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University of Miami Law Review  
Spring-Summer 1995**\*855 PAYING FOR PERSONAL REPRESENTATIVES AND THEIR ATTORNEYS MAY COST YOU AN ARM AND A LEG**

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## I. The Platt Opinion

### A. Introduction

On October 1, 1993, two new statutes went into effect in Florida. [Florida Statutes section 733.617](#) was amended to award commissions to personal representatives by calculating a percentage of the probated estate's value. [\[FN1\]](#) Also enacted was section 733.6171, which introduced a bifurcated fee for the attorney of the personal representative consisting of a percentage of estate assets, as well as a charge for time expended. [\[FN2\]](#) The committee report notes that the bill introducing these changes “dramatically revises the means of determining reasonable compensation for fiduciaries and attorneys who represent personal representatives in probate, trust, and guardianship estate matters.” [\[FN3\]](#) While the analysis doesn't explain why these “dramatic” changes were made, it does refer to the \*856 1991 Florida Supreme Court opinion, *In re Estate of Platt*, [\[FN4\]](#) with the parenthetical comment that the “decision indicates awkwardness in trying to combine the fees of professionals employed by the personal representative with the fees of the personal representative.” [\[FN5\]](#) To begin our analysis of the new statutes, let us take the suggestion of the staff of the House Judiciary Committee and focus on what the supreme court said in *Platt*.

### B. Facts

Lester Platt became incompetent late in life. [\[FN6\]](#) A bank and a lawyer managed his assets under a guardianship agreement, for which they were fully compensated. Upon Platt's death in March of 1985, the two fiduciaries were appointed co-personal representatives of the estate, and they engaged the lawyer as attorney for the estate. As guardians, the co-personal representatives were in control of Platt's property, and no marshaling of assets was required to administer Platt's \$7 million estate. Still, they advised Platt's daughters, the beneficiaries, that the personal representative [\[FN7\]](#) fees

and attorney fees would equal 4.5% of the value of the estate. One daughter objected to a percentage fee and asked the bank and the lawyer to maintain time records for their services. Two years later, the bank and lawyer requested fees of \$489, 877, or around seven percent of the estate. The lawyer petitioned for attorney's fees of \$144, 300, calculated as two percent of the estate, for 274 hours of work. This implies an hourly rate of \$526.64, which reflected fifty-four hours apparently expended in pursuit of the fee itself. The lawyer also charged a PR fee of \$92, 500. The bank billed \$203, 077, based on percentages contained in its published fee schedule, plus an additional \$50, 000 for extraordinary services. It is not clear what, if any, time records were kept by the bank.

### C. Trial Court

The parts of the PR fee statute applicable to the Platt case read as follows:

(1) Personal representatives, attorneys, accountants, and appraisers . . . shall be entitled to reasonable compensation. Reasonable compensation shall be based on one or more of the following:

(a) The time and labor required . . . .

. . . .

\*857 (c) The fee customarily charged in the locality for similar services.

(d) The amount involved . . . .

. . . .

(3) If the personal representative is a member of The Florida Bar and has rendered legal services in connection with his official duties, he shall be allowed a fee therefor, determined as provided in subsection (1). [FN8]

The trial court noted that the requested fees were based on criteria approved by this statute. The court approved the bank's fee of \$203, 077 because it was based on a published fee schedule, but it denied the bank's request for an extra \$50, 000, finding insufficient evidence for a claim of extraordinary services. Regarding the attorney's fees, the court determined that a charge of \$144, 300, based solely on a percentage of the estate, was reasonable. The court did, however, reduce the requested co-personal representative fee from \$92, 500 to \$67, 692, an amount equal to one-third of the bank's fee. Apparently, the judge was convinced by the lawyer's expert witness, who testified that this was the lowest figure to which the lawyer was entitled. [FN9] In effect, the fees approved by the court were exclusively calculated as a percentage of the estate's value. [FN10]

### D. Supreme Court

The Supreme Court of Florida reversed, holding that reasonable compensation under the statute could not be computed solely on the basis of a fixed percentage of the probate estate. [FN11] Such an approach had been the law until 1976, when the legislature first adopted the "reasonable compensation" language. [FN12] The court reasoned:

If the legislature had desired to set the fees in accordance with a sliding-percentage scale, plus fees for extraordinary services, it could have retained or modified the prior statute. It did not do so; rather, when it amended the statute, it changed from a specific sliding-percentage scale for personal representatives to 'reasonable' fees for all professionals and agents performing services for the estate. [FN13] The court concluded that the legislature, while rejecting the use of

a **\*858** statutorily-defined compensation formulae, did not mean to imply that professionals and others providing services to an estate could bill in any manner they saw fit.

[W]e construe [the statute], requiring that reasonable compensation be based on ‘one or more of the following’ factors to mean the applicable factor or factors for the particular professional or agent employed by the estate. . . . Consequently, the factors that would apply to each category are not the same. We find that it would be unreasonable to hold that the legislature intended that reasonable fees could be arrived at by allowing the use of different factors for the same category of professionals for the same type of service. [FN14]

As an alternative to percentage-based fees, the court discussed the lodestar method, under which the number of hours reasonably expended in providing services is multiplied by a reasonable hourly rate for such services. [FN15] While commentators differ on whether the court meant to include personal representatives in this discussion, [FN16] there is no doubt that the court was directing its remarks towards attorneys. Referring to Patient’s Compensation Fund v. Rowe, [FN17] the court in Platt drew a comparison between workers’ compensation and probate by stating that “one of the primary reasons for the adoption of the ‘lodestar’ method in Rowe was the fact that someone other than the client who received the services would be required to pay the attorney’s fees.” [FN18] The court went on to quote from its opinion in Standard Guarantee Insurance Co. v. Quanstrom, [FN19] suggesting that “in estate and trust matters . . . the basic lodestar method of computing a reasonable attorney’s fee may be an appropriate starting point.” [FN20]

#### E. Reaction

The Platt opinion came as a great shock to trust bankers and probate lawyers, since both were accustomed to charging percentage-based fees. The supreme court had told them that the way they were doing **\*859** business was unlawful. The court endorsed the lodestar method, but it was still unclear to what extent fees had to be based on billable hours.

The uncertainty spawned numerous fee contests. Judge Penick, the chief probate judge in Pinellas County, noted that after Platt, 300 to 400 fee challenges were filed every month. [FN21] By 1993 he was spending over a third of his time presiding over fee disputes, and still had a backlog of 5000 cases. According to Robert Goldman, the former chairman of the Florida Bar’s Probate and Trust Law Section, hourly charges had become more costly than percentage fees.

Because the new fees were based on lawyers’ time sheets, estate beneficiaries could nit-pick the records if they thought the fee was too high. But the challengers had to hire experts -- other lawyers -- to testify against the estate attorney’s fee. Those experts cost more money. [FN22] While the holding in Platt was obtuse, the court had clearly based its opinion on legislative intent. From October 1991 when the decision in Platt was announced till April 1993 when the new fee statutes were passed, the probate bar and the corporate fiduciary community lobbied the legislature intensively to help formulate a clearer view of this intent. Specifically, the Trust Division of the Florida Bankers Association reacted to Platt by drafting amendments to [Florida Statutes section 733.617](#) for submission to the legislature. [FN23] “The statutory language of the 1993 amendment is a virtual reenactment of [[Florida Statutes section](#)] [734.01 \(1973\)](#),” [FN24] which contained the percentage commission structure abolished by the legislature effective January 1, 1976. Parallel to this effort, the Real Property, Probate and Trust Law Section of the Florida Bar formed a committee chaired by the late William Belcher. [FN25] As enacted, [Florida Statutes section 733. 6171](#) tracked the language of the Belcher Committee with slight -- but significant -- modifications, which will be discussed below.

