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IN THE SUPREME COURT OF FLORIDA

CASE NOS.: 90,074 & 90,075

FILED
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Chief Deputy Clerk

STEPHAN BITTERMAN, et al.,

Petitioners,

v.

ANNETTE BITTERMAN,

Respondent.

STEPHAN BITTERMAN, et al.,

Petitioners,

v.

PATRICK R. WEIDENBENNER,
et al.,

Respondent.

Discretionary Proceedings to Review a Decision of the
District Court of Appeal, Fourth District, State of Florida
Case Nos.: 94-411 and 94-412

BRIEF OF PETITIONERS ON THE MERITS

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	-ii-
QUESTIONS PRESENTED	-iii-
PREFACE	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	7
ARGUMENT	
POINT I	
THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE BITTERMAN AND WILLIAMS COLLEGE DECISIONS BY HOLDING THAT SECTION 733.6171, FLORIDA STATUTES (1993) MAY NOT CONSTITUTIONALLY BE APPLIED TO AFFECT THE AMOUNT OF ATTORNEY'S FEES AWARDED IN ANY PROBATE MATTER WHERE THE ATTORNEY WAS RETAINED AND PERFORMED ALL SERVICES PRIOR TO THE STATUTE'S EFFECTIVE DATE.	9
Williams and Bitterman are in Conflict	9
Williams Is Correct	14
Bitterman Should Be Quashed	17
Quashing Bitterman Requires Reversal and Remand of Both Fee Awards	20
POINT II	
THE PROBATE COURT AND THE FOURTH DISTRICT COURT OF APPEAL IMPROPERLY APPLIED SECTION 57.105 AND RELIED UPON OBSOLETE CASE LAW TO IMPOSE AN ADDITIONAL PENALTY ON THE ESTATE FOR REQUIRING THE ATTORNEYS TO ESTABLISH THE REASONABLENESS OF THEIR COMPENSATION.	21
Section 57.105 Should Not Have Been Applied By The Probate Court	22
Section 57.105 Should Not Have Been Applied Bv The Appellate Court	25
No Common Law Basis for Awardinq "Fees on Fees"	27
Additional Fees Were Uniustified on Anv Theory	33

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TABLE OF CONTENTS (Continued)

Page

POINT III

THE PROBATE COURT ABUSED ITS DISCRETION IN THE AMOUNT OF ATTORNEY'S FEES AWARDED TO BOTH LAW FIRMS FOR THEIR PRE-DISCHARGE SERVICES. 33

CONCLUSION 35

CERTIFICATE OF SERVICE 37

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
4419 WEST TRADEWINDS AVENUE SUITE 100 . FORT LAUDERDALE FLORIDA 33308 . (954) 771-0606

TABLE OF CITATIONS

Cases **Page**

Alamo Rent-A-Car, Inc. v. Mancusi,
632 So. 2d 1352 (Fla. 1994) 1520

Beck v. Beck,
383 So. 2d 268 (Fla. 3rd DCA 1980) 23

Bitterman v. Bitterman,
685 So. 2d 861 (Fla. 4th DCA 1996) . 1, 2, 8, 10, 14, 16, 17, 19, 20, 24, 27, 28, 32, 35

Bould v. Touchette,
349 So. 2d 1181 (Fla. 1977) 33

Crittenden Orange Blossom Fruit v. Stone,
514 So. 2d 351 (Fla. 1987) 28

Eisman v. Ross,
664 So. 2d 1128 (Fla. 3rd DCA 1995),
rev. dismissed, 668 So. 2d 603 (Fla. 1996) 29

Florida Patient's Compensation Fund v. Rowe,
472 So. 2d 1145 (Fla. 1985) 23

Florida Birth Related Neurological Injury Comp. Assn. v. Carreras,
633 So. 2d 1103 (Fla. 3rd DCA 1994) 29

Heirs of the Estate of Waldon v. Rotella,
427 So. 2d 261 (Fla. 5th DCA 1983) . . . .". 35

In re Estate of DuVal,
174 So. 2d 580 (Fla. 2nd DCA 1965) 6, 21, 27, 29, 30, 31, 32, 33, 36

In re Estate of Good,
22 Fla. L. Weekly D1388 (Fla. 4th DCA June4, 1997). 12

In re Estate of Platt,
586 So. 2d 328 (Fla. 1991) . . . 4, 5, 6, 11, 12, 13, 17, 18, 20, 23, 24, 27, 28, 30, 31, 33

In re Estate of Murphv,
336 So. 2d 697 (Fla. 3rd DCA 1976) 33

NANCY LITTLE HOFFMANN. P.A.
ATTORNEY AT LAW
4419 WEST TRADEWINDS AVENUE SUITE 100 • FORT LAUDERDALE FLORIDA 33308 . (954) 771-0606

TABLE OF CITATIONS (Continued)

Cases **Page**

L. Ross, Inc. v. R. W. Roberts Constr. Co.,
466 So. 2d 1096 (Fla. 5th DCA 1985),
approved, 481 So. 2d 484 (Fla. 1986) 15, 16, 20

Muckenfuss v. Deltona Corp.,
508 So. 2d 340 (Fla. 1987). 24

Phipps v. Estate of Burdine,
586 So. 2d 381 (Fla 5th DCA 1991) 33

Pirretti v. Dean Witter Reynolds, Inc.,
578 So. 2d 474 (Fla. 4th DCA 1991) 6, 27, 28, 33

Richardson v. Jones,
508 So. 2d 739 (Fla. 2nd DCA),
rev. denied, 518 So. 2d 1277 (Fla. 1987) 23

Seminole County v. Butler,
676 So. 2d 451 (Fla. 5th DCA 1996),
rev. denied, 686 So. 2d 581 (Fla. 1997) 29

Solid Waste Authority of Palm Beach v. Parker,
622 So. 2d 1014 (Fla. 4th DCA 1993) 20

State Farm Mut. Auto. Ins. Co. v. LaForet,
658 So. 2d 55 (Fla. 1995) 15, 20

State Farm Fire & Casualty Co. v. Palma,
585 So. 2d 329 (Fla. 4th DCA 1991),
quashed, 629 So. 2d 830 (Fla. 1993) 6, 27, 28, 29, 31, 33

Thornber v. City of Fort Walton Beach,
568 So. 2d 914 (Fla. 1990). 22

Treat v. State Ex Rel Mitton,
121 Fla. 509, 163 So. 883 (1935) 26

Whitten v. Progressive Casualty Ins. Co.,
410 So. 2d 501 (Fla. 1982). 22, 24, 26

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
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TABLE OF CITATIONS (Continued)

Cases	Page
Williams College v. Bourne, 625 So. 2d 913 (Fla. 5th DCA 1993)	12
Williams College v. Bourne, 656 So. 2d 622 (Fla. 5th DCA 1995)	7, 8, 9, 10, 12, 13, 14, 15,16, 17, 20, 35
Williams College v. Bourne, 670 So. 2d 1118 (Fla. 5th DCA 1996)	7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 35
Woolf v. Reed, 389 So. 2d 1026 (Fla. 3rd DCA 1980)	35
Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985)	15, 16, 20

Other	
Ch. 74-106, Laws of Fla.	30
Ch. 93-257, Laws of Fla.	10
Ch. 93-257, $18, Laws of Fla.	10, 11, 13
557.105, Fla. Stats.	21, 22, 24, 25, 26, 29, 33
§57.105(1), Fla. Stats.	7, 8, 22, 35
$627.428, Fla.Stats.	28
5733.617, Fla. Stats.	4, 10, 11, 12, 13, 14, 18, 19, 25, 28, 33, 35
§733.617(1), Fla.Stats.	30
$733.6171, Fla.Stats.	7, 9, 12, 14, 15, 16, 17, 20, 25, 26, 33
§733.6171(7), Fla. Stats.	5, 7, 8, 11, 12, 13, 14, 19, 20, 21, 31, 35
§733.6171(8), Fla. Stats.	12, 14, 16
§733.6175, Fla. Stats.	3, 4, 7, 8, 20, 22, 23, 24, 29, 31, 32
§734.01(2), Fla. Stats.	30

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QUESTIONS PRESENTED

POINT I

WHETHER THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE BITTERMAN AND WILLIAMS COLLEGE DECISIONS BY HOLDING THAT SECTION 733.6171, FLORIDA STATUTES (1993) MAY NOT CONSTITUTIONALLY BE APPLIED TO AFFECT THE AMOUNT OF ATTORNEY'S FEES AWARDED IN ANY PROBATE MATTER WHERE THE ATTORNEY WAS RETAINED AND PERFORMED ALL SERVICES PRIOR TO THE STATUTE'S EFFECTIVE DATE.

