem." (R. 680). As the

Fourth District recognized, "[n]o one objected to the terms as contained in the correspondence." Bitterman, 685 So. 2d at 863.[5]

It is well settled that "[t]o create a contract by implication there must be an unequivocal and unqualified assertion of a right by one of the parties, and such silence by the other as to support the legal inference of his acquiescence." Kanter v. Safran, 68 So. 2d 553, 559 (Fla. 1953). Moreover,

> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract or of remedy."

State ex. rel. Watson v. Gray, 48 So. 2d 84, 87-88 (Fla. 1950). The acts or conduct necessary to create an estoppel need not be positive, and a failure to speak can be the basis for an estoppel when there is a duty to speak. Richards v. Dodge, 150 So. 2d 477, 481 (Fla. 2d DCA 1963).

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[5]While the trial court did not address the issues of equitable estoppel or implied contract, this Court considers the entire case on the merits. Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977). Accordingly, this Court can affirm Bitterman, even on grounds expressly not considered below. See, Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1151 (Fla. 1979) (the "final judgment of the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it").

Accordingly, equitable estoppel "is present when a person attempts to change his position after representing a contrary position to another who reasonably relied upon the representation and who would suffer substantial injury if the inconsistent position were permitted to be successfully asserted." Head v. Lane, 495 So. 2d 821, 824 (Fla. 4th DCA 1986). Failure to speak when there is a duty to do so "can be a representation relied upon by a party claiming estoppel." Id. With regard to the duty question, "[f]rom earliest cases the Florida Supreme Court has applied the doctrine of estoppel as a result of silence when common honesty and fair dealing demanded that a person estopped should have spoken." Davis v, Evans, 132 So. 2d 476 (Fla. 1st DCA 1961) (citations omitted).

Here, Petitioners should be estopped[6] altogether from contesting the Administrator's attempts to recover the attorneys' fees incurred in collecting his own fee and his attorneys' fees (the "fees on fees"). The Administrator made it abundantly clear in July 1992 that he would continue to serve only if the beneficiaries bearing the impact of his fees -- the Petitioners -- agreed that he would be entitled to "fees on fees" if a dispute over fees ensued. In response, Petitioners did nothing save for accept the benefit of the Administrator's service. Petitioners did not object to the July 9, 1992 letter's terms, nor did they respond in any way other than to allow the Administrator to continue

[6]or should be bound under an implied contract.

fulfilling his duties. Because Petitioners did not respond, the Administrator reasonably believed that Petitioners had no objection to his right to obtain "fees on fees" in the event of a fee dispute. See, Harbor House Partners, Ltd. v. Mitchell, 512 SO. 2d 242, 243 (Fla. 3d DCA 1987) (defendant's belief that plaintiff had no objection to terminating lease pursuant to hardship letter requesting unfavorable response reasonable where plaintiff did not respond to letter).

That Petitioners had a duty to speak and object is obvious. The Order appointing the Administrator specifically states that it is based on the "Co-Personal Representatives' Petition for Appointment of Administrator Ad Litem." (R. 41). Thus, Petitioners specifically requested that the Administrator serve. To hold that no duty to speak and object existed in circumstances such as these would be patently unfair.[7]

The Administrator in good faith relied upon Petitioners' failure to object, rendered substantial services and eventually

[7]Notably, in Platt this Court noted that the beneficiaries made it clear, at the "commencement of the probate of the estate," that they would object to the percentage fee proposed, and that the beneficiaries requested that accurate time records be kept. Platt, 586 So. 2d at 329. Likewise, in Williams College I, Williams College at all times disputed that a percentage fee was appropriate. Williams College I, 625 So. 2d at 914. Platt also points out that those bearing the impact of the fees had no voice in selecting the professionals. Platt, 586 So. 2d at 336. That is in stark contrast to this case in which the Administrator was appointed with Petitioner's consent, and the Administrator offered Petitioners an opportunity to object to the terms the Administrator proposed for payment of his and his counsel's fees.

found himself **embroiled** in a fee dispute.' Had Petitioners objected, the Administrator would have withdrawn. Accordingly, notwithstanding **Petitioners'** silence in the face of the July 9, 1992 letter, and notwithstanding Petitioners' position -- as expressed at trial **-- that,** with regard to the Administrator's fees, they did not **"think (the** Administrator's) basic number is too far off,"[9] the **Administrator was** forced to expend the very "fees on fees" that he sought **to avoid.** The prolonged appellate process in this case amply evidences the Administrator's detrimental reliance.