## II. Personal Representative Fees

### A. Commission Structure

Florida Statutes section 733.617 entitles a personal representative to a commission for ordinary services payable from the estate assets \*860 without order of court. [FN26] While this has been the informal practice in Florida since enactment of the probate code, [FN27] the supreme court in Platt interpreted the old statute as “mandat[ing] that an independent judicial officer set personal representatives' fees.” [FN28] Thus the new statute clearly limits judicial power.

The cornerstone of the new statute is the reenactment of a percentage commission based upon the probate estate's value. The commission is computed as 3% of the first \$1 million in assets, 2.5% of the next \$4 million, 2% of the next \$5 million, and 1.5% of assets over \$10 million in value. [FN29] Interestingly, under the pre-1976 statute the lowest rate was 2.5%, which applied to all assets above \$5000. [FN30] The new statute awards higher commissions for estates up to \$6 million, but lower fees for larger estates.

In addition to these commissions, the new statute allows compensation for extraordinary services. These services include selling property, conducting litigation, operating the decedent's business, and paying taxes. [FN31] The tax provision represents a change in the pre-1976 statute, which classified only “extensive or complicated estate or inheritance taxes” as extraordinary. [FN32] On its face, the language would seem to expand the base on which a PR can charge fees. However, “[c]orporate and individual fiduciaries for many years have charged an additional fee over and above the normal percentage fee for preparation of various tax returns or have charged the cost of an outside professional.” [FN33] Therefore, the new language would appear to merely codify existing practice. By drawing a brighter line, the new statute also eliminates disputes over what constitutes a “complicated” return and how much work a PR must perform before the effort may be labeled “extensive.”

### B. Contracting Out of the Statute

As in previous versions, the new statute allows the testator to affect the commission structure by will provision or contract. If the will contains a substitute rate or amount, the PR may choose to be paid as provided in the will or by statute. However, if the decedent contracted for the services of the PR, the PR is bound by the fee agreement. [FN34] “Where \*861 there was a contract, and the personal representative (perhaps because of a low contract fee) declines to serve, it provides interesting speculation whether the estate, which must then have a different personal representative at a presumably higher fee, has a right to damages against the contracting individual.” [FN35] Drawing an analogy to the Change of Law doctrine, the renegeing party might argue that the wholly executory contract represented an attempt to opt out of a previous version of the statute and, as such, lapsed when the statute it referenced was repealed. [FN36]

A new feature of the amended statute prohibits renunciation by the PR if the amount provided in the will is a reference to the PR's regularly published schedule of fees in effect at decedent's date of death. [FN37] This feature allows professional fiduciaries to compete on the basis of price, while protecting testator's against bait and switch tactics. Because most trust banks and other corporate fiduciaries maintain a fee schedule, the document referenced by the will has significance apart from the effect upon the disposition made by the will. Therefore, the statute's renunciation prohibition satisfies the doctrinal requirements of an act of independent significance under the common law of wills. [FN38]

### C. Multiple Personal Representatives

The new statute provides that if the estate's value is \$100,000 or more and there are two representatives, each PR is entitled to a full commission. [FN39] If there are three or more representatives, the PR “who has possession of and

primary responsibility for administration of the assets” [FN40] receives a full commission, while the other representatives must share a second commission among themselves. For estates under \$100,000 in value, only one commission is available. [FN41]

It is difficult to reconcile this provision with the logic of the rest of the statute. If performing the services ordinarily required entitles a single PR to a percentage commission, how can the appointment of a second PR to perform the exact same services justify a second commission? As the supreme court said in *Platt*, “[t]o have a co-personal representative, who is also the attorney for the estate, receive a co-personal representative’s fee computed solely on the basis of a percentage of the \*862 corporate fiduciary’s co-personal representative’s fee is illogical since the fee has no reasonable relationship to the services performed by the co-personal representative who serves with the corporate fiduciary.” [FN42] The court would thus deny a percentage-based fee to a second PR. Even accepting the legislature’s position that a percentage commission for a supporting PR makes sense, should it be the same amount as the commission paid to the PR charged with primary responsibility for shepherding the decedent’s assets? In *Platt*, the probate attorney’s own expert testified that the attorney was entitled to a co-personal representative’s fee equal to one-third to one-half of what the corporate fiduciary received. [FN43] The legislature should pause to consider the implication of an expert unable to justify a fee to which the new statute asserts the attorney, as co-personal representative, is entitled without justification.

A final provision carried over from prior versions of the PR fee statute allows a PR who is a member of the Florida Bar to receive additional compensation for legal services rendered for the estate. [FN44] This provision will be discussed below, after examination of the newly enacted attorney’s fee statute.

### III. Attorney’s Fees

#### A. Presumed Reasonable Fee Structure

In *Platt*, the Supreme Court of Florida endorsed the lodestar method as an appropriate starting point in calculating reasonable attorney’s fees, but declared that in no case could a fee be calculated solely on the basis of a fixed percentage of the value of the estate. What the court meant is that by comparing these and other methods of fee calculation, a reasonable amount of compensation could be derived. Upholding the literal language in *Platt*, but wreaking havoc with its spirit, newly enacted **Florida Statutes section 733.6171** presumes that a reasonable fee will result from the sum of the amounts computed under both a percentage commission and a lodestar calculation. [FN45]

The first part of this bifurcated fee is intended to compensate the attorney for his responsibilities. It is calculated as two percent of the value of the probate estate, including income earned during administration. [FN46] If the estate is required to file a federal estate tax return, an additional one percent of the difference between the value of the gross estate \*863 and the value of the probate estate is tacked on. [FN47] The second part of the fee compensates for the professional time expended by computing the product of the number of hours reasonably expended and a reasonable hourly rate for the attorney. [FN48] A similar calculation is performed in pricing the legal services provided to the estate by paralegals and lawyers who worked under the supervision of the probate attorney. [FN49]

Proponents of the dual fee structure argue that the size of the estate and the complexity of the legal work are independent parameters. [FN50] The risk of error varies with the size of the estate because in larger estates, errors are potentially more costly. [FN51] The amount of time required to perform the work, however, depends on countless variables that have little in common with the size of the estate, including the type of assets, the ease with which the will can be proved, the existence of pretermitted heirs, and the presence of lapsed bequests to name only a few. According to one

probate attorney: “It should be no mystery . . . that the predictability of the total time required is rather elusive, given the volume, and the impact, of all of these many variables.” [FN52] Therefore, according to the dual-fee-structure proponents, a time charge is needed to award the attorney for the difficulty of the assignment and a percentage commission to compensate for the attorney's responsibility.

There is clearly some validity to this argument. The California Law Revision Commission noted that one of the advantages of a pure percentage fee is that “[i]t makes legal services more affordable in small estates by shifting to larger, more profitable estates some of the overhead costs of administering smaller estates.” [FN53] This sentiment was echoed by a critic of the Supreme Court of Florida's endorsement of the lodestar method in Platt. “There could be a negative impact on consumers, and force a lot of those smaller estates out of the market.” [FN54] If both pure methods shift costs -- the percentage commission towards the large estates and the lodestar towards the small estates -- than a hybrid approach can clearly be fairer. However, before accepting the theoretical superiority of Florida's dual fee structure, it is worth examining the responsibility for which probate attorneys receive a percentage fee.