POINT II

WHETHER THE PROBATE COURT AND THE FOURTH DISTRICT COURT OF APPEAL IMPROPERLY APPLIED SECTION 57.105 AND RELIED UPON OBSOLETE CASE LAW TO IMPOSE AN ADDITIONAL PENALTY ON THE ESTATE FOR REQUIRING THE ATTORNEYS TO ESTABLISH THE REASONABLENESS OF THEIR COMPENSATION.

POINT III

WHETHER THE PROBATE COURT ABUSED ITS DISCRETION IN THE AMOUNT OF ATTORNEY'S FEES AWARDED TO BOTH LAW FIRMS FOR THEIR PRE-DISCHARGE SERVICES.

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PREFACE

This brief is submitted on behalf of the Petitioners, STEPHAN BITTERMAN and HOWARD BITTERMAN, as Co-Personal Representatives of the Estate of Irving Bitterman, deceased, in support of their 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 upheld two orders of the Palm Beach County Probate Court requiring the Estate to pay what it contends are legally impermissible attorney's fees to the Respondents and awarded appellate attorney's fees to both Respondents. The Respondents are PETER MATWICZYK, ESQUIRE, a discharged Administrator Ad Litem for the Estate; his law firm, METTLER & MATWICZYK; and the law firm formerly representing one of the personal representatives, BOOSE, CASEY, SIKLIN, LUBITZ, MARTENS, MCBANE & O'CONNELL [hereinafter "Boose, Casey"] .

In this brief, the parties may at times be referred to by name. In addition, the Petitioners will be referred to as "the Personal Representatives" or as "the Estate," and Mr. Matwiczyk will at times be referred to as "the Administrator."

Because the appeals were not consolidated at the Fourth District Court of Appeal, there are two separate records on appeal. The record in Fourth District Case No.: 94-411 (the Matwiczyk appeal) will be referred to by the designation "R." followed by a page number. The record in Fourth District Case No.: 94-412 (the Boose, Casey appeal) will be referred to by the designation "RR." followed by a page number. The transcript of the August 16, 1993 hearing will be referred to by the designation "T." followed by the page number assigned by the court reporter. Any emphasis appearing in quoted material is that of the writer unless otherwise indicated,

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STATEMENT OF THE CASE AND FACTS

Irving Bitterman died on July 21, 1991. His sons, Howard and Stephan, were appointed Co-Personal Representatives in accordance with his will. Each of the Co-Personal Representatives retained separate counsel because they disagreed about certain aspects of the administration of the estate, including the question of whether a certain asset was the property of one of the Personal Representatives or whether it was a conditional gift and thus an estate asset.[1] Howard Bitterman retained Pat Weidenbenner; Stephan retained Boose, Casey in September, 1991 (RR.104).

Although Annette Bitterman, the surviving spouse, had already received most of the distribution to which she was entitled under her late husband's will in May of 1992 (T.226-227), issues remained as to the remaining amount of her distribution. As a result, the probate court with the agreement of all concerned appointed Peter Matwiczyk as Administrator Ad Litem on June 1, 1992 for certain limited purposes, primarily to represent the Estate in responding to or settling those issues (R.41-42). Mr. Matwiczyk retained his own law firm to assist him, agreeing to submit monthly statements to the Estate setting forth detailed time records (July 9, 1992 letter, R.680).

The litigation brought by Mrs. Bitterman was resolved by stipulation in October, 1992 (R.317-397, 403-404). On December 8, 1992, the Administrator sought to be discharged (R.415-418), and an agreed order was entered on December 31, 1992

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[1] That issue, as well as all other issues between them, was resolved by a comprehensive settlement agreement in February 1993 (R.451-455). It is that settlement, and not the October settlement with Mrs. Bitterman, that was quoted in part in the Fourth District's opinion. Bitterman, 685 So. 2d at 863.

discharging Mr. Matwiczyk and retaining jurisdiction to determine the amount of reasonable fees and costs to be paid to him and his law firm (R.430-431).

In response to a request by counsel for one of the Personal Representatives for a bill and time records (Respondents' Exhibit 13, T.144), the Matwiczyk firm sent a one-page letter dated January 21, 1993 which summarized the hours expended and stated that the total fee as of the date of discharge (December 31, 1992) was $18,885.00 plus costs, for a total of $20,486.14 (Respondents' Exhibit 9, R. 682). Although one of the Personal Representatives requested further details (January 26, 1993 letter, Respondents' Exhibit 10; R.682), none were provided at that time.

Accordingly, the other Personal Representative on March 5, 1993 filed a petition pursuant to section 733.6175, Florida Statutes,' to determine the reasonable compensation for all of the attorneys who had represented the Estate, including both the Matwiczyk firm and Boose, Casey (R.499-505).[3] Thereafter, on April 14, 1993, Mr.

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[2] Section 733.6175 provides:

> **Proceedings for review of employment of agents and compensation of personal representatives and employees of estate**
>
> After notice to all affected interested persons and upon petition of an interested person bearing all or part of the impact of the payment of compensation to the personal representative or any person employed by him, the propriety of such employment and the reasonableness of such compensation or payment may be reviewed by the court. The burden of proof of propriety of such employment and the reasonableness of the compensation shall be upon the personal representative and the person employed by him. Any person who is determined to have received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

[3] Boose, Casey had also obtained an order granting it leave to withdraw on January 4,
(continued...)

Matwiczyk responded with a letter enclosing a computer run of all time expended by him and his firm, demanding that if the Estate would not agree by April 16 to pay $27,500, he would seek fees for his law firm "for pursuing both my fiduciary fee and my counsel's fee (Respondents' Exhibit 11, R.683)."[4] This was the first complete bill submitted by the Matwiczyk firm since its discharge and included time spent after its discharge.

The probate court conducted an evidentiary hearing to determine the reasonableness of the attorneys' compensation on August 16, 1993 (transcript at T. 1-361, RR.264-626). Since both the Matwiczyk and Boose, Casey billings included substantial time for matters after December, 1992 when their respective firms were discharged (R.430-434), issues arose as to (a) whether such post-discharge time was chargeable to the Estate and (b) whether any additional time expended in the reasonableness proceeding was similarly to be assessed against the Estate. The Personal Representatives argued that the Estate was entitled to have the reasonableness of the attorney's fees determined in accordance with the procedure set forth in section 733.6175, which places the burden of proof upon the attorneys seeking compensation, and according to the guidelines established in section 733.617, Florida Statutes and by this Court in <u>In re Estate of Platt</u>, 586 So. 2d 328 (Fla. 1991). They further contended that section 733.617 contained no provision requiring the Estate to pay additional fees for the

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[3](...continued)
1993 (R.432-434), but it did not submit a statement for services until the Personal Representatives filed a motion to produce it on February 26, 1993 (R.443-445).

[4] As was pointed out at the fee hearing, however, and acknowledged by Mr. Matwiczyk, the attached computer run showed total fees of only approximately $22,000.00 (T.137-138).

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attorneys' time spent in establishing the reasonableness of their fee, and that this Court in interpreting that statute had specifically held in Platt that such fees were not compensable. The Administrator and Boose, Casey argued that section 733.6171(7), Florida Statutes (1993)[5] applied instead, even though it had not been enacted until May 1993 and did not go into effect until October 1, 1993, and that the statute permitted an award of such fees.

