#L-1055

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05/12/88

Memorandum 88-48

Subject: Study L-1055 - Personal Representative and Attorney Fees in Probate

Attached is a letter (dated April 28, 1988) from Luther J. Avery, the former Chair of the ABA Section on Real Property, Probate and Trust Law. He forwards a copy of a Draft Statement of Principles Regarding Probate Practices and Expenses. This was adopted by the ABA.

The background study prepared by the staff noted the existence of this report and included extracts from it and references to it. However, this portion of the staff background study was not discussed in any depth at the meeting.

Also attached is a second letter from Mr. Avery (dated May 2, 1988). In this letter, Mr. Avery states that the existing statutory fee system is one under which most lawyers lose money on a formal probate unless the matter can be handled as a summary probate. The statutory fee precludes the skilled specialist from handling the small estate where Mr. Avery believes there are more disputes and more complicated problems than large estates. He believes that the inexperienced lawyers who handle these estates do a poor job. He also believes that the lawyer should be permitted to perform the duties of both the personal representative and the lawyer and be paid for both.

The staff has advised Mr. Avery that his letters will be included on the Agenda for the Commission's July meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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April 28, 1988

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STUDY L-1036/1055
PERSONAL REPRESENTATION
AND ATTORNEY FEES IN PROBATE

Dear Mr. DeMoully:

In 1971, before I became Chair of the ABA Section of Real Property, Probate and Trust Law, I caused the Section to form a committee and study fees and costs in fiduciary matters. That study led to a report (a draft copy enclosed), later adopted by the ABA.

I strongly recommend that the CLR study of fees in probate matters consider following the ABA Statement of Principles.

If there are hearings on the fee matter, I would like to be notified so I can contribute to the deliberations.

Yours sincerely,

Luther J. Avery

LJA:bal
841.1.probate

Enclosure

DRAFT STATEMENT OF PRINCIPLES REGARDING PROBATE PRACTICES AND EXPENSES

Reprinted from
REAL PROPERTY, PROBATE AND TRUST JOURNAL, Winter 1971

DRAFT STATEMENT OF PRINCIPLES REGARDING PROBATE PRACTICES AND EXPENSES

[Editor's Note: The following Statement of Principles was approved for publication by the Council of the Section of Real Property, Probate and Trust Law at its Fall meeting in Dallas, November 7, 1971. It is the outgrowth of surveys made by the Section's Committee on Administration Expenses, under the successive chairmanships of Otto J. Frohnmayer of Medford, Oregon, and George J. Hauptfuhrer, Jr. of Philadelphia, Pennsylvania. The Statement is not to be deemed to represent the views of the Section or the American Bar Association, but it is being published here in order to solicit the views of members of the Section for consideration prior to final action by the Council. Comments should be directed to Mr. George J. Hauptfuhrer, Jr., 1600 Three Penn Center, Philadelphia, Pa. 19102.]

BACKGROUND

Recent publicity has focused public attention upon probate practices. In particular there has been criticism of the charges, costs and delays in the settling of decedents' estates. Studies made by the American Bar Association's Section of Real Property, Probate and Trust Law indicate that sufficient justification for some of the criticism exists to warrant that Section's making clear, for the benefit of the public and the profession, its position with respect to fees, commissions and other charges, costs and practices involved in the settlement of decedents' estates.

Initially, it should be noted that probate laws and rules of practice are designed to protect not only heirs and beneficiaries, but also creditors and various public authorities, including tax collectors. Probate laws and procedures should keep the interests of all in proper balance.. Wholesale condemnation of existing laws and procedures is unwarranted, and in many instances such criticism is founded largely upon lack of understanding and knowledge of the subject matter.

Probate practices and procedures in the various states have developed into differing systems over the years. Many such practices and procedures, although substantially unchanged over a long period of time, were well conceived and are still valid today. Others, if originally desirable, no longer serve a valid public purpose and should be either modernized or abandoned.

It cannot be denied that outmoded procedures, unnecessary delays and excessive charges and costs exist in some probate jurisdictions. Such jurisdictions frequently have practices, charges and costs which, having been in effect for many years with deep political roots, are difficult to change. Many other jurisdictions have relatively modern, simple and inexpensive procedures that operate well and in the public interest. As is true in any area of any profession, however, some improvement could probably be made everywhere.

Although the organized bar should bear a substantial portion of the responsibility for continually improving the law and its procedures, it must be remembered that lawyers alone are frequently unable to overcome legislative hurdles and selfish political opposition and that public support is often needed to effect meaningful change.