In fact, **Petitioners** expressly stated that their "primary concern . . . is charges (the Administrator) has for services beyond the services he rendered to the estate when he **was** through."" **Petitioners did** not present any testimony -- expert or otherwise -- or **evidence** that specifically identified any unreasonable pre-discharge time charges. Instead, Petitioners effectively caused the Administrator to incur substantial "fees on fees" even though they could never enunciate for the trial court[11] what amount of pre-discharge fees the Administrator and his counsel were not entitled to. In other words, the Administrator ended up in the very situation he sought to avoid by means of his July 9,

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[8]R. 419-425.

[9]Tr. 21.

[10]Tr. 22.

"Nor the Fourth District either.

1992 letter. The Administrator has been prejudiced by Petitioner's silence.

Because the Administrator changed his position by refraining from withdrawing based on Petitioners' failure to respond, the Administrator acquired a "corresponding right . . . of remedy." Gray, 48 So. 2d at 88. The "corresponding right of remedy" in this case is the right to "fees on fees," irrespective of Florida statutory or common law. See, Lambert v. Nationwide Mutual Fire Insurance Co., 456 So. 2d 517, 518 (Fla. 1st DCA 1958) ("the occasions for fashioning a remedy under the label of estoppel in order to prevent injustice are too numerous to count").

Bitterman is correct even if 5733.6171 did not apply

There is ample legal authority to support the trial court's award of fees for the Administrator and his counsel and the Fourth District's affirmance thereof. Long-established legal doctrines, approved by this Court, long-standing statutory authority, as well as the inherent equitable power of the probate court, each independently support the award of fees both prior to, and following the Administrator's discharge.

In re Estate of Duval is Viable Precedent

In his closing statement at trial and his memorandum of law submitted to the trial court (R. 669-672), the Administrator cited the Court to In re Estate of Duval, 174 So. 2d 580 (Fla. 2d DCA 1965) for the proposition that an award of fees to a person who renders services to an estate is proper when a recalcitrant

personal representative causes the person rendering services to incur unnecessary expense and labor in seeking those fees.

Duval is premised on the rule that counsel fees can be taxed against a party because of the party's inequitable conduct. This Court expressly **acknowledged** the "inequitable conduct" rule in Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145, 1148 (Fla. 1985). In Florida Patients Fund, this Court cited to articles in the Florida Law Journal and Florida Bar Journal as support for the inequitable conduct exception.

The earlier of the two articles concludes that according to this Court:

> ". . . irrespective of statute, contract stipulation or fund, in exceptional circumstances, where justified by inequitable conduct, attorneys' fees may be assessed as costs against the losing party."

Wahl, "Attorneys' Fees Taxed Against a Party Because of his Inequitable Conduct," 26 Fla. L.J. 281, 284 (1952). The more recent article, Wahl, "Attorneys' Fees Taxed Against Opposing Party," 37 Fla. B.J. 220 (1963), explains that the doctrine has been expanded. The **article** quotes extensively from Vaughn v. Atkinson, 369 U.S. 527, 82 S. Ct. 997, 8 L.Ed. 2d 88 (1962), in which the court allowed counsel fees based upon recalcitrant conduct by a party.

Vaughn recognized that the ". . . allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts."' Vaughn, 369

U.S. at 530, 82 S. Ct. at 999; See, also, F.D. Rich Co., Inc. v. United States ex. rel. Industrial Lumber Co., Inc., 417 U.S. 116, 129 n.17, 94 S. Ct. 2157, 2165 n.17, 40 L.Ed 2d 703 (1974) (Supreme Court has "long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . ."); Hall v. Cole, 412 U.S. 1, 4, 93 s. ct. 1943, 1945, 36 L. Ed 2d 702 (1973) (". . . federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require . . . and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery'"). Accordingly, "it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Hall, 412 US at 5, 93 S. Ct. at 1946 (citations omitted).

