

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 Rules

BILL: CS/CS/SB 954

INTRODUCER: Rules Committee; Judiciary Committee; and Senator Bean

SUBJECT: Attorney Compensation

DATE: April 21, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|-----------|------------------|
| 1. | <u>Ravelo</u> | <u>Cibula</u> | <u>JU</u> | Fav/CS |
| 2. | <u>McMillan</u> | <u>McKay</u> | <u>CM</u> | Favorable |
| 3. | <u>Ravelo</u> | <u>Phelps</u> | <u>RC</u> | Fav/CS |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 954 creates a series of disclosures an attorney must provide when seeking to represent a personal representative in a probate proceeding or a trustee during the initial administration of a trust administration.

Current law establishes a presumption that an attorney's compensation for services for probate or trust proceedings are reasonable if the compensation conforms to a calculation based on a percentage of the value of the estate or trust. A judge, however, may increase or decrease the compensation of the attorney upon petition by an interested party.

The bill provides that when an attorney seeks compensation based on the fee schedule, the attorney must disclose, among other things, that the fee is not required to be based on the value of the estate or trust, is subject to negotiation, and that selection of the attorney is at the discretion of the personal representative or trustee.

The bill takes effect October 1, 2021.

II. Present Situation:

Probate Administration

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., 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, F.S., identifies a schedule of fees for the attorney which are presumed to be reasonable, 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;

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. 26, 2021).

² Section 733.106(2) & (3), F.S.

- 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;
- 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.³

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.⁴

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.⁵ 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.⁶

Trust Administration

Section 736.1007, F.S., authorizes the trustee of a revocable trust to retain an attorney in connection with the initial administration of the trust,⁷ and the attorney is entitled to reasonable compensation for the legal services provided, payable from the assets of the trust, without a court order.⁸ Current law also provides that a trustee and the attorney may agree to compensation

³ Section 733.6171(4), F.S.

⁴ Section 733.6171(5), F.S.

⁵ Section 733.106(4), F.S.

⁶ *Dourado v. Chousa*, 604 So. 2d 864, 866 (Fla. 5th DCA 1992).

⁷ Section 736.1007(8), F.S., defines "initial trust administration" to mean 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.

⁸ Section 736.1007(1), F.S., is subject to s. 736.0802(10), F.S.

outside of the manner or amount provided under s. 736.1007, F.S., and the 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.⁹

For ordinary services of all attorneys 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).¹⁰

Ordinary services of the 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;
- 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.¹¹

⁹ Section 736.1007(1), F.S. The statute provides that the agreement may provide that the trustee is not individually liable for the attorney fees and costs.

¹⁰ Section 736.1007(2), F.S.

¹¹ Section 736.1007(4), F.S.

For extraordinary services, the attorney for the trustee must be allowed further reasonable compensation.¹² Extraordinary services may include the following:¹³

- 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;¹⁴
- 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;¹⁵
- 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;
- 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.¹⁶

The court may increase or decrease the compensation for ordinary services of the attorney or award compensation for extraordinary services if the facts or particular circumstances warrant.¹⁷ In determining reasonable compensation, the court must consider all of the following factors:

- 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;

¹² See Section 736.1007(5), F.S.

¹³ *Id.*

¹⁴ Section 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, 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.

¹⁵ Section 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.

¹⁶ See Section 736.1007(5), F.S.

¹⁷ See Section 736.1007(6), F.S.

- 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.¹⁸

If a separate written agreement regarding compensation exists between the 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 interested persons.¹⁹ The trustee is not obligated to employ the attorney and the attorney is not obligated to accept representation but, if the attorney who is a party to the agreement or who drafted the trust is employed, the compensation paid must not exceed the amount provided in the agreement.²⁰

Other Rules

Attorneys are also bound by the Rules Regulating the Florida Bar when considering compensation from any client.²¹ 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.²²

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;
- The nature and length of the professional relationship with the client;
- The experience, reputation, and ability of the lawyer or lawyers performing the services; and

¹⁸ *Id.*

¹⁹ *See* Section 736.1007(7), F.S.

²⁰ *Id.*

²¹ Fla. Bar Code Prof. Resp. 4-1.5.