The probate court conducted an evidentiary hearing at which it heard testimony and argument from all interested parties.[6] At the conclusion of the hearing, the court requested each of the parties to submit a proposed judgment ordering "some fees" and containing "all findings of fact that are needed (T.359)." All of the proposed orders were submitted in early September, 1993. In a memorandum submitted to the court, Mr. Matwiczyk pointed out that newly enacted section 733.6171(7) would go into effect on October 1, 1993, and that if the court would delay entry of its judgment until after that date, the statute would allow the additional fees he was requesting (R.671-672). The probate court signed both proposed judgments on November 29, 1993 without making any

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[5] Section 733.6171(7), Florida Statutes (1993) provides:

> (7) Court proceedings to determine compensation, if required, are a part of the estate administration process, and the costs, including fees for the personal representative's attorney, shall be determined by the court and paid from the assets of the estate unless the court finds the request for attorney's fees to be substantially unreasonable. The court shall direct from which part of the estate they shall be paid.

[6] It is not necessary for the purposes of this review proceeding to set forth the specifics of the testimony at this point.

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changes to either judgment. Both judgments relied upon the new statute in awarding additional fees (R.667, paragraph 13; RR.212, paragraph 41).

The court awarded the Administrator and his law firm a total fee of $36567.50 exclusive of costs, noting that it included a “significant amount of time” following the Administrator’s discharge, but without differentiating between the pre-discharge and post-discharge fees (R.667). The Boose, Casey judgment awarded that firm a fee of $76,542.00 exclusive of costs, plus an additional $20,000.00 for its time spent in establishing the reasonable amount of its fee (RR.208-212). In addition to relying upon the new statute to justify the additional $20,000.00 fee, the court also invoked section 57.105(1), Florida Statutes, finding that Boose, Casey was the “prevailing party” and that the Personal Representatives had failed to provide evidence establishing any justiciable issues of law or fact in the fee proceeding (RR.209). The court also held that the additional fees were supported by certain district court decisions’ and expressly refused to apply this Court’s decision in <u>In re Estate of Platt</u> re post-discharge fees (RR.210).

The Personal Representatives appealed both judgments to the Fourth District Court of Appeal. Although that court had declined to consolidate the proceedings, it issued one opinion affirming both. <u>Bitterman v. Bitterman</u>, 685 So. 21 861 (Fla. 4th DCA 1996). The Fourth District upheld the probate court on each of the issues. The appellate court found that section 733.6171(7), Florida Statutes (1993), rather than section 733.617, Florida Statutes (1991) applied, even though all the legal services were performed prior to its

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[7] <u>State Farm Fire & Casualty Co. v. Palma,</u> 585 So. 2d 329 (Fla. 4th DCA 1991), <u>quashed</u>, 629 So. 2d 830 (Fla. 1993~~); Pirretti v. Dean Witter Reynolds, Inc.,~~ 578 So. 2d 474 (Fla. 4th DCA 1991); and <u>In re Estate of DuVal</u>, 174 So. 2d 580 (Fla. 2nd DCA 1965).]

effective date; that all of the attorney's fees awarded to both law firms were necessary and reasonable; that under section 733.6171, the Estate must pay a fee to all discharged attorneys for participating in a section 733.6175 reasonableness proceeding, as well as paying the Personal Representatives' present counsel; and that the probate court correctly required the Estate to pay such additional fees to both the Administrator and Boose, Casey on the grounds stated in the respective final judgments. The Fourth District also awarded appellate attorney's fees to both law firms, each of which had requested such fees based on section 733.6171(7), including Boose, Casey's motion for imposition of appellate fees based on section 57.105(1), Florida Statutes.

This Court has granted jurisdiction to review the Fourth District's decision because of its conflict with two Fifth District Court of Appeal decisions' reaching opposite conclusions on the retroactive application of section 733.6171, Florida Statutes.

SUMMARY OF ARGUMENT

The conflict between the decision of the Fourth District Court of Appeal in the present case and the decisions of the Fifth District in the Williams opinions should be resolved in favor of the rule announced in Williams II and Williams III. Those decisions correctly held that section 733.6171(7), Florida Statutes (1993) may not constitutionally be applied so as to increase the burden on an estate to pay for attorney's fees for services rendered prior to its effective date, where such fees would not have been chargeable to the estate under prior law.

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

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Resolution of the conflict in favor of Williams will require that the Bitterman decision be quashed, because the Fourth District affirmed two fee awards in which the probate court expressly relied upon section 733.6171(7) to support a substantial portion of each of the awards. It will also require setting aside the Fourth District's awards of appellate attorney's fees to each of the law firms, because both motions for appellate fees were grounded in part upon that inapplicable statute.

Both the probate court and the Fourth District also erred in relying upon section 57.105(1), Florida Statutes, to justify requiring the Estate to pay additional fees to Boose, Casey. The proceeding to determine the reasonable amount of fees to be awarded to the Administrator and to Boose, Casey cannot be considered a frivolous proceeding since it was expressly mandated by the Legislature in section 733.6175, Florida Statutes, as the appropriate method for determining such fees. Moreover, neither party to a proceeding to set an appropriate lodestar required by this Court in such cases could be considered the "prevailing party" under section 57.105(1). Finally, the Personal Representatives raised numerous justiciable issues of both law and fact in both the probate and appellate proceedings.

The probate court further erred in applying obsolete case law as an alternative basis for justifying the award of additional post-discharge attorney's fees to Boose, Casey, as did the Fourth District in affirming the awards to both law firms. As will be discussed in further detail in the argument section of this brief, each of the district court decisions cited by the probate court had either been expressly disapproved by this Court or rendered obsolete by this Court's more recent decisions and by legislative enactments.

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Finally, since this Court is to review the entire case on the merits, the Personal Representatives would point out that the testimony and billing records of both the Administrator and Boose, Casey show that they failed to carry their burden of establishing the reasonableness and necessity of all the fees awarded them by the probate court for their services during the administration of the estate.

The decision of the Fourth District should be quashed and the case remanded with directions that no fees should be awarded for time spent by the Administrator and his law firm or by Boose, Casey after they were discharged from their responsibility to the Estate. The Court should further direct on remand that the amount of fees awarded to both firms for their pre-discharge time should be redetermined, and that only the amount fully established as reasonable and necessary should be awarded.

ARGUMENT

POINT I

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE BITTERMAN AND WILLIAMS COLLEGE DECISIONS BY HOLDING THAT SECTION 733.6171, FLORIDA STATUTES (1993) MAY NOT CONSTITUTIONALLY BE APPLIED TO AFFECT THE AMOUNT OF ATTORNEY'S FEES AWARDED IN ANY PROBATE MATTER WHERE THE ATTORNEY WAS RETAINED AND PERFORMED ALL SERVICES PRIOR TO THE STATUTE'S EFFECTIVE DATE.

Williams and Bitterman are in Conflict

There is a clear conflict between rulings of the District Courts of Appeal for the Fourth and Fifth Districts regarding the applicability of section 733.6171, Florida Statutes (1993) to a proceeding for assessment of attorney's fees for services rendered prior to the

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effective date of the statute. According to the Fourth District, the operative date for application of the statute is the date when the proceeding for determination of attorney's fees was concluded, irrespective of when the services were performed. Bitterman, 685 So. 2d at 865. The Fifth District, however, has held that the operative date is the date when the attorney begins his representation of the estate. Williams II, 670 So. 2d at 1121. A resolution of that conflict is central to the present case. It will also have an impact on the administration and determination of attorney fee issues in numerous other estates and on the retroactive application of attorney fee statutes in general.

In May of 1993, the Legislature enacted chapter 93-257, Laws of Florida, which amended the probate code in numerous respects, and which provided for an effective date as follows:

> Except as otherwise provided herein, this Act shall take effect October 1, 1993, and shall be applicable to all decedents, including settlors of revokable inter vivos trusts, dying on or after that date.

Ch. 93-257, §18, Laws of Fla.

The Act amended section 733.617, Florida Statutes (1991), which was previously titled "Compensation of Personal Representatives and Professionals," and retitled it "Compensation of Personal Representative." That 1993 amendment to section 733.617 did not provide for a different effective date. Thus, the unamended version, which provided the basis for determining reasonable compensation for both personal representatives and their attorneys, continued to apply to all existing estates, including that of Irving Bitterman.[9]

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[9] Irving Bitterman died in 1991.

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The Act also created a new provision entitled "Compensation of Attorney for the Personal Representative." Unlike the amendment to section 733.617, newly enacted section 733.6171, Florida Statutes, did contain a specific provision regarding its applicability to existing estates, stating:

> (8) This section shall apply to estates in which an order of discharge has not been entered prior to its effective date but not to those estates in which attorney's fees have previously been determined by order of court after notice.