**\*864** Proponents of the bifurcated fee focus on the possibility of professional error. While the damages in a malpractice suit may be positively correlated with the size of the assignment, malpractice insurance rates vary with the overall volume of work in the office. For each practitioner, malpractice insurance tends to be a fixed amount, which, like any other overhead cost, can be spread over the base of billable hours. A second source of risk is the possibility that a dissatisfied personal representative will ask that the attorney waive his fee. However, it is a central purpose of attorney's fee statutes to mitigate this risk through the presumption that a fee computed by the statutorily-designated formula is reasonable, and, therefore, the burden rests with the PR to show otherwise. For similar reasons, the supreme court in Platt rejected the use of a contingency risk factor or multiplier in arriving at a reasonable hourly rate for use in a lodestar formula. “The contingency risk factor . . . was created to compensate attorneys for those cases where there was a risk of nonpayment. In other words, this factor was added to the lodestar formula to compensate attorneys who receive no fees if they do not prevail.” [FN55] Thus, despite the popularity of the responsibility factor in the Florida probate bar, it seems that the risks probate entail can be accommodated by an hourly fee. As one New York probate attorney concluded: “It is no mystery, then, . . . that the majority of lawyers charge fees on the basis of time ultimately required to do the job, so that the client takes the risk of the unknown . . . .” [FN56]

Perhaps the weakest argument against time charges was attributed to Robert Goldman, former chairman of the Florida Bar's Probate and Trust Law Section, who was paraphrased as having said, “[l]awyers felt the hourly rate was unfair to skillful attorneys who could finish work quickly while benefitting rookies who needed more time.” [FN57] Salary equalization was not contemplated under the old statute, which, in defining reasonable compensation, allowed the court to consider “[t]he experience, reputation, diligence, and ability of the person performing the services.” [FN58] It would be a sad state of affairs indeed, if an attorney who was unwilling to publicize his hourly billing rate were allowed to hide behind a percentage commission formula.

#### **\*865 B. Rebutting the Presumption**

There are three ways in which an attorney can receive compensation in an amount different from the fee that the statute presumes is reasonable. First, the attorney and the testator can set a fee by contract. [FN59] This contract obligates neither the personal representative to hire the attorney nor the attorney to accept the representation. If the PR chooses to engage the attorney, the contract fee serves as a ceiling that the fee actually paid may not exceed. Second, the attorney, the personal representative, and the beneficiaries may agree to a different fee, either explicitly by contract or implicitly by disclosure of the fee variation in a petition for discharge to which no objection is filed. [FN60]

The third and final way to pay a fee different from the compensation set by statute is for an interested party to petition the court. [FN61] The statute contemplates either an increase or a decrease in the ordinary compensation computed by the hybrid formula. However, since the statute presumes that the ordinary compensation is reasonable, the burden is on the petitioner to rebut this presumption. [FN62] In formulating an argument, the petitioner is given a list of factors to consider, a number of which are (for the first time in Florida law) specific to the probate process. [FN63] These include the nature and value of both the probate and nonprobate assets, the complexity of the work, the novelty of the legal issues, and the impact of the work on the beneficiaries. [FN64] In another change from the old statute which provided for consideration of “ ‘one or more’ ” [FN65] of the stated factors, the new law requires the court to consider “all of the following factors giving such weight to each as it may determine to be appropriate.” [FN66]

In a change from prior law, a “court may [now] determine reasonable attorney's compensation without receiving expert testimony.” [FN67] While a party may still offer expert testimony, the court is no longer \*866 required to pay the expert witness from the proceeds of the estate. Unlike the experts, the attorneys fare better under the new statute. In Platt, the supreme court held that the attorney's time spent in a fee dispute was not compensable. The new statute reverses that rule. [FN68]

### C. Selecting a Percentage

#### 1. The Florida Debate

While the Belcher Committee drafted the hybrid structure of the attorney's fee statute, it did not recommend the figures in the formula as enacted by the legislature. The committee compared the responsibility percentage to a lodestar multiplier capped at two, and concluded that “[t]he fee for responsibility cannot logically exceed . . . the amount of the hourly fee.” [FN69] Relying on empirical information on the size of estates and the amount of time attorneys spend on probating estates of different sizes, the committee concluded that the desired balance would be achieved by charging one percent of the value of the probate assets and one-quarter of one percent of the value of nonprobate assets for large estates. [FN70] The committee also recognized that no single figure would fit all lawyers on all assignments, and that a figure presumed reasonable should be on the low side. As one member wrote:

[T]he committee opted for a ‘low’ percentage, designed to fit the lowest common denominator. If in practice a greater percentage was appropriate, the lawyer could apply to the court to increase it. We considered ‘human nature’ was less likely to seek a reduction if the applicable percentage was too high, than to seek an increase if the applicable percentage was too low. [FN71] The probate division of the Palm Beach County Bar Association opposed the parameters recommended by the Belcher Committee. They felt that courts would view the percentages as a ceiling; it would be easier for lawyers to bill less, rather than have to persuade judges that they deserve to be paid more than the statutorily presumed reasonable amount. [FN72] “Their spokesmen complained that they often administered estates having only minimal probate assets but very large nonprobate assets -- often in the form of revocable living trusts as will substitutes.” [FN73] The Palm Beach group recommended to the executive council of the Real Property, Probate and Trust Law Section of the Florida Bar that the minimum figure of one percent of the probate assets be doubled and the \*867 suggested one-quarter of one percent of nonprobate assets for large estates be quadrupled. [FN74]

Attempting to compensate legal services for trusts that substitute for wills through a probate fee statute creates problems of its own. If the trust beneficiaries are different from the beneficiaries under the will, the latter will be paying for the legal services that benefit the former. Alternatively, the trustee may hire his own attorney and pay him from the proceeds of the trust. However, this will not prevent the responsibility formula from kicking in and assessing a charge



against the trust assets payable to the probate attorney. The estate, therefore, will be double billed.

A far simpler and more effective solution to the problem encountered by the Palm Beach attorneys would be to roll-back the percentages to the figures recommended by the Belcher Committee [FN75] and to enact “[a] parallel provision [to] compensate attorneys for trustees during the initial trust administration of a revocable living trust as a will substitute.” [FN76] As proposed by Rohan Kelley, the trust attorney fee statute would contain an initial test to determine whether the trust in question is a bona fide will substitute. Thereafter, its provisions would mirror the probate attorney fee statute, including the bifurcated fee structure and the percentages recommended by the Belcher Committee. [FN77]

## 2. Comparison to Other States

In ten states (including Florida) probate attorneys are paid a percentage fee determined by statute. [FN78] No state other than Florida adds an hourly charge to this fee. Arkansas, Missouri, Iowa, and Wyoming each use a sliding percentage scale that levels out at two percent of the value of the probate assets. [FN79] In Wyoming and Iowa the two percent figure is reached quickly, and thus is applied to large and small estates. In Arkansas and Missouri, on the other hand, two percent applies to probate\*868 assets in excess of \$1 million, and thus only effects large estates. After the first \$25, 000 assets are assessed at a rate of 3% up to a value of \$100, 000, 2.75% from \$100, 000 to \$400, 000, and 2.5% from \$400, 000 to \$1, 000, 000. California and Hawaii also use a sliding percentage scale, starting at 2% and leveling out at 0.5% and 1%, respectively. [FN80]

New Mexico's attorneys receive no commission on real property, 1% on cash and cash equivalents over \$5000, and 5% on other personalty subject to probate over \$3000. [FN81] In Montana, lawyers may charge 3% of the federal estate tax base or the state inheritance tax base in excess of \$40, 000, whichever is larger. [FN82] In Delaware the personal representative and his attorney share a fee of 2.8% applied against commissionable estates in excess of \$500, 000. [FN83] The commissionable estate is defined as the sum of the probate estate, one-half of any jointly owned personalty, and one-half of any realty in which the decedent held an interest. For purposes of comparison, the commissionable estate can be thought of as a rough approximation of the federal estate tax base of a married decedent.