In Hilton Oil Transport v. Oil Transport Co., 659 So. 2d 1141, 1153 (Fla. 3d DCA 1995), the Third District recognized the judicially created "bad faith litigation" exception to the general "American Rule." According to Hilton Oil, "[a] court may award attorneys' fees if one party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons.'" Id. (citations omitted). The Third District held that there are two distinct grounds for the award of fees, "[b]ad faith may be found either in the action that led to the lawsuit, or in the conduct of the litigation." Id. (citations omitted). A fee award here is proper on either ground.

Here, the trial court expressly held that "the difficult circumstances presented by this case, which the Administrator and his counsel encountered, in particular, justify the fee awarded herein." (R. 666).[12]

The Fourth District likewise held that Petitioners caused the Administrator to expend "inordinate legal effort" and termed the trial court's findings and analysis "well reasoned." Bitterman, 685 So. 2d at 866.

The evidence in the record amply demonstrates bad faith and vexatiousness on both grounds (nature of litigation and conduct of litigation). Petitioners' failure to respond to the July 9, 1992 Letter (r. 680), threatening litigation over fees without even knowing the amounts, dilatory conduct during the litigation, and then failing to present any evidence or even articulate an argument to dispute the pre-discharge fees of the Administrator and his counsel are graphic examples of Petitioners' oppressive conduct. In light of the foregoing, the Fourth District was entirely correct in relying on Duval and affirming the trial court.

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[12]Additionally, while the Administrator did not raise Florida Statutes 57.105, Boose Casey Ciklin Lubitz Martens Mcbane & O'Connell ("Boose Casey") was awarded fees under that statute by the trial court, and the Fourth District affirmed. Bitterman, 685 so. 2d at 866. The Administrator and Boose Casey were similarly situated and co-parties at the trial, indicating that the trial court's finding of frivolousness should apply equally to both parties. In fact, as in Petitioners' Brief, at trial Petitioners actually contested the reasonableness of Boose Casey's pre-discharge fees, contrary to their efforts (or lack thereof) regarding those of the Administrator and his counsel.

petitioners' primary argument is that Duval is obsolete, and has been overruled **by Platt.** In Platt, this Court went to great lengths to **explain Florida** Patients Compensation Fund v. Rowe, and adopted the opinion as **its** rationale in Platt. It is unlikely this Court intended **to abolish the** well-established common law rule of Duval, which this Court approved in Florida Patients Compensation Fund, **by** mere **dicta.** Importantly, there is no indication Platt presented vexatious **or obdurate** conduct sufficient to justify the award of fees as is the **case** here.

Accordingly, **while** Petitioners' position that there is no Florida common law **basis** for awarding "fees on fees" is based on the Platt decision, the very decision that Platt relied on -- Florida Patients Fund -- refutes that position. To say that Duval "can no longer **logically coexist** with Platt" is plainly incorrect. Florida Patients Fund recognized the correctness of DuVal.

Here, contrary to Petitioners' **assertions,** Petitioners' vexatious and obdurate conduct justified utilization of DuVal's "inequitable conduct" rule. As in Duval, Petitioners caused the Administrator to expend time to simply have his petition heard (Tr. 167-175). Petitioner Stephan Bitterman threatened surcharge and made allegations of gross breach of fiduciary duty, causing the Administrator to expend numerous hours (Tr. 167-175). Petitioner Stephan Bitterman also threatened the Administrator with a fee dispute, and hired a **lawyer** for that purpose, without even having seen the amount of the Administrator's fees. (R. 419-425).

What is most alarming about Petitioners' conduct is the position they then took at trial: the Administrator's and his counsel's fees were not "too far off" (Tr. 21); instead, now Petitioners were complaining about post-discharge time that they caused the Administrator to expend. The Fourth District found it "particularly pertinent" that in Duval, the appellant had made allegations that the appellees' fees "should be reduced . . . because of the acts of omission or commission in the performance of their legal services to the estate," but that the appellant failed to establish any reduction and the record failed "to reveal that appellant made any serious effort by competent proofs to sustain such allegations." Bitterman, 685 So. 2d at 866 (emphasis added). Clearly, as the trial court and the Fourth District recognized, this situation cried out for application of the rule enunciated in DuVal and the other authority cited above..