²² *Id.*

- Whether the fee is fixed or contingent.²³

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.²⁴

Background

In 1988, Florida passed legislation that covered the reasonable compensation of personal representatives as well as attorneys, accountants, appraisers, and other agents employed by the personal representative.²⁵ The statute provided that reasonable compensation must be based on one or more of the following:

- 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.²⁶

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.²⁷ In contrast to the 1988 compensation structure, the new legislation allowed for attorney compensation to be based on the value of the estate along with the work hours contributed.²⁸ Additionally, the statute allowed for two types of compensations: ordinary and extraordinary.²⁹ 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

²³ Fla. Bar Code Prof. Resp. 4-1.5(b)(1).

²⁴ Fla. Bar Code Prof. Resp. 4-1.5(b)(2).

²⁵ See ch. 88-340, Laws of Fla.

²⁶ *Id.*

²⁷ See ch. 93-257, Laws of Fla.

²⁸ *Id.*

²⁹ *Id.*

compensation, the court weighed factors that were similar to those in the 1988 statute. Thus, although a fee determined using the above guidelines was presumed reasonable, it was not definitive.³⁰

In 1995, the Legislature amended s. 733.6171, F.S., to provide a fee structure. Specifically, compensation based on the value of the estate and the income earned by the estate was presumed reasonable based on a fee schedule similar to the current schedule.³¹ An attorney could be further compensated for any “extraordinary services,” such as more complex estates that may involve tax preparation or contested claims.³² The amendment still provided that compensation may be increased or decreased by a court upon petition by an interested party.³³

III. Effect of Proposed Changes:

Under current law, a fee for an attorney for probate or trust administration services is presumed reasonable if it conforms to a calculation based on the percentage of the value of the estate. This fee structure is presumed reasonable regardless of the hours or complexity of work conducted for the estate or trust.

Under the bill, an attorney must provide a series of disclosures to the personal representative or trustee if the attorney intends to charge a fee using the statutory fee schedule. These disclosures state that:

- There is not a mandatory statutory attorney fee for estate or trust administration;
- The attorney fee is not required to be based on the size of the estate or trust and that the presumption of reasonableness may not be appropriate to every estate administration;
- The fee is subject to negotiation between the personal representative or trustee and the attorney;
- The selection of the attorney is made at the discretion of the personal representative or trustee, who is not required to select the attorney who prepared the will or trust; and
- The personal representative or trustee shall be entitled to a summary of ordinary and extraordinary services rendered for the fees agreed upon at the conclusion of the representation. The summary shall be provided by counsel and shall consist of the total hours devoted to the representation or a detailed summary of the services performed during the representation.

Additionally, the attorney is required to obtain a timely signature acknowledging these disclosures. If the attorney does not make the disclosures required under the bill, the attorney may not be paid for legal services without prior court approval or the written consent of the interested parties to an estate proceeding or the written consent of the trustee and all qualified beneficiaries of a trust.

³⁰ 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. *See Sitomer v. First of Am. Bank-Cent.*, 667 So. 2d 456, 458 (Fla. 4th DCA 1996).

³¹ See ch. 95-401, Laws of Fla.

³² *Id.*

³³ *Id.*

Under current law, an interested person may petition a court to increase or decrease an attorney's compensation for ordinary services or award additional compensation based on extraordinary services. Under the bill, a court may consider any agreement relating the attorney's compensation and whether the above disclosures were made to the personal representative or trustee in a timely manner in order to determine reasonable compensation.

The bill provides that the complexity of an estate or trust may be considered when determining additional compensation based on an attorney's extraordinary services during the estate or trust administration.

The bill provides that it applies to initial estate and initial trust administrations commenced on or after October 1, 2021.

The bill takes effect October 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.

B. Private Sector Impact:

The bill may impact consumers involved in probate and estate administrations. By requiring certain disclosures which inform consumers of potential fee negotiations, the bill may encourage negotiated fees or fees based on the work necessary to execute the estate as opposed to the value of the estate or trust.

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 and 736.1007

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Rules on April 20, 2021:

The committee substitute changes the bill by:

- Retains the statutory attorney fee schedule under current law for a probate or trust administration along with its presumption of reasonableness.
- Provides that written agreements regarding attorney compensation in a probate or trust administration may be considered when a judge is determining reasonable compensation.
- Potentially requiring court approval to recover attorney fees if the required disclosures were not made by the attorney.

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.