Relying on the Belcher Committee's empirical work, the hourly charge applied in Florida can conservatively be estimated at 1% of the probate assets and .25% of the nonprobate assets. [FN84] Since the responsibility component as enacted is 2% of the probate assets and 1% of the nonprobate assets, Florida's attorney's fees can be represented on a pure commission basis as 3% of the probate assets and 1.25% of the nonprobate assets. Consequently, the compensation presumed reasonable for probate attorneys in Florida far exceeds the level set by eight of the nine other states which employ a statutory percentage commission. The only state where attorneys may charge more than in Florida is Montana. Taking into account the distribution of estates by size, it is, however, quite possible that the median estate in Montana pays a substantially lower commission than the median estate in Florida. [FN85]

## \*869 IV. Combining Personal Representative Fees and Attorney Compensation

### A. Overview

A number of interesting points emerge in a comparison of the Florida attorney and PR fee statutes. First, while probate attorneys must account for their time, personal representatives need not keep track of the time they spend working on the estate. Second, a PR has a right to the percentage commission, while the attorney is allowed a statutory percentage and an hourly fee if uncontested. Third, while both attorneys and personal representatives deal with probate and

nonprobate assets, [FN86] only the attorney's compensation takes the nonprobate assets into account.

Focusing on this last point, it is often the case that significant time and effort may be spent by both the attorney and the PR on administering property passing by right of survivorship, homestead exemption, trust, insurance, annuity, or appointment power. This property is not part of the probate inventory and therefore does not effect the personal representative's commission. The attorney, on the other hand, is compensated for time spent on the estate. Additionally, if the estate exceeds \$600,000 in value and thus must file a federal estate tax return, the attorney is entitled to a one percent responsibility fee on the excess of the estate value over the probate value. [FN87] Furthermore, in a fee challenge, the court must explicitly take into account the "nature and value of the assets that are affected by the decedent's death" [FN88] as well as the "nature of the probate, nonprobate, and exempt assets" [FN89] in setting reasonable compensation for the attorney. Although it is true that the PR is allowed compensation for extraordinary services, nonprobate assets are not mentioned in the list of specific criteria to consider. [FN90]

### B. Attorneys as Personal Representatives

As mentioned above, the PR fee statute continues the practice of permitting probate attorneys to serve as personal representatives and collect \*870 fees for both positions. [FN91] Before October 1, 1993, the court had full authority to adjust either fee, so this provision was not particularly troublesome. "Now, with a statutory fixed and unadjustable percentage-based fee for serving as personal representative as well as a [presumed reasonable] statutory percentage and hourly fee . . . for serving as attorney . . . the opportunity for abuse is substantially increased." [FN92] This feature of the new law seems to have been unintended. Senator Fred Dudley, one of the bill's sponsors, blames the Florida Banker's Association for the oversight and would now like to add a provision for a hearing to the PR fee statute. [FN93] Representative John Cosgrove, the House sponsor, is concerned about lawyers who are paid twice for performing the same work, and has asked the Florida Bar to recommend changes. [FN94] The probate bar has responded with a proposed amendment to the rules of professional conduct concerning conflict of interest and prohibited transactions. [FN95] The proposal would require lawyers who also serve as personal representatives to tell testators in writing that they will be able to collect two fees from the estate. [FN96] Interestingly, California, which pays percentage commissions to both attorneys and personal representatives, allows an attorney who serves as PR only one fee unless the decedent's will expressly authorizes the payment of both fees. [FN97]

### C. Ethical Considerations

Despite academic challenges on grounds of ethics, efficiency, and equity, statutory percentage formulas are employed by one-half of the \*871 states in compensating personal representatives [FN98] and by ten states in awarding attorney's fees. [FN99] Constitutional challenges by beneficiaries on due process and equal protection grounds have been unsuccessful, [FN100] notwithstanding the fact that no commission formula will result in reasonable fees in all cases given the diversity and complexity of probate assignments. The Platt case serves as an excellent example of the kind of mischief percentage-based fees can cause. As discussed above, Platt involved a bank and a lawyer that together billed triple-dipping [FN101] fees of close to one-half million dollars to probate a routine estate whose assets were already under their control.

In hearing Platt, the supreme court chose to limit its enquiry to the intent of the legislature in defining reasonable compensation for personal representatives and their attorneys. Not mentioned in the case, however, is the court's own authority to regulate the practice of law in Florida, and the limit this authority places on the power of the legislature to set fees.

Article 5, section 15 of the Florida Constitution vests the supreme court with exclusive jurisdiction to discipline members of the Florida bar for ethics violations. Under this constitutional authority, the supreme court has promulgated the Rules Regulating the Florida Bar. Included therein, under the Rules of Professional Conduct, is a rule regulating fees for legal services, which states that “[a] fee is clearly excessive when . . . after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided.” [FN102] Among the various actions contemplated under the Rules of Discipline for charging excessive fees are forfeiture of fees or restitution. Thus, “the excessive amount of the fee may be ordered returned to the client” [FN103] or “the respondent may be ordered or agree to pay restitution to a claimant or other person.” [FN104] It \*872 remains to be seen whether a fee challenge by a personal representative or a beneficiary against an attorney who charged a fee presumed reasonable by Florida Statutes section 733. 6171 could succeed by charging the attorney with an ethics violation.

Lest the preceding discussion be viewed as mere theoretical musings, it should be noted that reports of unethical conduct under the new law are already appearing. Judge Penick “has received requests from attorneys who want to withdraw petitions for fees so that they can reapply under the new statute.” [FN105] In one such case, an attorney who requested \$200, 000 under a Platt lodestar calculation now asserts that a \$600, 000 fee is reasonable. [FN106] Furthermore, Sam Smith, attorney for the beneficiaries in Platt, has collected anecdotal evidence that some lawyers are misrepresenting the law to their clients by telling them that the statute mandates how much they charge. [FN107]

## V. Conclusion

This Comment has shown that the new statutes setting fees for personal representatives and their attorneys were enacted in response to Platt. In Platt, the Supreme Court of Florida held that reasonable compensation could not be computed solely on the basis of a fixed percentage of the probate estate. The legislature responded by writing percentage-based fee formulae into both the personal representative and the attorney compensation statutes. These statutes were drafted by interest groups who did not coordinate their efforts. Thus, the Trust Division of the Florida Bankers Association designed the PR commission structure, and the Real Property, Probate and Trust Law Section of the Florida Bar wrote the attorney's fee statute.

As under prior law, two co-personal representatives may each bill a full fee and a member of the Florida bar can serve as personal representative and hire himself to probate the will. New, however, is a provision which treats the PR fee as a commission to which the personal representative is entitled without order of court. Also new is the structure of the attorney's fee that includes a component for professional time expended charged on the basis of billable hours, a fee for the attorney's responsibility calculated as a percentage of the estate's value, and a presumption that the sum of the two charges is reasonable.