In the hope that improvements will continue to be effected throughout the United States, this Statement of Principles is hereby adopted by the Section of Real Property, Probate and Trust Law as a guideline for state and local legislatures, courts and bar associations to consider when investigating, evaluating and establishing standards with respect to attorneys' fees, personal representatives' commissions and other practices and costs involved in the administration of decedents' estates.

PRINCIPLES

General

The public is entitled to assurance that the overall costs of the settlement of a decedent's estate will be fair and reasonable in the light of the circumstances of the particular estate. It should be borne in mind that the public is not so much concerned with the allocation of fees and charges among the parties involved in the settlement of the estate as it is in the aggregate amount of such items. Accordingly, this general principle should be carried throughout the specific areas of costs and charges, and for each estate reference to the total picture is essential. This Statement, however, is not intended to limit or to restrict in any way a testator's right to provide either by inter vivos agreement or by will for the compensation to be paid for services to be rendered in the settlement of his estate.

Comment: Where a testator contracts during his lifetime as to payment for services to be rendered in the settlement of his estate, such agreement should be given effect to the extent feasible but without thereby automatically reducing the fair and reasonable compensation to be paid to others who render services in the settlement of the estate and who were not parties to the agreement.

Where a testator provides by will for the amount of compensation for services in the settlement of the estate, acceptance of the position described in the will should not be required, but where there is such acceptance, then in the absence of extraordinary circumstances, it should constitute acceptance of the terms of compensation.

When no one is willing to render services in the settlement of an estate because of the onerous burden on compensation by the provisions of the will, the court should declare such provision null and void and the settlement of the estate should proceed as if the provision were nonexistent.

Compensation for Services

1. Where the testator has made no effective arrangements for compensation, the commissions of a personal representative and the fee of the attorney for services in the settlement of a decedent's estate should bear a reasonable relationship to the value of the services rendered by each and the responsibility assumed by each. Even though on occasion it may be difficult to delineate the extent of the services properly to be rendered and the responsibility properly to be assumed by the personal representative and by the attorney, such services and responsibilities should be delineated generally for and by each jurisdiction. Thereafter, within such guidelines the

personal representative and the attorney should, to the extent possible, agree in advance as to the respective services and responsibilities each shall render and assume in the particular estate.

2. Where the testator has made no effective arrangements for compensation, the following factors, in particular, should be given significant weight in determining the reasonableness of the compensation of the attorney and of the personal representative in connection with their services in the settlement of the estate:

A. The extent of the responsibilities assumed and the results obtained;
B. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the services properly;
C. The sufficiency of assets properly available to pay for the services.

Comment: As to the attorney the above factors are consistent with the Code of Professional Responsibility, which of course applies in every situation.

3. Rigid adherence to statutory or recommended commission or fee schedules is a frequent source of unfairness to beneficiaries of estates, to personal representatives and to lawyers settling estates. Such schedules, however, may be helpful primarily as suggestive of the reasonableness of the compensation with reference to the responsibilities and potential liabilities which should be assumed by the personal representative or the attorney, as the case may be. Where such schedule is employed, it should (a) be predicated upon the assumption of the full and timely performance of the normal services involved in the proceeding and the full assumption of the responsibilities attached thereto, and (b) not be regarded automatically as either a maximum or a minimum but only as a possible or suggested starting point to be considered in determining reasonable compensation.

Comment: A comparison of two estates of the same value may be helpful to an understanding of the problem:

1. The estate has a 50 per cent interest in the capital stock of a closely held corporation. After several appraisals and substantial infighting and negotiation with the taxing authorities and the other owners, the estate is finally settled on the basis of an assumption that the block of stock is worth $1,000,000; installment payments of the taxes have been worked out with the government; and the estate has been settled.

2. The estate is composed solely of two large blocks of readily marketable stock: $500,000 worth of Standard Oil Company of New Jersey common stock and $500,000 worth of IBM common stock. There are no particular problems in the timely settlement of the estate.

One of these estates has been very difficult to handle; appraisals of the stock of the closely held corporation ranged widely; it was necessary to spend a great deal of time in deciding first the stock's value and secondly how far the family could afford to push the taxing authorities and still arrive at a solution that would not bankrupt the estate. A great deal of responsibility was assumed by the personal representative and by the attorney; a great deal of work was done; and the result that was obtained was eminently satisfactory to the family.

In the second estate, only the basic normal services were required and rendered.

In the first case a substantial commission to the personal representative and a substantial fee to the lawyer are both fully justified.

In the second case, it would be unconscionable for the personal representative and the lawyer to be paid for their services the same amounts which are justified in the first case. Less work has ben done; less responsibility has been assumed; and there was never any doubt about the outcome of the settlement of the estate.

To the extent that a statutory or recommended commission or fee schedule fails to distinguish between such situations it will unquestionably operate unfairly in one case or the other, or possibly in both cases. Such a schedule has little, if any, value in the setting of fair and reasonable compensation.