5733.6171 (8), Fla. Stat. (1993).

The question of which statute controls the fee determination in this probate proceeding is an important one, because subsection (7) of newly enacted section 733.6171 purports to require an estate to pay the fees and costs for the time spent by a personal representative's attorney in a proceeding to determine the amount of compensation to be awarded. That subsection states:

> Court proceedings to determine compensation, if required, are a part of the estate administration process, and the costs, including fees for the personal representative's attorney, shall be determined by the court and paid from the assets of the estate unless the court finds the request for attorney's fees to be substantially unreasonable. The court shall direct from which part of the estate they shall be paid.

§733.6171 (7), Fla. Stat. (1993). However, pre-amended section 733.617, which remained applicable to this estate," contains no provision requiring an estate to compensate the attorney for its personal representative for time spent in determining the reasonableness of his or her fee. Indeed, this Court specifically held in In re Estate of Platt, 586 So. 2d 328, 336 (Fla. 1991), that time spent by the attorney collecting a fee is

[10] See ch. 93-257, §18, Laws of Fla.

not compensable against the estate. See also In re Estate of Good, 22 Fla. L. Weekly D1388 (Fla. 4th DCA June 4, 1997), in which the Fourth District recognized that Platt precludes such an award under the former statute.

Thus, under the 1991 version of section 733.617, an estate would not be required to pay a fee to its personal representative's counsel for a determination of the reasonableness of his or her fee. However, under section 733.6171 (7), Florida Statutes (1993), which in accordance with subsection (8) purports to apply to an existing estate, such fees could be paid from the assets of the estate. Both Bitterman and Williams College have addressed this issue and reached contrary conclusions.

The Williams College cases from the Fifth District involved the issue of attorney's fees for an attorney who had performed services for the personal representative between 1988 and 1990, and for his counsel. After the first order awarding fees was reversed on appeal," the attorney filed a new petition for fees in which he calculated his award based on section 733.6171,[12] which had recently become law. Williams College, a beneficiary under the will, argued that the new statute did not apply. The lower court rejected that argument and awarded fees based on the new statute, thereby increasing the award by more than $50,000.00.

The Fifth District reversed, holding that since section 733.6171 was enacted in 1993, it could not constitutionally be applied to increase the estate's obligation to pay fees for services rendered before enactment of the statute. Williams II, 656 So. 2d at 623.

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[11] Williams College v. Bourne, 625 So. 2d 913 (Fla. 5th DCA 1993) (Williams I).

[12] As the Fifth District has observed, the effect of that provision was to "undo" this Court's holding in In Re Estate of Platt. Williams III, 670 So. 2d at 1119.

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While Williams II was on appeal, the attorney sought and obtained additional fees and costs for services rendered by his attorney after the effective date of section 733.6171(7). The Fifth District again reversed, holding that the attorney could not recover fees for litigating the reasonableness of his fee request based on the new statute because such fees were not allowed under the law in effect when he began representing the estate. Id. at 1121. Williams III held that section 733.6171(7), Florida Statutes (1993), could not constitutionally be applied to award attorney's fees in that case since such fees would not have been taxable to the estate under this Court's decision in Platt, 586 So. 2d at 336.[13] The Fifth District explained that

> Here, Ward is seeking fees for the litigation over the reasonableness of his fee request. The personal representative's attorney has the right to recover fees incurred in the representation of the estate from the moment such representation is commenced; however, under prior law, recovery did not include time spent on his own compensation. Under the new statute, the attorney can expect that if the request is opposed and a hearing required, the fees incurred in that proceeding will likewise be compensable. To the extent Ward did or did not possess the right to compensation calculated in a certain way and the right to charge his time to litigate his own compensation, these rights were inextricably bundled at the moment Ward began his representation of the estate. It was at that time that any right he had to receive his fees and any corresponding obligation of the estate to pay those fees was legally vested. The effective date of section 733.6171(7), Florida Statutes (1993), was October 1, 1993. Prior to that date, and certainly on the date Ward began his representation, Ward was not entitled to receive fees for time expended in determining the amount of his fee, as the court explained in *Platt*. Because the effect of applying section 733.6171(7) to compensate Roby for defending Ward's fee claim is to retrospectively enhance the obligations of the estate, and ultimately Williams College, to pay Ward's fees, we reverse the order awarding fees for Roby's services in litigating Ward's fee.

Williams III, 670 So. 2d at 1121 (footnotes omitted).

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[13] Platt was based upon section 733.617, which still applies to this estate. Ch. 93-257, §18, Laws of Fla.

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By contrast, the Fourth District in Bitterman held that section 733.6171(7) (1993) did apply to the attorney's fee proceeding in that estate, even though all services had been rendered, and the fee proceeding conducted, prior to the statute's effective date. The court stated:

> The first matter in dispute is whether section 733.617, Florida Statutes (1991), or section 733.6171(7), Florida Statutes (1993), is applicable to this case.
>
> In 1993, the Legislature amended section 733.617, Florida Statutes (1991). What remained after the amendment was section 733.617, which applies to compensation of personal representatives, and section 733.6171, which applies to compensation for the attorneys for the personal representative. Section 733.6171(8) indicates an effective date of October 1, 1993, and directs:
>
>> (8) This section shall apply to estates in which an order of discharge has not been entered prior to its effective date but not to those estates in which attorney's fees have previously been determined by order of court after notice.
>
> §733.6171(8), Fla.Stat. (1993). See *Fogg v.* Southeast Bank, *N.A., 473 So.* 2d 1352, 1354 (Fla. 4th DCA 1985) (a clear statement of legislative intent may determine the retroactive effect of a statute.) This proceeding commenced in March 1993, was tried in August 1993, and was concluded in the trial court in December 1993. Clearly, it falls within the purview of section 733.6171(8), Florida Statutes (I 993).

Bitterman, 685 So. 2d at 865.

Williams Is Correct

The conflict between Williams and Bitterman should be resolved in favor of a holding that section 733.6171 may not constitutionally be applied retroactively. The Fifth District correctly recognized in both Williams II and Williams III that regardless of the stated intent of the Legislature, it cannot constitutionally increase an existing obligation as to a set of facts after those facts have occurred. Williams II, 656 So. 2d at 623, quoting

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L. Ross, Inc. v. R. W. Roberts Construction Company, 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985), approved, 481 So. 2d 484 (Fla. 1986). In Williams III, the court again stated that the ability to collect attorney's fees from an opposing party, and the obligation to pay such fees, is substantive in nature. The court recognized, again citing Ross, that substantive rights cannot be adversely affected by the enactment of legislation once those rights have vested. Williams III, 670 So. 2d at 1120.

Prior decisions of this Court are fully in accord with the Williams cases. In its opinion approving the Fifth District's Ross decision, this Court made it clear that the burden on a party responsible for paying an attorney's fee is a substantive one, as is a statutory amendment affecting that burden. L. Ross, Inc. v. R. W. Roberts Constr. Co., Inc., 481 So. 2d 484,485 (Fla. 1986). Such an amendment cannot be considered merely "remedial" and thus procedural, and therefore cannot constitutionally be retroactively applied. That rule of law has consistently been applied by this Court. See State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55, 60-62 (Fla. 1995); Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994); Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985). In LaForet, this Court explained that even when the Legislature expressly states an intention that a statute be applied retroactively, the Court will refuse to do so if the statute impairs vested rights, creates new obligations, or imposes new penalties. LaForet, 658 So. 2d at 61.

By holding that section 733.6171 applied in the present case, the Bitterman court appears to have disregarded this Court's repeated admonitions in the above-cited cases that the courts may not apply substantive statutes retroactively, regardless of whether the Legislature had so provided. After reciting that the attorney's fee proceeding commenced

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in March, 1993, was tried in August, 1993, and was concluded in December, 1993, the Fourth District simply held that "Clearly, [the fee proceeding] falls within the purview of section 733.6171(8)." Bitterman, 685 So. 2d at 865. The court stopped short of any analysis of the constitutional issues raised by retroactive application of the statute. Indeed, it did not even acknowledge the argument which the Personal Representatives had raised in their briefs, including citation to Ross, Young v. Altenhaus, and other opinions holding that retroactive application of a statutory amendment affecting imposition of attorney's fees is a violation of due process.

