

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 954

INTRODUCER: Judiciary Committee and Senator Bean

SUBJECT: Attorney Compensation

DATE: March 17, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Ravelo | Cibula | JU | Fav/CS |
| 2. | | | CM | |
| 3. | | | RC | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 954 removes the estate-value-based fee schedule that is currently in place for attorneys in a probate or trust administration.

Currently, the fee schedule provides that an attorney's fee is presumed reasonable if it conforms to a calculation based on a percentage of the value of the estate. A fee of \$55,000 for an estate valued at \$2 million, for example, is presumed reasonable regardless of the amount or complexity of work conducted by the attorney. A judge, however, may increase or decrease the compensation of an attorney upon petition by an interested party.

The bill removes the presumption that a fee based on the fee schedule is reasonable and instead requires an attorney to obtain a fee disclosure statement from a prospective client in a probate or trust administration. This disclosure statement is intended to inform a prospective client that the fee is subject to negotiation and not required to be based on the value of the estate. Likewise, the disclosure provides that selection of the attorney is at the discretion of the personal representative.

The bill takes effect July 1, 2021.

II. Present Situation:

Overview

Probate is a court supervised process for identifying and gathering the assets of a deceased person, paying his or her debts, and distributing those assets to beneficiaries.¹ A personal representative is appointed to execute this process, and the representative may retain an attorney using funds from the estate.²

Section 733.6171, F.S, allows for an attorney who represents a personal representative to be compensated based on a percentage of the value of the estate.³ The Legislature has amended this section several times since it was first enacted. These amendments have generally ranged from clarifying amendments to substantive new guidelines regarding attorney compensation. Importantly, attorneys are still bound by the *Rules Regulating the Florida Bar* when considering compensation from any client.⁴ Under the Bar rules, an attorney may not charge a “clearly excessive” fee or cost.

A fee or cost is clearly excessive when:

- (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or
- (2) the fee or cost is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.⁵

Additionally, a federal district court has found that the fact that “a fee charged by an attorney for a personal representative or a trust is *presumptively* reasonable or within the statutory limit under Florida law does not mean that it is *actually* reasonable.”⁶ (Emphasis added)

Reasonable fees, according to the Bar rules are determined by taking into account:

- The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.

¹ The Florida Bar, *Consumer Pamphlet: Probate in Florida, What is Probate?* available at <https://www.floridabar.org/public/consumer/pamphlet026/#whatisprobate> (last visited Mar. 12, 2021).

² Section 733.106(2) & (3), F.S.

³ Section 733.6171(3), F.S.

⁴ Specifically, Rule 4-1.5, *Rules Regulating the Florida Bar*, covers attorney compensation.

⁵ *Id.*

⁶ *West v. Chrisman*, 518 B.R. 655 (M.D. Fla. 2014).

- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer or lawyers performing the services.
- Whether the fee is fixed or contingent.⁷

Reasonable costs, such as witness costs, may be considered by taking into account:

- The nature and extent of the disclosure made to the client about the costs;
- Whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;
- The actual amount charged by third party providers of services to the attorney;
- Whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;
- The reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and
- The relationship and past course of conduct between the lawyer and the client.⁸

Compensation for an Attorney Representing a Personal Representative, 1988

Previously, Section 733.617 (1988) covered the reasonable compensation of personal representatives as well as attorneys, accountants, appraisers, and other agents employed by the personal representative. The statute provided that “reasonable compensation *shall* be based on one or more of the following” (emphasis added):

- The time and labor required;
- The novelty and the difficulty of the questions involved, and the skill requisite to perform the service properly;
- The likelihood that the acceptance of the particular employment will preclude other employment by the person;
- The fee customarily charged in the locality for similar services;
- The nature and value of the assets of the estate, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
- The final results obtained;
- The time limitations imposed by the circumstances;
- The nature and length of the professional relationship with the decedent; and
- The experience, reputation, diligence, and ability of the person performing the service.⁹

Importantly, these provisions mirror the guidelines for attorney compensation provided in Rule 4-1.5(b)(1), *Rules Regulating the Florida Bar*.

1993 Legislation

In 1993, the Legislature created s. 733.6171, F.S., to differentiate the compensation of attorneys from others retained by a personal representative covered separately in s. 733.617, F.S.¹⁰ In contrast to the 1988 compensation structure, the new legislation allowed for attorney

⁷ R. Regulating Fla. Bar 4-1.5(b)(1).

⁸ R. Regulating Fla. Bar 4-1.5(b)(2).

⁹ Section 733.617(1), F.S. (1988).

¹⁰ See CS/HB 1295 (1993 Reg. Session).

compensation to be based on the value of the estate along with the work hours contributed.¹¹ Additionally, the statute allowed for two types of compensations: ordinary and extraordinary. While undefined, The Legislature presumably intended extraordinary compensation to apply to complex cases.¹²

Ordinary compensation was presumed reasonable if it was based on:

- An amount equal to 2 percent of the inventory value of the estate assets and the income earned by the estate during the administration and, if the estate is required to file an estate tax return, an additional 1 percent on the balance of the gross estate as finally determined for federal estate tax purposes; and
- An amount equal to the product of the number of hours reasonably expended, and a reasonable hourly rate for the attorney and for persons with special education, training, or experience, who are employed by and work under the supervision of the attorney and have furnished services in the estate administration.