In setting the parameters for the attorney responsibility fee, the Palm Beach County Bar Association convinced the legislature to increase the percentage figures selected by the Real Property, Probate \*873 and Trust Law Section. The Palm Beach attorneys were concerned because their affluent clients made greater use of revocable inter vivos trusts as will substitutes, leaving only household goods and miscellaneous financial assets to make up the probate estate. As a result of the decision to increase the percentages to cover the trust problem, Florida's statutory probate attorney's fees are the highest in the nation, with the possible exception of Montana.

The combination of the high fees, the ease with which multiple commissions may be assessed, and the presumption that compensation computed under the statutes is reasonable, significantly increases the possibility that estates will be charged excessive fees by personal representatives and their attorneys.

But the power of the legislature is not limitless. The constitution's exclusive grant of jurisdiction to the supreme court to discipline members of the Florida Bar for violations of the Rules of Professional Conduct, and the power of the probate courts to supervise the actions taken by personal representatives on behalf of probate estates, might well be sufficient to create causes of action against lawyers and personal representatives as fiduciaries, with restitution of the excessive fees to the beneficiary constituting the judicial remedy. It remains to be seen how and to what extent the Florida judiciary asserts this power in the future.

## VI. Postscript

This Comment was written in early 1994. Since then, the fee statutes enacted in 1993 have been extensively discussed and critiqued. Particularly scathing were the attacks leveled by Jeffrey Good, an editorial writer for the St. Petersburg Times. [FN108] Stung by the public outcry, members of the probate bar began discussing how they should respond. In a letter to fellow probate lawyers, Rohan Kelley suggested that the new statute be amended:

[T]he statute came under substantial media attack, and active attack from the probate judiciary, and the image of the Bar and the probate lawyer has, in some instances, been tarnished as a result. . . . [A] serious attempt was made in the last legislature to repeal all references\*874 to a presumptively reasonable percentage attorney's fee. . . . I have every reason to believe it will be introduced again this year, with at least as good a chance, if not better, of passing. We need to offer our own alternative. [FN109] In this letter, Kelley also took the opportunity to defend the fee statute and the billing practices of the probate bar:

**F.S. s 733. 6171**, our present attorney's fee statute . . . is a monumental step forward (beyond the Platt case). . . . I have criticized the present statute, but only in one particular area. Most of you know it is my opinion that the 2% (plus 1%) presumptions are too frequently excessive. For several months now, I have begun informally surveying groups of lawyers regarding the fees they charge in probate administration matters. As I would expect, I find that most of my colleagues, those who practice substantially in this area (such as yourself), charge and collect a fee less [than] that [[[which] is presumed to be reasonable by the statute. However, the real shock is that I have also found that lawyers who are not "probate specialists" normally charge the presumed reasonable fee. This results in a true anomaly -- the specialist charges less than the non-specialist for the same service. [FN110]

This argument became the rallying cry of the Florida probate bar. In response to the editorial attacks in the St. Petersburg Times, Bruce Marger, the current chair of the Real Property, Probate and Trust Law Section of the Florida Bar, wrote "[w]e find that the fee statute is misunderstood and is not being used by experienced estate practitioners. Attorneys who are not estate practitioners may be using it to set higher-than-ordinary fees. The probate bar will propose legislation to remedy this situation." [FN111]

The centerpiece of the proposal submitted by the bar to the legislature was the abandonment of the billable hour component of the bifurcated attorney fee, and the rescue of the presumed reasonable fee with a table of declining percentages similar to the personal representative's commission. In the words of their chief media critic, Jeffrey Good, the bar's position was as follows:

Two years ago, the Legislature gave Florida lawyers an outrageous pay hike. In addition to charging an hourly wage for handling a deceased person's estate, lawyers can charge an extra 2 percent of the estate's value. Bar leaders now acknowledge that unscrupulous lawyers have used the law to inflate fees without doing any extra work. \*875 Smarting from public criticism, they are asking lawmakers to create a flat rate fee system. [FN112] Essentially, the probate bar's position was to admit that the bifurcated attorney fee statute enacted in 1993 led to abuses. These abuses, however, were

the result of general practitioners charging excessive hours because they lacked the experience of the probate specialist, who could get the job done in less time. Logically therefore, it made sense to drop the hourly component of the fee, thus curbing the abuses.

The irony of this argument is that the bifurcated fee structure was introduced because the Supreme Court of Florida had held in *Platt* that reasonable compensation could not be computed solely on the basis of a fixed percentage of the probate estate. Of course the solution proposed by the bar directly violates the holding in *Platt*. This contradiction can only be eliminated by recognizing that the supreme court based its decision in *Platt* on legislative intent and not ethical or constitutional principles. Therefore, despite the ringing endorsement of the lodestar method in estate and trust matters articulated by the supreme court in *Platt*, the legislature was entitled to change its mind.

And so it did. On June 18, 1995, Senate Bill 1378 became law without the Governor's signature, [FN113] and was designated Session Law Chapter Number 95 - 401. [FN114] Under this law, the presumed reasonable compensation for ordinary services performed by the attorney retained by the personal representative is calculated as a straight percentage of the value of the probate estate, including income earned by the estate during administration. [FN115] This percentage declines as the estate increases in size. Specifically, the attorney fee is set at 3% of the first \$1 million of the estate, 2.5% of the next \$2 million, 2% of the next \$2 million, 1.5% of the next \$5 million, and 1% of the probate estate over \$10 million in value. [FN116]

This structure is remarkably similar to that of the personal representative's commission, which remains computed in the same manner as before. [FN117] Also remaining intact are the provisions of the PR commission statute permitting co-personal representatives to charge two full fees and permitting a personal representative who performs legal services \*876 for the estate to charge both an attorney's fee and a personal representative's commission.

New, however, is a statute creating a presumed reasonable trust attorney's fee. Under this new statute, a fee of seventy-five percent of the rate set by the probate attorney's fee schedule is presumed reasonable compensation for an attorney retained by a trustee of a revocable trust for ordinary services provided following the settlor's death. [FN118] The fee is to be calculated based upon the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration. [FN119]

Under the statute enacted in 1993, a probate attorney was presumed to act reasonably if he charged the sum of an hourly fee for time expended, 2% of the value of the probate estate and 1% of the nonprobate assets included in the gross estate for federal tax purposes. Earlier, this author argued that this formula could be approximated on a pure commission basis as 3% of the probate assets and 1.25% of the nonprobate assets. [FN120] Comparing this approximation of the old statute with the newly enacted law, it is interesting to note that for probate estates up to \$1 million in assets, the attorney may reasonably charge the same 3%. For larger estates the percentages under the new law drop, thus constituting a decrease in the presumed reasonable fee. However, the trust attorney's fee calculated at 75% of what a probate attorney could reasonably charge, substantially exceeds the 1.25% estimated above as allowable under the 1993 statute for all but the largest trusts. Thus, for example, the attorney retained by the trustee can reasonably charge 2.25% (75% of 3%) of the value of trust assets up to \$1 million under the new approach. In fact, it is not until the trust reaches \$14.25 million in assets that the fee under the new law equals the 1.25% that an attorney might charge as the pure commission equivalent of the 1993 statute. [FN121]

It is the opinion of this author that, on balance, the new statute represents an increase in the attorney's fee presumed reasonable under Florida law. While it is true that lawyers are giving up the billable hour \*877 component of the old structure, they are gaining a higher percentage commission on the first \$3 million of probate assets equal to \$20,000 in

compensation. [FN122] While the amount of time required to probate an estate does increase with the size of the estate, the number of hours to be expended are limited by economies of scale. Put simply, the amount of time it takes to write out a check to a beneficiary for \$1 million doesn't double when the check to be written increases to \$2 million. It is thus quite possible that probate attorneys may have lost less in fees by giving up the time component than the \$20,000 in commissions gained on estates in the \$3 to \$5 million range. Furthermore, there is little doubt that the new trust attorney's fee statute represents a sizeable increase over the responsibility component of the old probate attorney fee statute applicable to nonprobate assets. When this fact is considered in combination with the prevalence of trusts as will substitutes in estate planning for wealthy clients and with the diminished significance of the time component in larger estates due to economies of scale, it is apparent that the legislature has increased the presumptively reasonable amount that an attorney may charge an estate for ordinary services.