The Administrator's fees and his counsel fees are authorized by statute

The source of payment for the Administrator's and his counsel's fees is governed by Florida Statutes §733.106.[13] Section 733.106(1) constitutes statutory authority for the trial court to award attorneys' fees to the Administrator and his counsel for seeking their fees when, as the trial court and district court

[13]"The administrator is allowed reasonable compensation for the services rendered. The amount of the compensation and the assets from which it will be paid are within the discretion of the court. F.S. 733.106." Basic Practice Under Florida Probate Code, The Florida Bar (1995), Section 2.34, p. 2-24.

determined, they were required to expend an inordinate legal effort to obtain a judgment of their fees.[14]

Attorneys' fees are properly awardable as costs in a chancery action, when, as in the present matter, the lower courts find that the conduct of the opposing party was obdurate or vexatious. The Duval holding works hand in hand with Florida Statutes §733.106(1), and with the "inequitable conduct" rule announced by this Court in Florida Compensation Fund to authorize the award of fees in this case.

Moreover, Florida Statutes 5733.609 provides that ". . . [i]n all actions challenging the proper exercise of a personal representative's powers, the court shall award taxable costs as in chancery actions, including attorneys' fees." The two lower courts each held, expressly, that Petitioner, Stephan Bitterman's actions, as personal representative, were improper. Thus, Section 733.609 constitutes a separate, independent ground for the award of fees, as well as confirmation that Duval remains viable.

This Court's dicta statement regarding attorneys' fees for seeking fees in Platt cannot extend to cases covered by Duval and the sections of the probate code which expressly authorize the probate court to award costs, including attorneys' fees, as in

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[14]Section 733.106(1) provides: "In all probate proceedings costs may be awarded as in chancery actions." Section 733.106(3) provides: "An attorney who has rendered services to an estate may apply for an order awarding attorney fees, and after informal notice too the personal representative and all persons bearing the impact of the payment the court shall enter its order on the petition."

chancery actions. This conclusion is required since this Court acknowledged the viability of an award of fees against a recalcitrant party or his counsel in Florida Patients. The dictum in Platt should be limited to the facts of Platt, rather than have a footnote in Platt obliquely overrule well-established precedent.

Further, the Administrator's services both before and after his discharge constitute a "benefit" to the estate because those services effectuated decedent's intent. Thus, the services are compensable under Section 733.106. Article V of decedent's will directs the personal representative to pay all costs of administration which would include fees for the administrator and his counsel. "Benefit" to the estate, as used in Florida Statutes §733.106 is not limited to an enhancement of an estate's value, but also includes services which effectuate decedent's testamentary intent. In re Estate of Lewis, 442 So. 2d 290 (4th DCA 1984).

The administrator and his counsel were entitled to be paid reasonable compensation for his time prior to discharge. Even Petitioner concedes as much, and further concedes little dispute with the Administrator's or his counsel's fees prior to discharge. (Tr. 21). The trial court confirmed that the pre-discharge fees were proper and, as such, fall squarely within the direction in Article V of the will. Absent the extraordinary efforts of the Administrator and counsel to have those fees awarded, they would not have been paid.

Petitioner Stephan Bitterman makes the argument that litigation to determine fees will not benefit the estate because

the award of fees will result in the net diminution of the estate's value. (Pet. Brief p. 29). The same could be said as to the payment of a decedent's debts or taxes due from an estate. Petitioner's argument fails to recognize the broader meaning of "benefit" to an estate, beyond mere monetary enhancement. Moreover, Petitioner's argument confuses benefit to the estate with the benefit which accrues to an individual beneficiary of an estate. The interests of the estate and the beneficiaries as to payment of administration expenses are not congruent in this case.

Section 733.6175 is Not Applicable to the Administrator

Prior to trial, the Administrator successfully argued that his fee petition was not covered by Section 733.6175. The trial, as to the Administrator, was not held under that section. Petitioner's unrelenting attempt to have the Administrator's fee request governed by §733.6175 continue, even to this date, at great expense of time and money.