While a retroactive application of section 733.6171 in the present case impacts only on the improper award of fees for time spent in proving the reasonable amount of fees, an affirmance of the rule articulated by the Fourth District in Bitterman could have a broader impact in the administration of other estates. As was the case in Williams II,[14] for example, the amount of a personal representative's attorney's fees may also be affected by use of the statutory formula set forth in section 733.6171. Had the situation been reversed, i.e., if the newly enacted formula had resulted in calculation of a lower fee for the personal representative's attorney, it would have been equally impermissible, since the right to attorney's fees is also a substantive one which cannot be lessened by a later legislative enactment. In either case, retroactive application of section 733.6171 is unconstitutional. The rights of both the estate and the attorney are fixed at the time the

[14] In Williams, the probate court allowed $187,931 .OO in fees based on the formula contained in the new statute and held that absent the new statute, an appropriate fee would have been $63,624.00. Williams III, 670 So. 2d at 1119. The Williams court held that such an increase in the estate's obligation was an unconstitutional denial of due process. Id. at 1119.

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attorney is retained and begins to render services to the personal representative. The rights and obligations of both the attorney and the estate are vested as of that time, and neither party's right or obligation can constitutionally be affected by later legislative action. Both the estate and the attorney are entitled to rely upon the law as it exists when they enter into their initial agreement.

Bitterman Should Be Quashed

The facts in Bitterman provide an even stronger case than those of Williams for refusing to apply the statute retroactively. While at least some of the legal services in Williams were rendered after the effective date of the statute, that was clearly not so in Bitterman. For example, Mr. Matwiczyk filed his petition for discharge and sought a fee for his services and those of his law firm on December 8, 1992 (R.415418). The agreed order granting the Administrator Ad Litem's petition for discharge and reserving jurisdiction to determine a reasonable fee was signed on December 31, 1992 (R.430-431). Similarly, Boose, Casey was granted leave to withdraw on January 4, 1993 (R.432-434). In the Administrator's petition for discharge, he recognized that this Court's Platt decision would deny him fees for seeking his attorney's fees (R.417-418). At that point, of course, the Florida Legislature had not even enacted section 733.6171.

Similarly, the statute had not yet been enacted as of March 5, 1993 when the petition to determine reasonable compensation for both the Administrator Ad Litem and Boose, Casey was filed (R.499-505). The statute had not yet been enacted when the Administrator filed his motion seeking a hearing to determine his attorney's fees (R.512-515). The statute had still not been enacted when Boose, Casey sought an award of

attorney's fees from the Estate, specifically relying upon then-existing section 733.617, Florida Statutes (1991) (RR.43).

The evidentiary hearing on attorney's fees for both the Administrator and Boose, Casey was held in August, 1993, after the Legislature had enacted the statute but before its October 1, 1993 effective date. Recognizing that the statute was not yet in effect, Mr. Matwiczyk filed a memorandum of law urging the probate court to apply it nonetheless, stating:

> The legislature has announced a clear policy shift in the area of attorney's fees. The statute [733.6171] is applicable to the current case and clearly allows fees.
>
> Arguably, however, the effective date of the statute is October lst, five weeks from now. <u>If this Court were to enter its Order more than five weeks from todav,</u> there is no question but that the fees requested by the fiduciary's counsel would be allowable as part of the administration process.

(R.671-672). Mr. Matwiczyk made that same request at the hearing (T.333). The probate court acceded to that request since, although it received proposed orders from all counsel by early September, 1993 (R.662), it waited until November 29, 1993 to sign the final judgments submitted by the Administrator's counsel and Boose, Casey even though it made no changes to either proposed judgment. Since by then the October 1, 1993 date had passed, the final judgment awarding fees to the Administrator and its counsel stated in paragraph 13:

> 13. The Court notes that the Administrator's counsel spent a significant amount of time following the Administrator's discharge on December 31, 1992, in an effort to collect the Administrator's fee and the Administrator's counsel's fee. T<u>here is no longer a question that the time spent by the Administrator's counsel is compensable from the Estate assets.</u>

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(R.667). In a footnote to that paragraph, the final judgment quoted section 733.6171(7), Florida Statutes (1993). The Boose, Casey final judgment also justified the award of an additional $20,000.00 in attorney's fees on section 733.6171 (7),[15] stating:

> 41. Finally, the court believes it [sic] fee award for BOOSE CASEY's collection effort is justified and appropriate under the provisions of Section 733.617(7) [sic], Florida Statutes.

(RR.212).

It is thus evident that all parties, and presumably the court, were well aware that the attorney's fees for time expended in establishing a reasonable fee could not be assessed against the Estate under the law in existence when the attorneys were retained, when they rendered their services, and when they litigated the reasonableness of their fees, based on Platt's interpretation of section 733.617 (1991). By waiting until after October 1 to sign the final judgments, the lower court was apparently satisfied that the statute had become effective and could properly be applied.

The Fourth District also seized upon the date of the final judgment as the operative one by stating in its opinion that because the fee proceeding was "concluded in the trial court in December, 1993,"[16] that the new statute applied. Bitterman, 685 So. 2d at 865. In so doing, the Fourth District erred. Application of this new statute to increase the attorney's fee obligation on the Estate as to services rendered before its effective date -- and, for the most part, before it was even enacted -- violated the Estate's basic constitutional due process guarantees. The rule announced by the Fourth District in

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[15] The probate court relied on other grounds as well, to be discussed later in this brief

[16] That date is erroneous, since the final judgments were signed in November, 1993 (R.663-668; RR.200-212).

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Bitterman adopting the date of the fee award as the determinative one not only conflicts with Williams but is directly contrary to this Court's opinions in L. Ross, Young, LaForet, and Alamo.

The Personal Representatives respectfully urge this Court to quash Bitterman and to approve the rule announced in Williams II and Williams III that the operative date for application of section 733.6171 is the date the personal representative's attorneys embark upon their representation of the Estate.

Quashing Bitterman Requires Reversal and Remand of Both Fee Awards

A resolution of the conflict in favor of the Williams rule will affect this Estate as follows. Since the probate court specifically relied upon section 733.6171(7) in allowing fees to the Administrator Ad Litem and his counsel for the significant portion of their fees awarded for litigating the amount thereof (R.667, paragraph 13), and since the court cited no other basis for awarding those fees, that entire award must be remanded with directions that the post-discharge fees be excluded from the computation.[17] The Fourth District's award of appellate attorney's fees must also be set aside, since appellate fees are not allowed where the sole issue is the reasonableness of an award of fees. See Solid Waste Authority of Palm Beach County v. Parker, 622. So. 2d 1014 (Fla. 4th DCA 1993), citing Platt, 586 So. 2d at 336. For the same reason, any motion for attorney's fees which may be filed in this Court by the Administrator's counsel must also be denied.

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[17] This would encompass not only the time spent by the Administrator and his law firm for the actual 733.6175 reasonableness proceeding, but also the unexplained increase in their bill from the first post-discharge bill of $20,486.14 (January 21, 1993 letter, R.681) and their April 14, 1993 demand for $27,500.00 (R.683) submitted in response to the Personal Representative's request for more detailed billing information (R.682).

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The Fourth District also erred in affirming the probate courts retroactive application of section 733.6171(7) in the Boose, Casey final judgment (RR.212). However, both the probate court and the Fourth District committed further error in that case by relying upon additional bases for assessment of Boose, Casey's time spent in determining the amount of its fee. Those issues will be discussed in Point II of this brief. Should this Court agree with the Personal Representatives on each of these points, then the Boose, Casey final judgment should be reversed with directions that the additional $20,000.00 should be stricken. By the same token, the Fourth District's award of appellate fees to Boose, Casey should also be set aside, and any application to this Court for fees should be denied.

POINT II

THE PROBATE COURT AND THE FOURTH DISTRICT COURT OF APPEAL IMPROPERLY APPLIED SECTION 57.105 AND RELIED UPON OBSOLETE CASE LAW TO IMPOSE AN ADDITIONAL PENALTY ON THE ESTATE FOR REQUIRING THE ATTORNEYS TO ESTABLISH THE REASONABLENESS OF THEIR COMPENSATION.

