SATISFYING THE "GATEKEEPER"
A GUIDE TO ATTORNEYS FEES IN PROBATE CASES
By Charles T. Newland

I. Introduction.

Like any legal matter, the Illinois Rules of Professional Conduct is the guiding light for attorney's fees. Specifically, Rule 1.5 states that a lawyer's fee shall be reasonable. The factors to determine reasonableness are:

1. The time, labor, novelty and difficulty of the question involved and the skill level;
2. The likelihood of precluding other employment by the lawyer;
3. The fee customarily charged in the locality for similar services;
4. The amount involved in the result obtained;
5. The time limitations imposed by the client or circumstances;
6. The nature of professional relationship;
7. The experience, reputation and ability of the attorney;
8. Whether fee is fixed or contingent.

Illinois Rules of Professional Conduct, Rule 1.5.

The Illinois Probate Act also provides that the attorney for a representative is entitled to reasonable compensation for services. *755 ILCS 5/27-2*. However, in probate cases there are additional considerations. In supervised administration of a decedent's estate or a guardianship matter the court will decide what is reasonable. The trial court has broad discretion in determining what constitutes reasonable compensation. *Estate of Thorp, 282 Ill.App.3d 612, 669 N.E.2d 359 (4th Dist. 1996).*

II. Factors considered in Probate.

In determining what reasonable compensation is in a probate case the judge should take into consideration various factors, such as:

1. The size of the estate;
2. The work performed;
3. The skill evidenced by the work performed;
4. The time expended;
5. The successfulness of the efforts;
6. Good faith and efficiency of the administration.

Estate of Brown, 58 Ill.App.3d 697, 374 N.E. 2d 699 (1st Dist. 1978)

While in many instances the parties to a probate matter may agree as to attorney fees, the court is not bound by such an agreement. The court is entitled to use his or her own experience in determining fees. *Estate of Healy*, 137 Ill. App. 3d 406, 484 N.E. 2d 890 (2nd Dist. 1985). In *Healy* the court referred to the trial judge's 3 1/2 years of involvement with the case, putting the lower court in an excellent position to observe the attorney's work product. *Id.* Further, in determining reasonable compensation for an attorney in a probate matter the court may reject expert testimony. *Estate of Brown, 58 Ill.App.3d 697, 374 N.E. 2d 699 (1st Dist. 1978)*

Good faith and efficiency of representation is a significant factor. Although the hiring of an attorney by an executor is indispensable to reasonable discharge of an executor's duty, when an executor involves the estate in unnecessary litigation or pursues issues at great cost to the estate, counsel fees can be denied. *Estate of Minsky, 59 Ill. App. 3d 974, 376 N.E.2d 647 (1st Dist. 1978).* Moreover, the court can

also order a refund if the final fee awarded is less than what has already been prepaid by the estate. *Estate of Thompson, 139 Ill. App.3d 930, 487 N.E.2d 1193 (1986).* In *Thompson,* the estate was in supervised administration and the executor never sought leave to pay attorney's fees that were paid with "astonishing regularity with no attempt to document the services received". On remand the trial court was ordered to carefully consider the propriety of the fees paid*. Id.*

Because an award of fees is based on the discretion of the probate judge, *a*nybody seeking to have a ruling on fees overturned on appeal has an uphill battle. A trial court's award or denial of attorney's fees must be manifestly or palpably erroneous to be reversed. *Estate of Grabow,* 74 Ill. App.3d 336, 392 N.E.2d 980 (3d Dist. 1979). An award of attorney's fees will be affirmed as long as there is any evidence in the record to support the trial court's finding. *Estate of Fruend,* 63 Ill.App. 3d 1, 379 N.E.2d 935 (1978).

Attorneys who do not represent the representative of the estate can still have their fees paid by the estate if their work benefited the estate. *Estate of Freund, 63 Ill. App. 3d 1, 379 N.E.2d 935 (1978).* Moreover, the estate can be liable to pay the loser of a will contest, as long as the contest is based on an honest difference as to the construction of the will or trust. *Orme vs. Northern Trust, 25 Ill. 2d 151, 183 N.E.2d 505 (1962).* When there are multiple heirs in estate litigation the judge can apply the common fund doctrine and attorneys fees may be assessed against all parties' share of the estate that benefit from a will contest as the result of a work of an attorney for one party. *Estate of Pfoertner, 298 Ill. App. 3d 1134, 700 N.E.2d 438 (1998).*

Although a fee schedule that determines the fee based on a percentage of the estate's value without regard to value of the services is inappropriate for determining compensation, Illinois courts have upheld awards of attorney's fees computed from fee schedules that were based on a percentage of the gross estate where the fee schedule itself is based on the local bar associations customary charges for the same or similar services. *Estate of Parlier,* 40 Ill. App.3d 840, 842-844, 354 N.E.2d 32 (4th Dist. 1976); *Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699 (1st. Dist. 1978). However, this writer believes the better practice is to present a fee petition showing the time expended.

III. Fee Petitions

In getting your fees approved it is important to not only know the factors a court considers in determining the reasonableness of fees, but also, it is important to know the judge you are in front of and his or her pet peeves. In other words, you need to determine "what makes the frog jump". In that respect, seeking fees from a probate judge can be a lot like a law school exam, in that sometimes it doesn't really matter how much you know but rather how it's presented. The burden is on the attorney to prove the necessity and reasonableness of the fees by way of a fee petition in supervised administration or in guardianship estates. Notice should be sent to all interested parties. There is no standard form for a fee petition, however, a petition should set forth certain personal attributes of the attorney such as: education, years of experience, areas of practice concentration, and usual customary billing rate for services rendered. In addition the petition should set forth certain characteristics of the estate such as: the nature and complexity of the matters addressed; the size of the estate and successful

results obtained with respect to any adversarial or litigated issues. An exhibit should be attached to the petition showing a breakdown of time expended for each task performed. The exhibit can be prepared with a simple spread sheet or the use of a billing program. You should avoid vague time entries that merely state: “conference” and “work on estate”. *Estate of Halas,* 159 Ill. App.3d 818, 512 N.E.2d 1276 (1987).