4. Even if he is the sole personal representative an attorney may serve both as a personal representative of a decedent's estate and as counsel to the personal representative and may receive reasonable compensation for his aggregate services and responsibilities.

Comment: In a few jurisdictions it is either illegal for an attorney to serve in both capacities or impossible for him to be adequately and fairly compensated for his services when he so acts. As the rule in the overwhelming number of jurisdictions is to the contrary, and as there are a great many estate situations where, if the attorney serves in both capacities, this may be the most efficient and economical way to settle the estate, the above statement seems clearly to be in the public interest.

5. When a personal representative, either by choice or by lack of experience, has the attorney perform a portion or all of the normal duties of the personal representative, it should be expected that the attorney will be paid for performing those duties, either by payment directly by the personal representative of a fair share of any otherwise allowable compensation due him or by a reduction of the personal representative's otherwise allowable compensation and a corresponding increase in the attorney's fees.

Comment: Unfairness frequently occurs when an inexperienced layman accepts the office of personal representative and then performs little or no work toward the settlement of the estate. In such circumstances, it is not unusual for the attorney, who – because of the void – performs all or most of the services required of both the attorney and the personal representative, to be inadequately and unfairly compensated for his overall services, and at the same time for the estate to be overcharged for commissions of the personal representative. The adjustments suggested by the above paragraph should correct such unfairness.

6. When an attorney or personal representative, either by choice or by lack of experience, has certain of his normal duties performed by others, his compensation should, generally, be lower than otherwise to reflect the fact that certain services and responsibilities were not performed and assumed by him. In such case, the party rendering the services should be fairly compensated for his services.

Comment: In some areas it is common practice for either the attorney or the personal representative or both to engage accountants to keep the financial records of the estate or to prepare tax returns. It is obvious that the accountant rendering such services should be adequately compensated, but his com-

pensation should not increase the overall administration expenses of the estate (see paragraph 1). To the extent that the accountant performs services or even assumes responsibilities which are normally a part of the lawyer's duties or responsibilities in the particular jurisdiction, then the lawyer's compensation should be adjusted to reflect that fact. In like manner, where the accountant's services relieve the personal representative of any of his normal services or responsibilities, the personal representative's compensation should be adjusted. The same procedures and considerations should apply with regard to the hiring of investment advisors or other experts to aid in the settlement of the estate. Of course, specific will provisions or inter vivos agreements which might produce a different result should be given effect.

7. When a personal representative or an attorney is required to render services with regard to nonprobate property, he should be reasonably compensated for such services, and a determination should be made with respect to the amount to be charged and the property against which the charge should be made. The fact that the owner of such property did not request the services should be immaterial where it is the duty of the personal representative to consider such property in order to settle the estate properly. Such determination should be made, if feasible, by the interested parties themselves, otherwise by the court having jurisdiction of the decedent's estate applying general principles of equity.

Comment: (1) There appears to be a general absence of specific legislation assessing charges against nonprobate assets, and in some jurisdictions supplemental legislation may be indicated to assure the desired result.

(2) Examples of the indicated work are (a) the proper valuation and tracing of property passing outside the will, such as jointly held property, property held in an inter vivos trust; and (b) the determination of whether a gift has ben made in contemplation of death.

Standard of Care

8. Because of the many technical legal concepts and principles involved in the settlement of a decedent's estate, the employment of an attorney by the personal representative (who is not himself an attorney qualified to handle estate matters) to perform the necessary legal services is in the best interests of both the estate and the public. A personal representative who is not an attorney and who undertakes duties that, under court rule or local practice, constitute legal services should be aware of the substantial risk that his failure to obtain competent legal advice may constitute negligence in the event of an error in the performance of such duties.

In determining which duties constitute legal services, weight should be given to bar association rulings and statements. Generally, these duties include (i) the interpretation of all legal documents, (ii) the determination of priority of claims, (iii) the resolution of questions of distribution, (iv) the probate and other court work customarily involved in the settlement of a decedent's estate and (v) the responsibility for all tax matters, including the determination of death taxes, the estate's income taxes and all post mortem tax planning for the estate.

Comment: Special attention is called to the word "responsibility" in subpara-

graph (v) above. It is not intended to suggest that the lawyer should be responsible for the mechanical preparation of tax returns (although he may elect to do so), but that his expertise should be utilized not only in planning the steps to be followed in connection with the proper settlement of the estate and the preparation of the tax returns in connection therewith, but also in reviewing all such returns before they are filed and participating in any audits which take place in relation thereto.

