

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 625 Compensation in Estate Administration

**SPONSOR(S):** Judiciary Committee, Yarborough

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	15 Y, 0 N	Mathews	Jones
2) Judiciary Committee	19 Y, 0 N, As CS	Mathews	Kramer

### SUMMARY ANALYSIS

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. A will is a legal document that a person (testator) uses to direct how his or her property is distributed upon death. A personal representative, who is a person designated by a will or the circuit court to administer an estate, must provide a notice of administration to various parties, including family members, beneficiaries, and other entities.

A personal representative may hire an attorney who specializes in probate and estate administration to help carry out the duties of the representative. Section 733.6171, F.S., identifies a compensation schedule for such attorney based on the compensable value of the subject estate, and compensation of an attorney is presumed to be reasonable if it is calculated pursuant to the schedule. An attorney fee for certain extraordinary professional services may be presumed reasonable if it is above the schedule rates. Under current law, the attorney, personal representative, and interested parties may agree to the compensation structure in s. 733.6171 or may structure compensation in a different manner. If the parties cannot reach an agreement on compensation, either party may petition the court for a determination on compensation. Section 736.1007, F.S., provides somewhat similar guidelines for determining a reasonable attorney fee for legal services relating to a trust.

CS/HB 625 amends ss. 733.6171 and 736.1007, F.S., to require that certain disclosures be made by an attorney to the personal representative or trustee in an estate or initial trust administration. The PCS clarifies that if an attorney intends to use the statutory schedule for the determination of fees in an estate or initial trust administration, he or she must make specified disclosures to the personal representative or trustee and must obtain his or her signature acknowledging receipt of such disclosures. An attorney who fails to provide the required disclosures may not be paid for legal services without prior court approval of the fees or the written consent of all interested parties or qualified beneficiaries.

The bill is not likely to have a fiscal impact on state or local government.

The bill provides an effective date of October 1, 2021. The bill is applicable to initial estate and initial trust administrations commenced on or after the effective date.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Probate Administration

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. A will is a legal document that a person (a testator) uses to direct the disposition of his or her property upon death. A will does not necessarily dispose of all of a testator's property, but only the estate, which is those assets that are subject to probate administration.<sup>1</sup> Other assets may be disposed of outside of probate.

Depending on the size and complexity of the estate, a personal representative may hire an attorney to assist in carrying out his or her duties. Section 733.6171, F.S., provides that an attorney for the personal representative is entitled to reasonable compensation for his or her services payable from the estate without a court order. The attorney, the personal representative, and the heirs to the estate may agree to the specific compensation of the attorney. Section 733.6171 identifies a schedule of fees for the attorney which are presumed to be reasonable, based on the size of the estate, as follows:

Compensable Value of the Estate	Reasonable Compensation
\$40,000 or less	\$1,500
\$40,000 - \$70,000	\$2,250
\$70,000 - \$100,000	\$3,000
> \$100,000	\$3,000 + 3% on the next \$900,000
\$1,000,000 - \$3,000,000	2.5% for all above \$1 million and not exceeding \$3 million
\$3,000,000 - \$5,000,000	2% for all above \$3 million and not exceeding \$5 million
\$5,000,000 – \$10,000,000	1.5% for all above \$5 million and not exceeding \$10 million
> \$10,000,000	1% for all above \$10 million

An attorney for the personal representative may receive further compensation for any extraordinary service. What constitutes an extraordinary service may depend on a number of factors like the size of the estate and the number of beneficiaries. Extraordinary services may include, but are not limited to:

- A will contest;
- Will drafting and construction;
- A proceeding for the determination of beneficiaries;
- A contested claim;
- An elective share proceeding;
- Apportionment of estate taxes;
- An adversarial proceeding;
- Litigation by or against the estate;
- Representation during an audit;
- Tax advice on post mortem planning;
- Review of estate tax return and preparation of other associated returns;
- Preparation of the estate's federal tax return;
- Purchase, sale, lease, or encumbrance of real property by the personal representative;
- Legal advice regarding the decedent's business or commercial activity;
- Legal advice regarding claims for damage to environment or similar proceedings;