IV. Bad Acts By the Representative and the Attorney’s derivative duty.

Because the attorney for the representative has a fiduciary duty to the estate, a representative found to have committed bad acts against the estate or to have acted in a conflict of the interest can detrimentally affect the attorney’s right to compensation. *Estate of Baker, 315 Ill. App. 366, 43 N.E.2d 170 (1942).* In *Baker* the administrator deposited the funds from the sale of decedent’s automobile that was never inventoried in his personal account. The administrator neglected administration of the estate including payments of the widow’s award and “made no pretense in administering the estate in manner provided by law”. He also failed to distribute personal property within the two (2) year requirement. *315 Ill. App. 366, at 377.* On appeal the court agreed with the trial court that the attorney was not entitled to be paid by the estate as his services did not benefit the estate*. Id, at 379.*

V. Bad Acts by the Attorney

An attorney that engages in bad acts should not expect his fees to be paid in full. *Estate of Halas, 159 Ill. App.3d 818, 512 N.E.2d 1276 (1987).* The *Halas* case provides numerous examples of what a lawyer should not do. *Halas* involved Chicago’s first family of football in the estate of George Halas, Jr. The attorneys for the estate filed a fee petition for over $957,000.00 in fees and $24,000.00 in expenses in representing

the executor and trustee. *159 Ill. App.3d 818, at 820.* The successor executor and former spouse of decedent, individually, and as guardian of the decedent's minor children, objected to the fees. The principle asset of the estate was 20% of the Chicago Bears stock, initially valued at 4.2 million dollars and at the time of the appeal was worth approximately $10 million dollars. *Id, at 821.* George Halas, Jr. died in 1979 and the appeal was in 1987. *Id.* George Halas, Sr. was initially appointed the executor. When he died in 1983 Virginia McCaskey and a friend Gerson Miller were appointed as successors. *Id.* Under the administration of George, Sr. the attorneys began a corporate reorganization of the Bears that converted stock to a new class of shares that were subordinate to others with respect to dividend and liquidation rights. *Id, at 822.* The stock was transferred to various holding companies with right of first refusal when the new stock was instituted. They also eliminated cumulative voting and the "S" election. *Id*.

The attorneys for the executor engaged in several bad acts. First, they failed to timely give a 30 days notice to the Guardian Ad Litem of the new stock structure as ordered by the court and they misrepresented the nature of the stock structure and advised the GAL that there were no restrictions on the stock affecting the value. *Id, at 826.* The reorganization was not disclosed in the first current account. *Id, at 827.* Without permission of the co-trustee, the attorneys entered into an agreed order temporarily delegating the co-trustee's rights and powers. *Id, at 828.* When they were later advised by the co-trustee that he refused to delegate said rights and powers, they entered another order withdrawing the first order. In addition, they caused the estate to

pay $285,000.00 in fees and expenses without knowledge or consent of the co-executors. *Id.*

The attorneys also operated under several conflicts of interest. Attorneys acted as legal counsel for both the Halas Estate and the Bears Holding Companies. They arranged for the Bears to loan $500,000.00 to the holding company, the holding company to loan money to the estate and the estate to pay petitioner's fees. *Id.* The attorneys never notified the co-executors of the fees that were already paid and co-executor did not find out until they were shown deductions on trust tax returns. *Id.* When the attorneys for the estate were finally terminated they delivered unmarked files from which all memorandum and notes had been removed. *Id.*

The trial court reduced the attorney's fees to $535,000.00 and ordered them to pay interest on the money they paid themselves without approval of the co-executors. The appellate court affirmed and made numerous scathing findings, such as:

1. The attorneys breached their derivative duty with respect to the reorganization of the Bears;
2. The breach by the executor would not have been attributed to them if they did not act in bad faith themselves;
3. They violated the court orders, breached its own fiduciary duty by their failure to notify the respondents or the GAL of the reorganization and failed to protect the respondent's interest in the reorganization;
4. They misrepresented the status of the stock to the guardian and the timing of the reorganization;

5. Their taking of payments without approval of the co-executors showed a complete lack of good faith;

6. They operated under conflicts of interest with respect to the loans between the entities and exhibited bad faith in the delay and transfer of the file after termination. They also acted in bad faith by entering the so-called "Agreed" order. *Id.*

What is amazing about *Halas* is that even with all of these findings of bad acts, the appellate court affirmed the amount of over $500,000.00 in fees. The reasoning was that an award of fees is in the sole discretion of the trial court and it will not be disturbed if there is any evidence in the record to support the findings. The court stated that the record indicated that the estate did derive benefit form the respondent's services and a reasonable fee should be paid. *Id, at 833.* In agreeing with the trial court to reduce the fees, the court found that the fees petitioned for were excessive given: the repetition of billing as a result of multiple attorneys working on the file; inexperience associates were assigned to research issues that more experienced attorneys would know. In addition, preparation and litigation concerning their own fee petitions did not benefit the estate, and therefore, fees were not allowed for these time entries. *Id.*

VI. Conclusion.

The trial court is the "gatekeeper" when it comes to getting paid in a probate case. In petitioning for fees in a probate matter: 1) keep in mind the size of the estate, 2) be prepared to show how your fees are reasonable in light of the issues addressed, your experience and efficiency, and 3) be prepared to show the benefit derived by the

estate from the services rendered. Remember that misconduct on behalf of the representative could cost you financially.

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