One of the advantages of the declining percentage tables used in computing both personal representative and attorney fees under the new scheme is that the only independent variable required to compute the presumed reasonable fee is the size of the estate. For example, taking the facts in *Platt*, we can use the tables to compute what two personal representative fees and one attorney's fee would amount to on a \$7 million estate. Remarkably, the resulting figure is \$490,000, exactly the amount originally billed by the bank and the lawyer who were guardians of Lester Platt's property. [FN123] This author finds it difficult to explain how a figure that was outrageous and exorbitant when originally charged could be presumed legally reasonable today.

Procedurally, the probate bar suggested two changes in the attorney fee provisions that were enacted. The first change involved fee disputes. \*878 In *Platt*, the supreme court had held that the attorney's time spent in a fee dispute was not compensable. As discussed above, the legislature reversed that holding outright in 1993. [FN124] Under the new legislation, the time spent in the dispute is still compensable "unless the court finds the request for attorney's fees to be substantially unreasonable." [FN125] The second change involves the addition of a disclosure provision under which "[t]he amount and manner of determining compensation for attorneys and personal representatives must be disclosed in the final accounting, unless the disclosure is waived in writing signed by the parties bearing the impact of the compensation and filed with the court." [FN126] By bringing fees into the open, this latter provision should engender some lively discussion between trust bankers and attorneys on one side and beneficiaries on the other.

In 1993, the Trust Division of the Florida Bankers Association drafted the changes to the personal representative commission statute, and the Real Property, Probate and Trust Law Section of the Florida Bar wrote the new attorney fee statute. [FN127] In 1995, the changes were drafted by the bar without input from the bankers. Two procedural provisions in the new legislation reflect this change in authorship. The first provision involves the practice of double dipping, under which probate attorneys also serve as personal representatives and collect fees for both positions. By introducing the personal representative commission as an entitlement and pronouncing the attorney fee provisions as presumptively reasonable, the legislature in 1993 severely limited the courts' ability to control abuses in this practice. [FN128] Rather than curbing the practice itself, the probate bar chose to assist the courts in policing abuses by adding a fee challenge provision to the personal representative statute, under which an interested person may petition the court for an increase or decrease in the commission. [FN129] Given the mischief it was intended to address, the new provision is breathtakingly overinclusive.

The second provision reflecting the new legislation's authorship is found in the trust attorney's fee statute. Today, trust bankers rarely hire independent outside counsel to provide routine legal services, as many banks have engaged sufficient numbers of lawyers as employees to provide these services more cost effectively to their clients. Perhaps to ensure that these cost savings are passed on to these clients rather than \*879 letting them accrue to the banks and their stockholders, the trust attorney's fee statute contains a narrow exclusion. Specifically this exclusion states

that “[w]hen a corporate fiduciary is serving as trustee . . . the presumptive fee for ordinary [legal] services . . . shall not apply.” [FN130] According to Michael Dribin, a probate attorney who serves as Treasurer of the Real Property, Probate and Trust Law Section of the Florida Bar, this exclusion has infuriated the trust banking community. [FN131]

Whether and when the bankers will suggest legislative changes of their own remains to be seen. However, even in its absence, this author regretfully predicts that the process of determining compensation for personal representatives and probate attorneys in Florida will be rife with conflict for years to come.

[FN1]. Ch. 93 -257, s 10, Laws of Fla. (1993).

[FN2]. *Id.* s 4.

[FN3]. Florida House of Representatives, Comm. on Judiciary, Bill Analysis & Economic Impact Statement of CS/HB 1295 , at 15 (1993).

[FN4]. 586 So. 2d 328 (Fla. 1991).

[FN5]. Florida House of Representatives , *supra* note 3, at 2.

[FN6]. Platt, 586 So. 2d at 329. The facts discussed in the text may be found at 329 -30.

[FN7]. Throughout this comment “personal representative” will be abbreviated as “PR”.

[FN8]. Platt, 586 So. 2d at 332 (quoting Fla. Stat. s 733.617 (Supp. 1976)).

[FN9]. *Id.* at 330 -31.

[FN10]. Percentage fees are covered by subsection (1)(d) of Fla. Stat. s 733.617 quoted in the text. Subsection (1)(d) permits compensation to be based on “the amount involved.” The statutory justification for adding a percentage fee for the lawyer's legal services follows from combining subsection (3) with subsection (1)(d).

[FN11]. Platt, 586 So. 2d at 337.

[FN12]. *Id.* at 331.

[FN13]. *Id.* at 335.

[FN14]. *Id.* at 336.

[FN15]. *Id.* at 333 -34.

[FN16]. Compare Nicholas H. Hagoort, Jr., *The Legislature Tries to Reverse Platt. Will it Work?*, South County Advocate (Palm Beach), Fall 1993, at 9 (“ Platt adopted the ‘lodestar’ method for the determination of attorney's fees in probate matters ....”) with Kathryn G. Benish, *The Lodestar: A Millstone for Fiduciaries and Their Lawyers*, Prob. & Prop. , May/June 1992, at 36, 37 (“[T]he Florida court held in ... Platt ... that fees for personal representatives and lawyers in probate matters cannot be based solely on a percentage of the value of the estate. Instead, the court endorsed the ‘lodestar’ method ... .”).

[FN17]. 472 So. 2d 1145 (Fla. 1985).

[FN18]. Platt, 586 So. 2d at 333.

[FN19]. 555 So. 2d 828 (Fla. 1990).

[FN20]. Platt, 568 So. 2d at 335.

[FN21]. Bruce Vielmetti, New Law Can Put Pitfalls in Probate, St. Petersburg Times , Oct. 17, 1993, at 1B.

[FN22]. Id.

[FN23]. Rohan Kelley, Statutory Changes in Compensating Attorneys and Personal Representatives, Oct. 1993, at 4.5, available in Florida LAW/net (draft outline for a Florida Bar CLE course).

[FN24]. Id.

[FN25]. Id. at 4.16.

[FN26]. Fla. Stat. s 733.617(1) (1993).

[FN27]. Kelley, supra note 23, at 4.5.

[FN28]. Platt, 586 So. 2d at 337.

[FN29]. Fla. Stat. s 733.617(2) (1993).

[FN30]. Platt, 586 So. 2d at 331 n.4.

[FN31]. Fla. Stat. s 733.617(3) (1993).

[FN32]. Kelley, supra note 23, at 4.7.

[FN33]. Id.

[FN34]. Fla. Stat. s 733.617(4) (1993).