<sup>1</sup> S. 732.201(14), F.S.  
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- Legal advice related to homestead status of real property;
- Involvement in fiduciary, employee, or attorney compensation disputes; or
- Administration of assets not subject to administration in Florida.<sup>2</sup>

Upon the petition of any interested party, the court may increase or decrease the compensation for ordinary services of the attorney or award compensation for the performance of extraordinary services. When making a determination regarding reasonable compensation, the court must consider the:

- Promptness, efficiency, and skill with which the administration was handled by the attorney;
- Responsibilities assumed by and the potential liabilities of the attorney;
- Nature and value of the assets;
- Benefits or detriments resulting to the estate or interested parties from the attorney's services;
- Complexity or simplicity of the administration and the novelty of the issues presented;
- Attorney's participation in tax planning for the estate and the estate's beneficiaries and tax return preparation, review, or approval;
- Nature of the probate, nonprobate, and exempt asset, the expenses of administration, the liabilities of the decedent, and the compensation paid to other professionals and fiduciaries;
- Delay in payment of the compensation after the services were furnished; and
- Other relevant factors the court deems appropriate.<sup>3</sup>

Fees and costs awarded under s. 733.106, F.S., are payable from the estate. The court has the discretion to assess the burden of the fees paid from the estate to the part of the estate of the person who should be equitably charged for the fees.<sup>4</sup> However, the assessment is limited to the value of that person's interest in the estate. If the fees and costs awarded are in excess of the person's share of the estate, there is no personal liability for the fees and costs on the part of such person.<sup>5</sup>

### Trust Administration

S. 736.1007, F.S., authorizes the trustee of a revocable trust to retain an attorney in connection with the initial administration of the trust.<sup>6</sup> Such attorney is entitled to reasonable compensation for the legal services provided, payable from the assets of the trust, without a court order.<sup>7</sup> Currently, a trustee and an attorney may agree to compensation outside the manner or amount provided under s. 736.1007, F.S., and such agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement.<sup>8</sup>

For ordinary services of an attorney employed to advise a trustee concerning the trustee's duties in the initial trust administration, compensation is presumed to be reasonable if it is based on the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in s. 733.6171(3)(a)-(h).<sup>9</sup>

Ordinary services of an attorney in an initial trust administration include legal advice and representation concerning the trustee's duties relating to the following:

- Review of the trust instrument and each amendment for legal sufficiency and interpretation;
- Implementation of substitution of the successor trustee;
- Persons who must or should be served with required notices and the method and timing of such service;

<sup>2</sup> S. 733.6171(4), F.S.

<sup>3</sup> S. 733.6171(5), F.S.

<sup>4</sup> S. 733.106(4), F.S.

<sup>5</sup> *Dourado v. Chousa*, 604 So. 2d 864, 866 (Fla. 5th DCA 1992).

<sup>6</sup> S. 736.1007(8), F.S., defines "initial trust administration" as the administration of a revocable trust during the period that begins with the death of the settlor and ends on the final distribution of trust assets outright or to continuing trusts created under the trust agreement but, if an estate tax return is required, not until after issuance of an estate tax closing letter or other evidence of termination of the estate tax proceeding. This initial period is not intended to include continued regular administration of the trust.

<sup>7</sup> Ss. 736.1007(1) and 736.0802(10), F.S.

<sup>8</sup> S. 736.1007(1), F.S.

<sup>9</sup> S. 736.1007(2), F.S.

- The obligation of a successor to require a former trustee to provide an accounting;
- The trustee's duty to protect, insure, and manage trust assets and the trustee's liability relating to these duties;
- The trustee's duty regarding investments imposed by the prudent investor rule;
- The trustee's obligation to inform and account to beneficiaries and the method of satisfaction of such obligations, the liability of the trust and trustee to the settlor's creditors, and the advisability or necessity for probate proceedings to bar creditors;
- Contributions due to the personal representative of the settlor's estate for payment of expenses of administration and obligations of the settlor's estate;
- Identifying tax returns required to be filed by the trustee, the trustee's liability for payment of taxes, and the due date of returns;
- Filing a nontaxable affidavit, if not filed by a personal representative;
- Order of payment of expenses of administration of the trust and order and priority of abatement of trust distributions;
- Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument;
- Preparation of any legal documents required to effect distribution;
- Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries;
- If there is a conflict of interest between a trustee who is a beneficiary and other beneficiaries of the trust, advice to the trustee on limitations of certain authority of the trustee regarding discretionary distributions or exercise of certain powers and alternatives for appointment of an independent trustee and appropriate procedures; and
- Procedures for the trustee's discharge from liability for administration of the trust on termination or resignation.<sup>10</sup>

