

#L-1036

jd 561
01/05/88

Fourth Supplement to Memorandum 87-100

Subject: Study L-1036 - Probate Attorney Fees (Policy Issue
Determination)

Attached is a table showing for each state information on the standard used to compute probate attorney fees and the role of the court in fixing or reviewing the fees.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

PROBATE ATTORNEY FEE

(Prepared by Megan A. Smith, a student at the University of Santa Clara Law School who is employed as a student legal assistant for the California Law Revision Commission)

| <u>STATE</u> | <u>Reason- able Comp.</u> | <u>Set by</u> | <u>Role of Court</u> | <u>Percentage Formula</u> | <u>Basis of Formula</u> | <u>Extra- Ordinary Comp.</u> | <u>Court Can Award Less</u> | <u>Notes</u> |
|---------------|---|-------------------|--------------------------|-------------------------------|--------------------------|--------------------------------------|-------------------------------------|--------------|
| Alabama | | Ct. | | | | | | 1 |
| Alaska | X | P.R. | UPC | | | | | 2, 3 |
| Arizona | X | P.R. | UPC | | | | | 2, 3 |
| Arkansas | X | P.R. | UPC | Yes absent a fee contract | Estate's Market Value | Yes | Yes | 2, 4, 5 |
| California | | | | X | Estate Value | Yes | No | 6, 8, 14 |
| Colorado | X | P.R. | UPC | | | | | 2, 3, 7 |
| Connecticut | P. R. is authorized to employ and compensate agents, including attorneys. | | | | | | | |
| Delaware | | | | Schedule by court rule | Special Formula | Yes | Yes | 7, 8, 9 |
| Florida | X | P.R. | UPC | | | | | 2, 3, 7 |
| Georgia | | Ct. | | | | | | |
| Hawaii | | | | X | Estate Value | Yes | No | 2, 3 |
| Idaho | X | P.R. | UPC | | | | | 2, 3 |
| Illinois | X | Ct. | fixes comp | | | | | |
| Indiana | X | Ct. | fixes comp | | | | | 6 |
| Iowa | | Ct. | | X | Estate Assets | Yes | Yes | 9 |
| Kansas | X | Ct. | fixes comp | | | | | 11 |
| Kentucky | P. R. is authorized to employ and compensate agents, including attorneys. | | | | | | | |
| Louisiana | NO STATUTE | | | | | | | |
| Maine | X | P.R. | UPC | | | | | 2, 3, 7, 11 |
| Maryland | X | Ct. | fixes comp | | | | | |
| Massachusetts | X | Ct. | fixes comp | | | | | 2, 7 |
| Michigan | X | Ct. | fixes comp | | | | | |
| Minnesota | X | P.R. | UPC | | | | | 2, 3 |
| Mississippi | X | Ct. | fixes comp | | | | | |
| Missouri | X | | | X | Pers. Prop & Sales | Yes | No | 5, 6, 8 |
| Montana | X | | UPC | X | Tax value of est. | Yes | Yes | 2, 3 |
| Nebraska | X | P.R. | UPC | | | | | 2, 3, 7 |
| Nevada | X | P.R. | See n. 10 | | | | | 10 |

PROBATE ATTORNEY FEE
(Continuation of Table)

| <u>STATE</u> | <u>Reason- able Comp.</u> | <u>Set by</u> | <u>Role of Court</u> | <u>Percentage Formula</u> | <u>Basis of Formula</u> | <u>Extra- Ordinary Comp.</u> | <u>Court Can Award Less</u> | <u>Notes</u> |
|----------------|---|-------------------|---|-------------------------------|-------------------------|--------------------------------------|-------------------------------------|--------------|
| New Hampshire | NO STATUTE | | | | | | | |
| New Jersey | X | Ct. | fixes comp | | | | | |
| New Mexico | | | | X | Prop. in P.R. Poss | No | Yes | 12 |
| New York | X | Ct. | fixes comp | | | | | 2, 3, 6 |
| North Carolina | X | P.R. | | | | | | 13 |
| North Dakota | X | P.R. | UPC | | | | | 2, 3 |
| Ohio | X | P.R. | | | | | | 4 |
| Oklahoma | NO STATUTE | | | | | | | |
| Oregon | X | Ct. | fixes comp | | | | | 7 |
| Pennsylvania | NO STATUTE | | | | | | | |
| Rhode Island | NO STATUTE | | | | | | | 11 |
| South Carolina | X | P.R. | UPC | | | | | 2, 3 |
| South Dakota | NO STATUTE | | | | | | | |
| Tennessee | NO STATUTE | | | | | | | |
| Texas | X | P.R. | Fees set by P.R. subject to approval by court | | | | | |
| Utah | X | P.R. | UPC | | | | | 2, 3 |
| Vermont | NO STATUTE | | | | | | | |
| Virginia | NO STATUTE | | | | | | | |
| Washington | X | Ct. | | | | | | 6 |
| West Virginia | NO STATUTE; case law allows P.R. to employ attorneys. | | | | | | | |
| Wisconsin | X | P.R. like UPC | | | | | | 3, 7 |
| Wyoming | | | | X | Probate Estate | Yes | No | 6 |

Notes:

1. Payment for services actually rendered authorized at time of annual, partial, or final settlement.
2. The court may order refunds of excess compensation.
3. The propriety of an attorney's employment and the amount of compensation may be reviewed by court upon petition of an interested person.
4. The personal representative has the option of setting attorney fees without prior court approval, but this is subject to review by the court. On petition of an interested person (including the representative or the attorney), the court fixes the fees allowed. Once reviewed, the fees allowed are binding upon all parties. The personal representative can set fees in Arkansas only if a contract is made with the attorney; otherwise the statutory fee schedule applies.
5. If reasonable compensation exceeds the statutory provision, the court shall allow additional compensation so that the compensation is reasonable and adequate. There is no need to perform extraordinary services to qualify for this additional compensation.
6. The court can allow partial payments for fees already earned.
7. The statute lists factors for the court to use in determining fees.
8. The court can deny all or part of the compensation if the attorney fails to perform certain duties.
9. The fee formula is a ceiling on compensation and is not to be charged in all cases.
10. Court determines attorney fee only if the personal representative and the attorney fail to agree on fee, but the fee is subject to approval of the court after notice to interested parties who are given an opportunity to object to the fee.
11. The statute only mentions attorney's fees in relation to prosecuting or defending actions in probate court.
12. Upon petition for judicial review, the court can fix the fees of the attorney.
13. The statute only mentions attorney's fees in reference to attorneys who are also fiduciaries of the estate, e.g., attorneys in a dual role as both attorney and executor.
14. See the staff Background Study for a discussion of the details concerning the California provision.