[FN35]. Kelley, supra note 23, at 4.10.

[FN36]. See John T. Gaubatz et al., Estates and Trusts: Cases, Problems and Materials 271 (1989) (discussing the Change of Law doctrine).

[FN37]. Fla. Stat. s 733.617(4) (1993).

[FN38]. See Gaubatz et al. , supra note 36, at 112 (discussing the doctrine of Acts of Independent Significance).

[FN39]. Fla. Stat. s 733.617(5) (1993).

[FN40]. Id.

[FN41]. Id.

[FN42]. Platt, 586 So. 2d at 337.



[FN43]. *Id.* at 330.

[FN44]. *Fla. Stat. s 733.617*(6) (1993).

[FN45]. *Id.* s **733. 6171( 3)**.

[FN46]. *Id.* s **733. 6171( 3)( a)**.

[FN47]. *Id.*

[FN48]. *Id.* s **733. 6171( 3)( b)**.

[FN49]. *Id.*

[FN50]. See, e.g., Kelley, *supra* note 23, at 4.17.

[FN51]. *Id.* at 4.18.

[FN52]. David S. Lande, Explaining Legal Fees for Probate, *Case & Com.* , July/Aug. 1988, at 32, 40.

[FN53]. California Law Revision Comm'n, Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative, *L.A. Daily J.* , Nov. 18, 1988, at 2, 3.

[FN54]. Jim Talley, Court Ruling on Fees Rocks Probate System, *Sun Sentinel* , May 26, 1991, at 1D (quoting Stewart Marshall, an Orlando lawyer representing the Florida Bankers Association).

[FN55]. *Platt*, 586 So. 2d at 334 (footnote omitted). Where appropriate, a contingency risk factor is applied to the reasonable hourly rate derived under the assumption that the attorney will be paid. Thus if an attorney's reasonable hourly rate is \$100 and there is a one-third chance of the client not paying for the legal services rendered, then the rate can be multiplied by a contingency risk factor of 1.5 to arrive at a "certainty equivalent" fee of \$150 per hour. Note that \$150 times the probability of payment (2/3) results in the reasonable hourly rate of \$100.

[FN56]. Lande, *supra* note 52, at 40.

[FN57]. Janice Heller, Probate Lawyers Said to be Abusing Fee Guidelines, *Palm Beach Daily Bus. Rev.* , Dec. 21, 1993, at A1, A10.

[FN58]. *Platt*, 586 So. 2d at 332 (quoting *Fla. Stat. s 733.617*(1)(g) (Supp. 1976)).

[FN59]. *Fla. Stat. s 733. 6171*(6) (1993).

[FN60]. *Id.* s **733. 6171**(2).

[FN61]. *Id.* s **733. 6171**(4).

[FN62]. Logically, the beneficiary as the petitioner in a fee challenge must have the burden of persuasion when the attorney charges the statutorily-presumed reasonable fee or the PR bills the amount to which he is entitled by statute. This logic is contradicted by the continued existence of *Fla. Stat. s 733.6175*, which states that "the reasonableness of such compensation or payment may be reviewed by the court. The burden of proof ... [of] the reasonableness of the compensation shall be upon the personal representative and the person employed by him." It should be interesting to observe how the

courts resolve this statutory conundrum in the future.

[FN63]. See Kelley, *supra* note 23, at 4.24.

[FN64]. Fla. Stat. s 733. 6171(4) (1993).

[FN65]. Platt, 586 So. 2d at 332 (quoting Fla. Stat. s 733.617(1) (Supp. 1976)).

[FN66]. Fla. Stat. s 733. 6171(4) (1993).

[FN67]. *Id.* s 733. 6171(5).

[FN68]. *Id.* s 733. 6171(7).

[FN69]. Kelley, *supra* note 23, at 4.34.

[FN70]. *Id.* at 4.33.

[FN71]. *Id.* at 32.

[FN72]. See Heller, *supra* note 57, at A10.

[FN73]. Kelley, *supra* note 23, at 4.33.

[FN74]. *Id.*

[FN75]. There may be support for the rollback in the Senate. According to John Lukosky (Senator Dudley's Legislative Aide), the Senator supported the hybrid structure but not the rates of the attorney compensation bill he sponsored. The higher percentages were introduced in the House bill, and were accepted in conference over the Senator's objection. Telephone Interview with John Lukosky, Legislative Aid (Oct. 18, 1993).

[FN76]. Kelley, *supra* note 23, at 4.35.

[FN77]. *Id.* at 4.35 -38.

[FN78]. See California Law Revision Commission, *supra* note 53, at 7, for a list of the nine states other than Florida. But cf. Jonathan G. Blattmacher, Attorneys' Fees in Estate Administration, N.Y. St. B.J. , Feb., 1991, at 24, 28, for a list of eight states. Blattmacher did not include Iowa on his list, which may be explained by his introductory signal: " See, e.g."

[FN79]. See Ark. Code Ann. s 28 - 48 -108 (Michie 1987); Iowa Code Ann. ss 633.197 to 198 (West 1992); Mo. Ann. Stat. s 473.153 (Vernon 1992); Wyo. Stat. Ann. s 2-7- 804 (Supp. 1993).

[FN80]. See Cal. Prob. Code s 10810 (West 1991); Haw. Rev. Stat. ss 560:3 -719, 721 (1993).

[FN81]. N.M. Stat. Ann. ss 45 -3 -719, 720 (Michie 1993).

[FN82]. Mont. Code Ann. ss 72-3 - 631, 633 (1993).

[FN83]. Del. Code Ann. Rule 192 (1991).

[FN84]. See supra note 70 and accompanying text.

[FN85]. Montana's median household income in 1989 of \$22, 988 ranked 44th among the 50 states. Florida, with a median household income of \$27, 483, ranked 28th. Bureau of the Census, Statistical Abstract of the United States 1993, xix (113th ed. 1993). Since, on average, Floridian households are wealthier than Montanan households, the average size of estates in Florida will be larger than in Montana.

[FN86]. Because the personal representative's authority emanates for the probate court, his legal responsibilities are limited to the probate proceedings. However, the family of the decedent often expects that the PR will coordinate all the affairs of the estate. These invariably involve such mundane matters as arranging for burial, cleaning out a residence, paying debts, and closing accounts. Also, as a practical matter, the attorney and the family will direct any questions concerning nonprobate assets to the PR.

[FN87]. Fla. Stat. s 733. 6171(3)(a) (1993).

[FN88]. Id. s 733. 6171(4)(c).

[FN89]. Id. s 733. 6171(4)(g).

[FN90]. See id. s 733.617(3).

[FN91]. Id. s 733.617(6).

[FN92]. Kelley, supra note 23, at 4.11.

[FN93]. See Bill Douthat, New Florida Probate Law Bad for Consumers, Foes Say, Palm Beach Post , Sept. 30, 1993, at 1A, 8A.

[FN94]. See Heller, supra note 57, at A10.

[FN95]. Kelley, supra note 23, at 4.11.