As noted earlier in this brief, the probate court justified its award of post-discharge fees to the Administrator and his law firm solely on the theory that section 733.6171(7) applied and permitted such an award.[18] As to Boose, Casey, however, the trial court specifically found that the objections raised by Boose, Casey's client, Co-Personal Representative Stephan Bitterman, were frivolous and without merit and lacked any justiciable issue of law or fact. Accordingly, the court awarded an additional fee of

[18] Arguably, the Fourth District may also have considered In re DuVal's Estate, 174 So. 2d 480 (Fla. 2nd DCA 1965), in awarding appellate attorney's fees to the Administrator, since Mr. Matwiczyk relied in part on that case in his motion for appellate fees.

$20,000.00 pursuant to section 57.105, Florida Statutes (RR.209). The court also relied on obsolete case law to support its award of the additional fees (RR.225228). However, neither the statute nor the case law supports that award.

Section 57.105 Should Not Have Been Applied Bv The Probate Court

As this Court held in Whitten v. Proqressive Casualty Ins. Co., 410 So. 2d 501, 505 (Fla. 1982), section 57.105 is in derogation of the common law and must be strictly construed. Fees may not be awarded under that statute unless the party seeking fees is a "prevailing party" and unless there was "a complete absence of a justiciable issue of either law or fact raised by the losing party." Section 57,105 (I), Fla. Stats. Since Boose, Casey was not a "prevailing party" as the term is used in the statute, and since the reasonableness of its fee was certainly a 'justiciable issue," section 57.105 should never have been applied to a section 733.6175 proceeding at all. Moreover, numerous justiciable issues of law and fact were raised throughout the fee proceeding, precluding a 57.105 award.

As this Court explained in Thornber v. Citv of Fort Walton Beach, 568 So. 2d 914, 919 (Fla. 1990), the purpose of section 57.105 is "to discourage baseless claims, stonewall defenses, and sham appeals in civil litigation" by requiring losing parties to pay the price of such litigation. In the present case, however, the Personal Representatives were simply asking the probate court to review the reasonableness of the compensation to be paid to the law firms, as they had the right to do pursuant to section 733.6175, Florida Statutes. That statute provides that upon the petition of any interested person bearing the impact of payment, the reasonableness of compensation to any person employed by the personal representative may be reviewed by the court. The Estate never

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claimed that the law firms were entitled to no compensation at all; rather, the Personal Representatives simply required them to establish the reasonableness of their compensation to the satisfaction of the court.

Section 733.6175 places the burden of proof as to the propriety, reasonableness and necessity of attorney's fees upon the party seeking them. Beck v. Beck, 383 So. 2d 268, 271 (Fla. 3rd DCA 1980). The probate court has an obligation to review and determine the reasonableness of compensation to be paid to an attorney for a personal representative. Richardson v. Jones, 508 So. 2d 739, 740 (Fla. 2nd DCA), rev. denied, 518 So. 2d 1277 (Fla. 1987). It was a foregone conclusion that both the Administrator and Boose, Casey would receive their fees from the Estate; the only question was a determination of the reasonable amount. It was clearly necessary that a section 733.6175 hearing be conducted, since this Court has required in Platt, 586 So. 2d at 336, that a Rowe[19] lodestar determination be made. Thus, this is not a situation in which the concepts of a "prevailing" and a "losing" party can have any application.

For the same reason, a reasonableness proceeding under section 733.6175 cannot, as a matter of law, be considered to lack any justiciable issue of law or fact. The Legislature has provided for such a proceeding, with the burden placed upon the party seeking payment of the fees. This Court has specifically required that the court determine a reasonable hourly rate and the number of hours reasonably expended by the attorneys in probate cases. Platt, 586 So. 2d at 335. Even if the probate court were to award every penny sought by the attorneys, despite the cross-examination of the attorneys and their

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[19] Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

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expert by the Personal Representatives as to the reasonableness and necessity of various items and duplication of services, that still cannot transform the entire proceeding into a "frivolous" one. As this Court has held, merely losing is not enough to invoke the operation of the statute; a claim must be frivolous or entirely devoid of even arguable substance before the rule may be applied. Whitten, 410 So. 2d at 506. Even where a substantial portion of an action is meritless, section 57.105 fees may not be awarded if any justiciable issues are present. Muckenfuss v. Deltona Corp., 508 So. 2d 340, 341 (Fla. 1987).

Since any interested party, including the personal representative, has the right under section 733.6175 to seek judicial review of the reasonableness of compensation, a probate court should not apply section 57.105 to such proceedings, even if the court ultimately determines based on its lodestar analysis and application of all statutory criteria under Platt that the fees sought by the attorneys were reasonable. If the Fourth District's Bitterman opinion remains the law in this area, personal representatives will be most reluctant to exercise their duty to require attorneys to justify the fees billed to the estate, for fear that the trial court might assess section 57.105 fees if it agrees with the attorney's view of a reasonable fee. That rule will have a "chilling effect" on the administration of estates, contrary to the legislative purpose in providing the 733.6175 mechanism for determining the reasonableness of compensation.

With specific regard to the present case, it appears that Boose, Casey had agreed to submit monthly billings to the Estate which would detail the work performed and the person involved, so that the Personal Representative could question or comment upon each bill (RR.104). However, it had failed to do so. Boose, Casey did not submit its final

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fee statement until after the Personal Representatives filed a motion to require production of the statement several months after Boose, Casey was discharged (R.443-445, 460). Thus, without even addressing the specifics of the factual and legal issues raised at the attorney's fee hearing, the proceeding as a whole was justified because the Personal Representatives were entitled to require substantiation of the services rendered, particularly since monthly detailed billings were not provided as promised.

In any event, the Personal Representatives raised numerous issues of law and fact with respect to the reasonableness of the fees sought. These included the question of whether section 733.617 or section 733.6171 was the controlling statute; whether section 733.6171, if it applied, authorized recovery of "fees on fees;" whether the language "including fees for the personal representative's attorney" in section 733.6171 included fees for a former attorney trying to obtain fees as well as the current personal representative's attorney; whether Boose, Casey should be awarded fees for certain activities which the Personal Representatives alleged should properly have been the responsibility of the Administrator Ad Litem; whether any of the time spent by Boose, Casey was for services rendered to Stephan Bitterman personally rather than as Personal Representative; whether duplicate time for internal meetings among various members of the Boose, Casey firm was compensable, as well as other issues. In light of these justiciable issues of law and fact presented to the probate court for resolution, imposition of a section 57.105 penalty was wholly unjustified.

Section 57.105 Should Not Have Been Applied By The Appellate Court

Since the Fourth District granted Boose, Casey's motion for appellate attorney's fees, which had relied in part upon section 57.105, it is also necessary to address whether

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the appellate court could appropriately find this to have been a frivolous appeal. The Personal Representatives submit that even though the Fourth District affirmed the judgments, their appeal from the Boose, Casey final judgment could not be considered frivolous as a matter of law. In Whitten, this Court quoted the definition of a "frivolous appeal" from Treat v. State ex rel Mitton, 121 Fla. 509, 510-511, 163 So. 883, 883-884 (1935) as follows:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it, i.e., against appellant or plaintiff in error.

Whitten, 410 So. 2d at 505. The Estate's appeals to the Fourth District cannot be characterized as frivolous under that definition. At the very least, the appeals contained one very important "substantial justiciable question," namely whether section 733.6171 can be retroactively applied.[20] The fact that the Fifth District reached a contrary conclusion on that point, and the very fact that this Court has accepted jurisdiction to review that conflict, is surely evidence that at least one justiciable legal issue was involved and that 57.105 fees should not have been awarded for a "frivolous appeal."

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[20] Other issues raised in the appeals include the probate court's failure to make the factual findings required by law; error in awarding fees to the Administrator for unnecessary time spent in promoting litigation rather than pursuing settlement; error in awarding fees not properly established by the parties seeking them; awarding fees for post-discharge time; awarding fees for Boose, Casey's time spent on matters not benefitting the estate; and error in awarding fees for duplicate time spent by lawyer and paralegal.