An attorney for the trustee must also be allowed further reasonable compensation for the provision of extraordinary services.<sup>11</sup> Extraordinary services may include the following:<sup>12</sup>

- Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust;
- Representation of the trustee in an audit or any proceeding for adjustment, determination, or collection of any taxes;
- Tax advice on postmortem tax planning;<sup>13</sup>
- Review of an estate tax return and preparation or review of other tax returns required to be filed by the trustee;
- Preparation of decedent's federal estate tax return;<sup>14</sup>
- Purchase, sale, lease, or encumbrance of real property by the trustee or involvement in zoning, land use, environmental, or other similar matters;
- Legal advice regarding carrying on of decedent's business or conducting other commercial activity by the trustee;
- Legal advice regarding claims for damage to the environment or related procedures;
- Legal advice regarding homestead status of trust real property or proceedings involving the status;

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<sup>10</sup> S. 736.1007(4), F.S.

<sup>11</sup> S. 736.1007(5), F.S.

<sup>12</sup> *Id.*

<sup>13</sup> S. 736.1007(5)(c), F.S., provides that tax advice on postmortem tax planning, includes, but is not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges,<sup>1</sup> deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release from personal liability for payment of tax.

<sup>14</sup> S. 736.1007(5)(e), F.S., provides that if the estate tax return is prepared by the attorney, a fee of one-half of 1 percent up to a value of \$10 million and one-fourth of 1 percent on the value in excess of \$10 million, of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.

- Involvement in fiduciary, employee, or attorney compensation disputes; and
- Considerations of special valuation of trust assets, including discounts for blockage, minority interests, lack of marketability, and environmental liability.<sup>15</sup>

A court may increase or decrease the compensation for ordinary services of an attorney or award compensation for extraordinary services if the facts or particular circumstances warrant such modification.<sup>16</sup> The court must consider all of the following factors in determining whether the additional fees for extraordinary services are reasonable:

- The promptness, efficiency, and skill with which the initial administration was handled by the attorney;
- The responsibilities assumed by, and potential liabilities of, the attorney;
- The nature and value of the assets that are affected by the decedent's death;
- The benefits or detriments resulting to the trust or the trust's beneficiaries from the attorney's services;
- The complexity or simplicity of the administration and the novelty of issues presented;
- The attorney's participation in tax planning for the estate, the trust, and the trust's beneficiaries and tax return preparation or review and approval;
- The nature of the trust assets, the expenses of administration, and the claims payable by the trust and the compensation paid to other professionals and fiduciaries;
- Any delay in payment of the compensation after the services were furnished; and
- Any other relevant factors.<sup>17</sup>

If a separate written agreement regarding compensation exists between an attorney and the settlor, the attorney must furnish a copy to the trustee prior to the commencement of employment and, if employed, must promptly serve a copy on all qualified beneficiaries.<sup>18</sup> In such a case, the trustee is not obligated to employ the attorney and the attorney is not obligated to accept representation; however, if the attorney who is a party to the agreement or who drafted the trust is employed, the compensation cannot exceed the amount provided for in the agreement.<sup>19</sup>

## Effect of Proposed Changes

### Probate Administration

CS/HB 625 amends s. 733.6171, to require certain disclosures to be made, in writing, by an attorney to the personal representative of an estate. Specifically, if an attorney representing the personal representative intends to charge a fee based upon the schedule provided under s. 733.6171(3), he or she must make the following specific written disclosures to the personal representative:

- There is not a mandatory statutory attorney fee for estate administration.
- The attorney fee is not required to be based on the size of the estate, and the presumed reasonable fee schedule may not be appropriate in all estate administrations.
- The fee is subject to negotiation between the personal representative and the attorney.
- The selection of the attorney is made at the discretion of the personal representative, who is not required to select the attorney who prepared the will.