[FN96]. Heller, supra note 57, at A10. As currently drafted, the Rules of Professional Conduct are silent on the potential for abuse created by attorneys who are appointed personal representatives and then hire themselves to probate the estate. The comment to Rule 4 -1.7, Conflict of Interest, points out that “[i]n Florida, the personal representative is the client rather than the estate or the beneficiaries.” Therefore, as far as the Rules Regulating the Florida Bar are concerned, the attorney owes the beneficiaries no special duty. This fact might surprise testators who named the lawyer who prepared their will as their PR. Rohan Kelley has suggested that, given the potential for uncontrolled double billing under the new fee statutes, Rule 4 -1.8 of the Rules of Professional Conduct, “Conflict of Interest; Prohibited Transactions, ” be amended to address this issue. As proposed, the attorney will be required to advise the client in writing that once the attorney is appointed as PR he may retain himself to probate the estate, and that he may collect both an attorney's fee and a PR fee. The proposal also requires that the attorney advise the client of the impact of the fee statutes by estimating the amount, or giving the formula for how much the attorney can recover from the estate for his services. Kelley, supra note 23, at 4.11-13. I would add to this proposal that the attorney also be required to advise the client that it is permissible to negotiate a lower fee.

[FN97]. California Law Revision Comm'n, supra note 53, at 5.

[FN98]. *Id.* at 4. See generally The American College of Trust and Estate Counsel, *Fees of Executors, Administrators, and Testamentary Trustees* (1993).

[FN99]. See California Law Revision Comm'n, *supra* note 53, at 7.

[FN100]. See Catalina Sugayan, *Abandoning Ad Valorem Estate Administration Charges*, 7 *Prob. L.J.* 33, 53 -56 (1985).

[FN101]. Cf. John D. McKinnon, *Court Restricts Lawyers' Probate Fees*, *St. Petersburg Times*, Oct. 4, 1991, at 5B (“[T]wo of Platt's children said they saw no reason for the attorney to collect such a huge sum for handling a relatively simple, straightforward estate.”). The triple dip results from the lawyer and the bank each charging a personal representative fee, the lawyer charging both a personal representative and an attorneys' fee, and the bank charging additional fees for extraordinary services. Kelley uses the term “double dip” to describe members of the Florida Bar who act as personal representatives and then hire themselves as attorneys for the same estate, thereby allowing themselves to charge twice. Kelley, *supra* note 23, at 4.11.

[FN102]. R. Regulating Fla. Bar 4 -1.5(a).

[FN103]. R. Regulating Fla. Bar 3 -5.1(h).

[FN104]. R. Regulating Fla. Bar 3 -5.1(i).

[FN105]. Heller, *supra* note 57, at A10.

[FN106]. *Id.*

[FN107]. *Id.* at A1.

[FN108]. See Jeffrey Good, *A License to Steel*, *St. Petersburg Times*, Nov. 7, 1993, at 1D (“Your legislature just gave unethical lawyers and bankers a license to rob their most helpless clients: the dead.... Rep. John F. Cosgrove, D-Miami, said he introduced the law at the request of -- you'll never guess -- the Florida Bar and the Florida Bankers Association.... Cosgrove, who holds himself out as a friend of the elderly, should be ashamed. So should the rest of the Legislature, which passed this bill in March [1993] with barely a whisper of debate.”); see also Jeffrey Good, *A License to Steal*, *St. Petersburg Times*, Aug. 28, 1994, at 5D (“In Florida, it's perfectly legal to rob an estate. All lawyers and bankers have to do is belly up to the trough our elected representatives built for them.”). See generally *Moving Toward Probate Reform*, *St. Petersburg Times*, Dec. 11, 1994, at 1D; *Reform Probate Now*, *St. Petersburg Times*, Apr. 3, 1995, at 8A.

[FN109]. Letter from Rohan Kelley to prominent members of the Florida probate bar 2 (July 28, 1994) (on file with the author).

[FN110]. *Id.* at 1.

[FN111]. Bruce Marger, *No One Solution Fits Everyone*, *St. Petersburg Times*, Sept. 18, 1994, at 4D.

[FN112]. Jeffrey Good, *Reforming Florida's Probate System*, *St. Petersburg Times*, Feb. 26, 1995, at 1D.

[FN113]. Ch. 95 - 401, *Laws of Fla.* (1995).

[FN114]. See Division of Statutory Revision, *Digest of General Laws Enacted by the 1995 Regular Session of the Florida Legislature*, at 27 (1995).

[FN115]. Ch. 95 - 401, s 2, Laws of Fla. (to be codified at [Fla. Stat. s 733.6171\(3\)](#) (1995)).

[FN116]. Id. Note that on the first \$100,000 of assets, the fee under the new law is front loaded so that the effective rate on estates valued under \$100,000 is higher than three percent.

[FN117]. See supra note 29 and accompanying text.

[FN118]. Ch. 95 - 401, s 4, Laws of Fla. (to be codified at [Fla. Stat. s 737.2041\(3\)](#)).

[FN119]. Id. "Initial trust administration" is defined in [Fla. Stat. s 737.2041\(10\)](#) (1995).

[FN120]. See supra notes 69 and 85 and accompanying text.

[FN121]. Let "x" be the size of the trust for which the fee under the old and new fee structures is equivalent. The fee can be algebraically represented as 1.25% (x) under the old statute, and under the new statute as:

$(75\%)(3.0\%)(\$1,000,000) \approx (75\%)(2.5\%)(\$2,000,000) \approx (75\%)(2.0\%)(\$2,000,000) \approx (75\%)(1.5\%)(\$5,000,000) \approx (75\%)(1.0\%)(x - \$10,000,000)$ . Setting the two sides of the equation equal and solving for "x" results in \$14,250,000.

[FN122]. Under the old statute lawyers could charge 2% of the probate assets. Under the new statute they may reasonably charge 3% for the first \$1 million of assets and 2.5% on the next \$2 million. That increase is worth \$20,000.

[FN123]. The bank and the lawyer were co-personal representatives of Platt's estate. Under [Fla. Stat. s 733.617\(5\)](#) (1993) they are each entitled to charge the full commission. The lawyer, as the attorney for the estate, is entitled under [Fla. Stat. s 733.617\(6\)](#) (1993) to charge separately for these legal services. Each PR commission under [Fla. Stat. s 733.617\(2\)](#) (1993) is 3% for the first \$1 million, 2.5% for the next \$4 million, and 2% for the last \$2 million. That amounts to \$170 thousand for each PR, or \$340 thousand for both. Under the latest attorney's fee statute, Ch. 95 - 401, s 2, Laws of Fla. (amending [Fla. Stat. s 733.6171\(3\)](#) (1995)), the lawyer may bill 3% for the first \$1 million, 2.5% for the next \$2 million, 2% for the next \$2 million, and 1.5% for the last \$2 million -- or \$150 thousand. The grand total the bank and the lawyer may charge as a presumed reasonable fee is thus \$490 thousand.

[FN124]. See supra note 68 and accompanying text.

[FN125]. The quoted language was added to [Fla. Stat. s 733.6171\(7\)](#) (1993) which, as renumbered, is now to be found at [Fla. Stat. s 733.6171\(8\)](#).

[FN126]. Ch. 95 - 401, s 2, Laws of Fla. (to be codified at [Fla. Stat. s 733.6171\(9\)](#)).

[FN127]. See Kelley, supra note 23, at 4.5, 4.16.

[FN128]. Id. at 4.11.

[FN129]. Ch. 95 - 401, s 1, Laws of Fla. (to be codified at [Fla. Stat. s 733.617\(7\)](#)).

[FN130]. Id. s 4 (to be codified at [Fla. Stat. s 733.2041\(5\)](#)).

[FN131]. Telephone Interview with Michael Dribin, Treasurer of Real Property, Probate and Trust Law Section of the Florida Bar (Aug. 3, 1995).

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