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No Common Law Basis for Awarding "Fees on Fees"

The probate court also justified its award of the additional $20,000.00 fee to Boose, Casey on a common law basis (RR.210-212). First, relying upon State Farm Fire & Casualtv Co. v. Palma, 585 So. 2d 329 (Fla. 4th DCA 1991), quashed, 629 So. 2d 830 (Fla. 1993), and Pirretti v. Dean Witter Reynolds, Inc., 578 So. 2d 474 (Fla. 4th DCA 1991), the court held that trial courts could under certain circumstances properly award attorney's fees in connection with litigation over attorney's fees (RR.210). The probate court also relied upon In re Estate of DuVal, 174 So. 2d 580 (Fla. 2nd DCA 1965), which had permitted an award of attorney's fees for extraordinary services rendered in that case (RR.210-212). However, this Court has quashed the Fourth District's decision in Palma, see State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993), and Pirretti was also overruled sub silentio by that opinion. Moreover, DuVal was no longer good law after this Court's decision in In re Estate of Platt. Indeed, the probate court refused to apply Platt, concluding that its holding that hours spent by an attorney in collecting his fees were not compensable, Platt, 586 So. 2d at 336, was mere "dicta" and should not apply in this case (RR.21 0).

The Fourth District, while simply avoiding reference to Platt rather than openly refusing to apply it, and while citing this Court's Palma decision rather than its own previously quashed opinion in that case, nonetheless affirmed the probate court in all respects. Bitterman, 685 So. 2d at 866. The Personal Representatives respectfully suggest that both the probate court and the Fourth District misapplied the law and misconstrued the record, and that the additional fees awarded to Boose, Casey at the trial and appellate levels are not supported by these common law theories.

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This Court has already held in Platt that an estate is not required to pay fees to an attorney for time spent in collecting his fees from the estate under section 733.617, Florida Statutes (1991). Platt, 586 So. 2d at 336. The probate court deliberately decided not to apply Platt in this case on the basis that it was mere dicta, and because of its citation to Crittenden Orange Blossom Fruit v. Stone, 514 So. 2d 351, 353 (Fla. 1987), a case involving the worker's compensation act (RR.210). The final judgment did not explain why it considered this Court's holding to be mere dicta. It is noteworthy that the Fourth District at least did not repeat that same error in its opinion in Bitterman; indeed, in an earlier opinion it had recognized that Platt prohibited such "fees on fees" in estate cases. See Solid Waste Authority, 622 So. 2d at 1014.

Both the probate court and the Fourth District also relied on an earlier opinion from the latter court, Pirretti v. Dean Witter Reynolds, Inc., 578 So. 2d 474 (Fla. 4th DCA 1991). In Pirretti, the court affirmed an award of fees for litigating the issue of attorney's fees, including contesting the amount of the fee award as well as entitlement. Pirretti, 578 So. 2d at 476. That decision, however, is no longer an accurate statement of the law after this Court's Palma decision, which held that time spent in determining entitlement to fees may be recovered, but time spent in determining the amount thereof is not recoverable. Palma, 629 So. 2d at 833. It can no longer provide support for an award of attorney's fees which are incurred solely for determining the amount of fees to be collected by that attorney.

While this Court's Palma decision involved application of section 627.428, Florida Statutes (providing for attorney's fees to an insured in a dispute with an insurer), its rationale that fees should not be awarded for litigating the amount of fees has been

applied in other contexts as well. Thus, in Seminole Countv v. Butler, 676 So. 2d 451 (Fla. 5th DCA 1996), rev. denied, 686 So. 2d 581 (Fla. 1997), an eminent domain case, the court refused to allow an award of fees for the attorney's time spent on litigating the correct amount of fees "because the client has no interest in the issue of the amount of fees," citing Palma. Seminole County, 676 So. 2d at 455. A fee for determining the amount of attorney's fees was also denied in Florida Birth Related Neurological Injury Compensation Ass'n. v. Carreras, 633 So. 2d 1103, 1107 (Fla. 3rd DCA 1994), again citing Palma, even where there has been an award of attorney's fees pursuant to section 57.105, the portion of that award which represents the attorney's time spent establishing the amount of fees was reversed because there was no statutory basis for such an award. Again, the court cited Palma in support of that conclusion. Eisman v. Ross, 664 So. 2d 1128, 1129 (Fla. 3rd DCA 1995), rev. dismissed, 668 So. 2d 603 (Fla. 1996).

Finally, it must be noted that this Court's rationale for refusing to allow such an award in Palma was based upon the fact that the client no longer has an interest in determining the amount of the attorney's fee. When applied to the present case, the error of permitting "fees on fees" in a section 733.6175 proceeding becomes all the more apparent. This is so because the "client" in such cases -- the Personal Representative -- not only will not benefit from litigating the amount of the award, but will in fact have to pay the award.

The award of additional attorney's fees also cannot be justified by application of the Second District's 1965 DuVal opinion, since it is now obsolete. At the time DuVal was decided, there were no statutory guidelines for determining an appropriate fee to counsel

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for a personal representative. The controlling statute at the time provided a formula for compensation of the personal representative but no guidelines at all for a determination of attorney's fees to the personal representative's counsel.*' Unlike the statute which controls the present proceedings," under the 1965 statute county judges were expected to determine attorney's fees based on the value of the probate estate and the judge's general familiarity with the estate and the services rendered therein. DuVal, 174 So. 2d at 588, 589. It was at that time considered both unnecessary and inappropriate to require evidence as to the specifics of the legal services rendered, because such matters were "generally within the knowledge of the County Judge." Id. at 589.

The personal representative in DuVal had engaged in vexatious discovery as well as trying to prevent the county court from determining fees in the first place.[23] In addition, the personal representative had tried to have the value of the estate's inventory revised downward so as to reduce the amount of fees; then, after the court awarded fees, he refused to pay them. In affirming the county judge's award of attorney's fees, the Second

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[21] Section 734.01(2), Florida Statutes (1965), repealed by Florida Probate Code, Ch. 74-106, Laws of Fla., effective January 1, 1976, simply provided: "Any attorney who has rendered services to an estate or the personal representative may apply to the court by petition for an order making an allowance for attorney's fees, and, after notice to persons adversely affected, the court shall make such order with respect thereto as shall be proper."

[22] Section 733.617(1), Florida Statutes (1991), specifically provides that the time and labor expended are appropriate criteria to be considered, and Platt requires a lodestar determination.

[23] The personal representative tried to have the case transferred to circuit court, then federal court, and then certified to the appellate court. When that proved unsuccessful, he filed a counterclaim for damages in an attempt to obtain a trial by jury. DuVal, 174 So. 2d at 584-586.

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District found that the attorneys had been required to perform extraordinary services because of the great lengths to which the personal representative had gone in attempting to prevent a determination of fees. Id. at 586.

Although both the probate judge and the Fourth District have relied upon DuVal in part in assessing additional fees against the Bitterman Estate, DuVal is no longer viable and thus cannot support such an award. The current probate code and judicial decisions have changed the law on the question of whether an estate can be required to pay additional fees to its attorney for time spent in establishing the reasonable amount of the attorney's fee. As to estates such as the present one, where section 733.6171(7) does not yet apply, the rule is that established by this Court in In re Platt, as well as the general prohibition against such fees decreed by this Court in Palma. As to attorneys who render services to an estate beginning after October 1, 1993, their entitlement to fees will be governed by section 733.6171(7). In neither circumstance, however, does DuVal have any application. It can no longer logically co-exist with Platt, Palma, section 733.617, section 733.6171(7) and section 733.6175, Florida Statutes, which now control questions of how attorney's fees are to be determined in estate matters and whether "fees on fees" may be awarded. Given all of these developments in the law since DuVal was decided, it is clearly obsolete and should be expressly overruled by this Court.

Even if DuVal still represented the law today, it could not support an award of additional fees in the present case. Unlike DuVal, where the personal representative used extraordinary means to try to prevent the court from hearing and determining a fee award, the Personal Representatives in the present case actively sought to have the probate court conduct a reasonableness proceeding under section 733.6175 (R.499-505). Unlike

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DuVal, where the personal representative took extraordinary steps to resist the payment of compensation to his former attorneys, the Personal Representatives in the present case took affirmative steps to obtain bills from the Administrator and from Boose, Casey (R.443, 682).