The statute provided that an attorney's compensation based on the above standard could be *increased or decreased* by a court upon petition by an interested party. In determining reasonable compensation, the court would weigh various factors that were similar to the both the Fla Bar Rule 4-1.5(b)(1) and the 1988 statute. Thus, although a fee determined using the above guidelines was presumed reasonable, it was not definitive. One court, for example, awarded \$60,000 as opposed to \$265,236.57 as calculated under the statute. The court reasoned "the statute's only requirement is that attorneys receive reasonable compensation" and that the higher fee included under the calculation may not be reasonable considering the amount of time and skill required for the estate in question.¹³

Finally, the statute allows an attorney and personal representative to have an agreement determining compensation, so long as the manner of compensation was disclosed to parties bearing the impact of the compensation and there was no object. This specific provision remains in place in the current statute.

1995 Amendment

The Legislature amended s. 733.6171, F.S., in 1995 to provide a fee structure that is largely unchanged under current law. Specifically, compensation based on the value of the estate and the income earned by the estate was presumed reasonable based on the following schedule:

- \$1,500 for estates having a value of \$40,000 or less;
- An additional \$750 for estates having a value of more than \$40,000 and not exceeding \$70,000;
- An additional \$750 for estates having a value of more than \$70,000 and not exceeding \$100,000;
- For estates having a value in excess of \$100,000, at the rate of 3 percent on the next \$900,000;
- At the rate of 2.5 percent for all above \$1 million and not exceeding \$3 million;

¹¹ Section 733.617(3), F.S. (1993).

¹² The 1995 amendment, for example, provides a non-exhaustive list of eligible services that may be deemed "extraordinary" for the purpose of separate compensation. *See supra* note 11.

¹³ *Sitomer v. First of Am. Bank-Cent.*, 667 So. 2d 456, 458 (Fla. 4th DCA 1996).

- At the rate of 2 percent for all above \$3 million and not exceeding \$5 million;
- At the rate of 1.5 percent for all above \$5 million and not exceeding \$10 million; and
- At the rate of 1 percent for all above \$10 million.¹⁴

An attorney could be further compensated for any “extraordinary services,” such as more complex estates that may involve tax preparation or contested claims.¹⁵ The amendment still provided that compensation may be *increased* or *decreased* by a court upon petition by an interested party.¹⁶

Finally, the 1995 amendment provided a mechanism for a court to find an attorneys’ request for fees from the estate to be “substantially unreasonable.” The Legislature removed this language in a 2001 amendment.¹⁷

III. Effect of Proposed Changes:

The bill removes the estate-valued-based fee schedule that is currently in place for attorneys in a probate or trust administration. Under current law, a fee based on the fee schedule for compensation for *ordinary* services is presumed reasonable. An attorney could receive further

¹⁴ Section 733.6171(3), F.S. (1995).

¹⁵ Section 733.6171(4), F.S. (1995) further provided “Extraordinary services may include, but are not limited to:

- Involvement in a will contest, will construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceeding, apportionment of estate taxes, or any adversarial proceeding or litigation by or against the estate.
- Representation of the personal representative in audit or any proceeding for adjustment, determination, or collection of any taxes.
- Tax advice on postmortem tax planning, including, but 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. 6166 and 303 privileges, deduction of last illness expenses, fiscal year planning, distribution planning, asset basis considerations, 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 of personal liability for payment of tax.
- Review of estate tax return and preparation or review of other tax returns required to be filed by the personal representative.
- Preparation of the estate’s federal estate tax return. If this 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.
- Purchase, sale, lease, or encumbrance of real property by the personal representative or involvement in zoning, land use, environmental, or other similar matters.
- Legal advice regarding carrying on of the decedent’s business or conducting other commercial activity by the personal representative.
- Legal advice regarding claims for damage to the environment or related procedures.
- Legal advice regarding homestead status of real property or proceedings involving that status and services related to protected homestead.
- Involvement in fiduciary, employee, or attorney compensation disputes.
- Proceedings involving ancillary administration of assets not subject to administration in this state.

¹⁶ Section 733.6171(5), F.S. (1995).

¹⁷ See CS/HB 137 (2001 Reg. Session).

compensation if he or she provided certain *extraordinary* services.¹⁸ Likewise, a court could increase or decrease compensation based on the particularities of a case. The bill removes these provisions. However, an attorney is ethically bound to charge reasonable fees under the *Rules Regulating the Florida Bar*.¹⁹

The bill creates a duty for an attorney to obtain a fee disclosure statement when representing an estate during a probate or trust administration. The fee disclosure statement will give notice to the client that the fee is not required to be based on the value of the estate and is subject to negotiation. Additionally, the disclosure must specify that the selection of an attorney is at the discretion of the personal representative and that the personal representative is not required to select the attorney who drafted the will.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹⁸ A non-exhaustive list of *extraordinary* services eligible for additional compensation for a trust administration is covered in Section 736.1007(5), F.S. For a probate administration, this is covered in Section 733.6171(4), F.S., *see supra* note 15.

¹⁹ *See supra* note 7.

B. Private Sector Impact:

CS/SB 954 may have a positive impact for consumers and families involved in probate and estate administrations. By removing the presumption that certain fees are *per se* reasonable, the bill may encourage market competition and negotiated fees or fees based on the work necessary to execute the estate as opposed to the estate's value.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 733.6171, 736.1007, 733.106, and 736.1005.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Judiciary on March 15, 2021:**

The committee substitute changes the bill by:

- Repealing the statutory attorney fee schedule for formal estate administration along with its presumption of reasonableness.
- Creating a fee disclosure statement that requires an attorney to make certain disclosures regarding fees when representing an estate in probate.

B. Amendments:

None.