An attorney must obtain the personal representative's signature acknowledging the required disclosures. If an attorney fails to make the required disclosures, he or she may not be paid for legal services without prior approval of the fees by the court or the written consent of all interested parties.

The bill provides for the payment of additional or increased fees to the attorney for any extraordinary services provided. Extraordinary service may be based upon the size and complexity of the estate as well as other factors currently provided under s. 733.6171(4), F.S.

<sup>15</sup> S. 736.1007(5), F.S.

<sup>16</sup> S. 736.1007(6), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> S. 736.1007(7), F.S.

<sup>19</sup> *Id.*

The bill amends the factors a court uses to determine whether to increase or decrease fees to include consideration of any agreement relating to the attorney's compensation and whether written disclosures were made to the personal representative in a timely manner under the circumstances.

### Trust Administration

The bill amends s. 736.1007, F.S., to require certain disclosures to be made in writing by an attorney to the trustee of a revocable trust in connection with the initial administration of the trust. The bill clarifies that an attorney for a trustee is entitled to reasonable compensation for his or her legal services, payable from the assets of the trust, and that the attorney may use the schedule outlined in s. 736.1007(2), F.S., to calculate reasonable fees or may use an alternative method if the trustee agrees to such.

If an attorney intends to use the statutory schedule to calculate his or her fees, he or she must make the following disclosures to the trustee, in writing:

- There is not a mandatory statutory attorney fee for trust administration.
- The attorney fee is not required to be based on the size of the trust, and the presumed reasonable fee schedule may not be appropriate in all trust administrations.
- The fee is subject to negotiation between the trustee and the attorney.
- The selection of the attorney is made at the discretion of the trustee, who is not required to select the attorney who prepared the trust.

An attorney must obtain the trustee's signature acknowledging the required disclosures. If an attorney fails to make the required disclosures, he or she may not be paid for legal services without prior approval of the fees by the court or the written consent of the trustee and all qualified beneficiaries.

The bill provides for the payment of additional or increased fees to the attorney for any extraordinary services provided. Extraordinary service may be based upon the size and complexity of the trust as well as other factors currently provided under s. 736.1007(5), F.S.

The bill amends the factors a court uses to determine whether to increase or decrease fees to include consideration of any agreement relating to the attorney's compensation and whether written disclosures were made to the trustee in a timely manner under the circumstances.

The bill provides an effective date of October 1, 2021, and specifies that it is applicable to initial estate and initial trust administrations commenced on or after the effective date.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 733.6171(3), F.S., relating to compensation of attorney for the personal representative.

**Section 2:** Amends s. 736.1007, F.S., relating to trustee's attorney fees.

**Section 3:** Provides an application provision specifying that the act shall apply to estate and initial trust administrations commenced on or after October 1, 2021.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may have a positive economic impact on the private sector for attorneys who practice probate and estate administration through the expansion of compensatory options allowed. However, the bill may have a negative fiscal impact on the private sector through potentially increased rates paid out of an estate to the attorney for the personal representative, resulting in a smaller amount in the estate potentially being distributed to the interested parties.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On April 6, 2021, the Judiciary Committee adopted a proposed committee substitute and one amendment and reported the bill favorably as a committee substitute. The PCS, as amended, differed from the original bill in that it:

- Required certain disclosures regarding attorney fees to be made by an attorney to the personal representative or trustee in an initial estate or trust administration.
- Required a personal representative or trustee to sign an acknowledgement that he or she was provided the required disclosures.
- Prohibited an attorney who fails to make the required disclosures from being paid for legal services without prior court approval of the fees or the consent of all interested parties or qualified beneficiaries.
- Clarified that the size and complexity of an estate or trust should be considered when making a determination of extraordinary services.
- Provided an effective date of October 1, 2021.
- Provided that the bill is applicable to initial estate and initial trust administrations commenced on or after the effective date.

This analysis is drafted to the amended committee substitute as passed by the Judiciary Committee.