Moreover, it is evident from the Fourth District's opinion that the court apparently misunderstood the record with respect to the section 733.6175 proceeding when it stated that the attorneys were entitled to additional fees under DuVal because of the "inordinate legal effort required in obtaining a contested judgment for attorney's fees." Bitterman, 685 So. 2d at 866. For example, footnote three of the opinion stated:

> The record shows that Stephan Bitterman obtained an 'eleventh hour' continuance of the first fee hearing and thereafter, in the two months that followed, filed approximately 35 pleadings which necessitated a response from Matwiczyk.

The opinion fails to mention that the continuance was necessary as a result of Mr. Bitterman's illness, supported by a letter from his pulmonary specialist which directed Mr. Bitterman not to travel (R.619-621). As to the "35 pleadings," the record in the Matwiczyk appeal reveals that in the two-month period after the continuance, the Personal Representatives filed only one motion, which sought an order resetting the fee hearing (R.627-629). Everything else during that two-month period was filed by Mr. Matwiczyk (R.632, 633, 634, 643, 645, 647, 655) except for the Personal Representatives' responses to discovery (R.635, 637, 639, 641, 649, 650) and exhibit lists (R.651, 653, 657). During the same two-month period, the record in the Boose, Casey appeal reveals that the Personal Representatives did not file a single pleading, whereas Boose, Casey filed 13 (RR.74-184).

Additional Fees Were Unjustified on Any Theory

As discussed in Point I of this brief, the award of additional fees cannot be supported by section 733.6171, Florida Statutes (1993) since that statute cannot be retroactively applied to the fee determination in this Estate. The alternative grounds relied upon by the lower courts, section 57.105, DuVal Pirretti and the quashed Palma opinion, cannot sustain the award of any additional fees for the reasons discussed above. Accordingly, the awards to both the Administrator and Boose, Casey must be set aside and remanded with directions that they be redetermined based upon section 733.617 as interpreted by this Court in Platt.

POINT III

THE PROBATE COURT ABUSED ITS DISCRETION IN THE AMOUNT OF ATTORNEY'S FEES AWARDED TO BOTH LAW FIRMS FOR THEIR PRE-DISCHARGE SERVICES.[24]

The Personal Representatives recognize that the standard of review of a contested fee proceeding is whether the lower court abused its discretion in finding that the fees were reasonable and necessary, and that the lower court's findings are presumed to be correct. In re Estate of Murphy, 336 So. 2d 697,698 (Fla. 3rd DCA 1976). However, such orders are not impervious to review, and a fee award will be reversed where the fee cannot be justified based on the factors set forth in section 733.617, Florida Statutes. See Phipps v. Estate of Burdine, 586 So. 2d 381, 383 (Fla. 5th DCA 1991).

[24] Since this Court has accepted this case for review, the entire case is now before this Court on the merits. Bould v. Touchette, 349 So. 2d 1181, 1183 (Fla. 1977).

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The Personal Representatives do not dispute that there was evidence to support much of the fee award in each case. However, several aspects of the fee awards are demonstrably contrary to the record. Accordingly, this Court can and should reverse with directions that further proceedings be conducted to determine the amount of fees to be awarded to both the Administrator and Boose, Casey for their services rendered during the administration of the Estate.

For example, Mr. Matwictyk conceded at the hearing that although his firm had demanded on April 14, 1993 that the Estate agree within 48 hours to pay $27,500.00 (R.683), that figure was approximately $5,500.00 higher than the computer run which accompanied the letter (T.137). He could not explain this discrepancy at the hearing (T.138). Nonetheless, the court awarded him $36,567.50 (R.667).

Similarly, while it was admitted, and the court found, that a .4 hour reduction should be made from the Boose, Casey bill because it reflected time spent in preparing an answer on behalf of a beneficiary rather than the Estate (RR.204-205), the bills in evidence showed that much more time was devoted by the firm to that same issue (Petitioner's Exhibit 4; R.711), such as attorney time attending the September 10, 1992 hearing on the motion to strike the answer and drafting a second answer. Moreover, the expert witness who testified on behalf of both the Administrator and Boose, Casey admitted that he had made no effort to determine what portion of Boose, Casey's time was expended on behalf of the Estate as distinguished from their client as an individual after the Administrator assumed his duties (T.193-195).

As counsel for the Personal Representatives argued in closing, the Boose, Casey bill contained numerous entries for services as to issues for which the Administrator had

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been appointed, and that Boose, Casey's services in connection with those issues would have necessarily been for Mr. Bitterman as an individual (T.347-348). Although the party seeking fees had the burden to establish what services were reasonably performed for the Estate, neither the attorney who testified for Boose, Casey nor their expert presented evidence as to which services were appropriately rendered for the Estate (T. 113-114, 193-195). Since the Administrator was solely responsible for those aspects of estate administration for which he had been appointed, see Woolf v. Reed, 389 So. 2d 1026, 1028 (Fla. 3rd DCA 1980), Boose, Casey's services performed for Mr. Bitterman as to those issues were necessarily rendered to him as an individual beneficiary, and thus should not have been charged against the Estate. See Heirs of the Estate of Waldon v. Rotella, 427 So. 2d 261, 264 (Fla. 5th DCA 1983).

Because the parties seeking compensation in this proceeding failed to carry the burden imposed upon them by section 733.617, Florida Statutes, to establish the reasonableness and necessity of all the fees awarded, the judgments should be reversed.

CONCLUSION

Because the Fifth District correctly held in its Williams decisions that section 733.6171(7) may not constitutionally be applied to services rendered prior to its effective date, this Court should approve those decisions and quash Bitterman. This Court should also hold that section 57.105(1), Florida Statutes, should not be applied to a section 733.6175 proceeding to determine the reasonableness of fees to be paid by an estate to its attorneys. Finally, the Personal Representatives urge that this Court should, in order to prevent further confusion, expressly overrule the Second District's 1965 DuVal opinion.

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Such a ruling from this Court will further require that the **case** be remanded with directions that no fees be awarded for time spent by the Administrator and two law firms after they were discharged from their responsibility to the Estate. This Court should further direct on remand that the amount of fees awarded to both firms for their pre-discharge time be redetermined, and that only the amount fully established as reasonable and necessary prior to discharge should be awarded.

Respectfully submitted,

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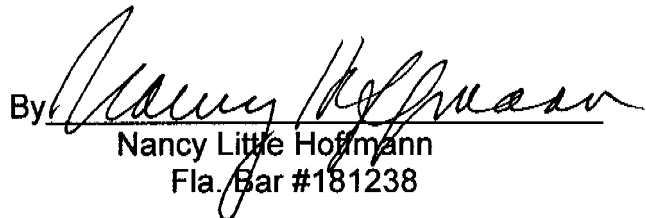

By ______________________
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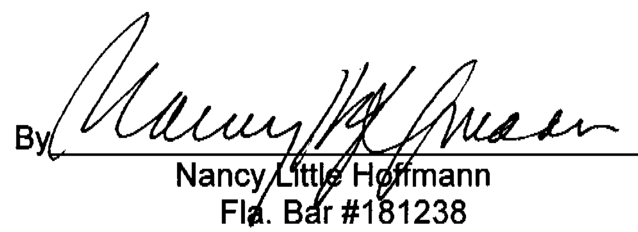
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail this 28th day of July, 1997, to: **BRIAN B. JOSLYN, ESQUIRE and RONALD E. CRESCENZO, ESQUIRE,** Boose, Casey, Ciklin, Lubitz, et al., 515 North Flagler Drive, Northbridge Tower - 18th Floor, West Palm Beach, Florida 33401, Counsel for Respondent, Boose, Casey;

and **JOHN R. HARGROVE, ESQUIRE and W. KENT BROWN, ESQUIRE,** Heinrich, Gordon, Hargrove, et al., 500 East Broward Boulevard, Broward Financial Center, 10th Floor, Fort Lauderdale, Florida 33301, Counsel for Respondents Peter Matwiczyk and Mettler & Matwiczyk; and **JOHN BERANEK, ESQUIRE,** Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302, Co-Counsel for Petitioners.



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