The Administrator petitioned for discharge and in the same petition, requested the court to award him fees. (R. 419-425). The Court entered an Order discharging the Administrator and reserving jurisdiction on fees. (R. 430-431). Thereafter on March 10, 1993 the Administrator filed a motion to set his fee petition for hearing. (R. 512-515). Two months after the Administrator filed his request for fees, Petitioner filed his petition pursuant to Florida Statutes 5733.6175, (R. 499-505) but the Administrator successfully had the petition stricken, as to the Administrator. (R. 542-543). Petitioner again, tried to have the Administrator's

fees and those of Boose Casey treated under his 733.6175 petition, but the trial court denied his request as to the Administrator. (R. 583). Petitioner then tried to have the Administrator's fee petition consolidated with that of Respondent Boose Casey Ciklin Lubitz Martens McBane & O'Connell, under 733.6175, but again, Petitioner was denied. (R. 569). Despite several unsuccessful attempts to have the Administrator treated under Section 733.6175, Petitioner erroneously criticizes the Fourth District opinion as to its understanding on Section 733.6175 (Pet. Br. 32). In fact, Petitioner has completely ignored several trial court orders which are part of the record and which indisputably establish that the Administrator is not governed by Section 733.6175. All of their arguments to the contrary must be disregarded.

By its own terms, Section 733.6175 does not apply to the Administrator or his counsel. The statute applies only to the compensation of the personal representative, or any person employed by the personal representative. The Administrator was appointed by the Court and his fee is awardable by the Court which appointed him, subject to objection by interested persons. The Administrator's fee is governed by Section 733.106.

POINT III

PETITIONERS' ATTEMPT TO SHOW ABUSE OF DISCRETION IN AWARD OF PRE-DISCHARGE FEES TOTALLY LACKS MERIT

Despite the fact that Petitioners, at trial, stated that with regard to the Administrator's fees they did not believe his "basic number is too far off" (Tr. 21) and that their "primary concern . . .

is charges he has for services beyond the services he rendered to the estate when he was through" (tr. 22), and notwithstanding Petitioners' utter failure at trial to present any evidence disputing the Administrator's pre-discharge fees, Petitioners now would like for the Administrator to expend still more fees to once again prove the reasonableness of his fee. Petitioners' position graphically demonstrates the difficult circumstances the Administrator has endured and continues to endure.

Quite simply, Petitioners still have not pointed to anything in the record that would show an abuse of discretion. Although they now point to a discrepancy between a letter and a "computer run," they still cannot take the position -- nor did they at trial -- that the pre-discharge fees were unreasonable. Petitioners' unsupported argument for reversal and remand harkens back to their position taken in late 1992 - early 1993: challenge the fee no matter what the amount and no matter what the services rendered.

The Administrator carried his burden and established the reasonableness of his fee. This Court should affirm the judgment in his favor.

CONCLUSION

This Court should affirm the Fourth District, on numerous grounds. First, Petitioners' inequitable conduct estops Petitioners from contesting the Administrator's rights to seek "fees on fees". Petitioners' inequitable conduct likewise authorized the trial court to award "fees on fees" under Florida common law and statutory law. Moreover, the trial court did not apply Section 733.6171 (1993) retroactively, and, even if it was so applied, to do so in this case would not be unconstitutional given its remedial nature regarding "fees on fees." Finally, while the Williams College line of cases may have been correctly decided, they are not in conflict with Bitterman due to the strikingly different set of facts in each case.

Lastly, the Administrator specifically adopts and incorporates herein all arguments contained in Respondent Boose Casey's Brief on the Merits (Fla. S.C. Case No. 90,075) that pertain to the issues discussed above,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by ~~telecopier and U.S. mail~~ federal express to: **NANCY LITTLE HOFFMANN, ESQ.**, Nancy Little Hoffmann, P.A. 4419 W. Tradewinds Avenue, Fort Lauderdale, Florida 33308 and by **U.S.** Mail to: **BRIAN B. JOSLYN, ESQ./RONALD E. CRESCENZO, ESQ., Boose, Casey,** et al., 515 No. Flagler Drive, West Palm Beach, FL **33401; JOHN BERANEK, ESQ.,** Ausley & McMullen, P.O. Box **391, 227 S. Calhoun Street,** Tallahassee, Florida 32302; and **ROBERT W. GOLDMAN, ESQ.**, Suite 203, Naples Professional Center, 4933 Tamiami Trail, **Naples,** Florida 34103 on this 5th day of September, 1997.

HEINRICH GORDON HARGROVE WEIHE
& JAMES, P.A.
Attorneys for Respondent
140 Royal Palm Way, Suite 206
Palm Beach, Florida 33480
Telephone: (561) 655-0043
Fax (561) 655-7073

By: Peter Matwiczyk
(PETER MATWICZYK
Florida Bar No. 251100
BENJAMIN P. BROWN
Florida Bar No. 841552