Governmental Charges and Appointees

9. In general, fees and charges by governmental authorities or appointees for services that accomplish no significant purpose in the settlement of a decedent's estate should be eliminated. Fees and charges which do serve a significant purpose in the settlement of the estate should bear a reasonable relationship to the services rendered.

Comment: The above paragraph has particular reference to court appointed appraisers and guardians.

10. The duty to protect all parties interested in a decedent's estate by having the estate property properly appraised should rest primarily with the personal representative who may employ, at estate expense, such experts to assist him as he deems appropriate. Additional appraisals of estate property by court or other government appointees, who have no direct relation to the tax collecting function, should not be required, and there should be no charge against the estate for any such appraisal unless it is necessary for a significant purpose in the administration of the estate and cannot be obtained in adequate fashion from generally available and reliable public sources.

Comment: It is believed that there are very few situations where a court appointed or governmental appointed appraiser, to be compensated at the estate's expense, is either necessary or desirable.

11. The duty to protect the interests of minors, incompetents or unascertained parties should rest primarily with the probate court. A guardian or trustee ad litem should be appointed to represent any such interest only if the court, in its sound discretion, believes it would be impracticable for it to discharge those duties without the assistance of such a guardian or trustee. If a guardian or trustee ad litem is appointed the following factors should be borne in mind:

A. The guardian or trustee should consider his services as being in aid of the court and should seek the specific permission of the court before undertaking to render unusual services (as he would seek the permission of his client if his client were adult and competent); and

B. The guardian or trustee in requesting, and the court in fixing, compensation should apply the standards set forth in the Code of Professional Responsibility in such a way as to resolve doubts as to the amounts against the interests of the guardian or trustee, recognizing that the person whose interests were represented by the guardian or trustee is, by definition, incapable of challenging the appropriateness of the amount requested.

Comment: In a situation where a necessary party who is adult and competent has interests substantially identical to those of a necessary party who is a minor, the court should be reluctant to burden the estate with the expenses of a guardian ad litem for such minor's interest.

Bonds

12. A bond that serves no significant purpose in the settlement of the estate should not be required of a personal representative or any other fiduciary. A testator should be allowed by will to relieve any fiduciary, including a resident of another jurisdiction, from posting a bond. An interested party of an estate should also be allowed to waive the requirement of a bond to the extent of his interest in the estate.

Comment: It is believed that there are relatively few situations which require bonding of a named executor. Of course, the above paragraph is not intended to eliminate the requirement of a bond where an interested party shows cause for the filing of security.

Uniform Law

13. Because of the increasing mobility of the population of the United States and the obvious benefits to the public of standardized probate laws, simplified probate procedures and uniform systems of death taxes, it would seem desirable that every jurisdiction consider promptly the enactment of legislation that will bring its laws and procedures into closer conformity with those of other jurisdictions. Enactment of the Uniform Probate Code would be a major and beneficial step toward this desirable goal.

Comment: The National Conference of Commissioners on Uniform State Laws and the American Bar Association have endorsed the Uniform Probate Code as desirable legislation.

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May 2, 1988

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STUDY L-1036 -- ATTORNEY FEES
IN PROBATE (DISCLOSURE REQUIREMENT)

Dear Mr. DeMoully:

Exhibit 1 to your Memo 88-33 amends B&P Code §4148 and proposes B&P Code §4148.5. In my opinion, the proposal is defective.

B&P §4148.5(a) states "...This additional fee will be an amount that the court determines is just and reasonable for the extraordinary services, but the attorney and client may agree on a lower fee." The quoted language invites every client to contest a lawyer's fee seeking an agreement that whatever the court determines is "just and reasonable" will be lowered.

At present, there are numerous fee arbitration disputes where clients refuse to pay fees awarded by the court and the attorney must go through the arbitration process. Normally, the arbitration results in an award equal to the court determined fee. Such disputes should not be encouraged. I urge the quoted language be modified to strike all language after "...extraordinary services."

The proposed rule to require an invitation to negotiate down a maximum fee is bad policy. The policy is bad for the same reason that the State Bar recently adopted an ethical rule prohibiting lawyers in public interest litigation from conditioning a settlement on nonpayment of legal fees. Such a policy attacks the client's Sixth Amendment rights and tends to discourage lawyers from helping clients in need.

In probate and trust matters, it is not uncommon for inexperienced fiduciaries to perform so poorly that the lawyer not only has to perform the legal services, but also performs the duties of the fiduciary. The new law should make it clear that if the lawyer performs both the functions of lawyer and fiduciary, the lawyer can be compensated for both services. If the law is not clear on that regard, then the tendency will be for lawyers to urge individuals to turn fiduciary matters over to corporate fiduciaries. In this way, lawyers can end up doing only the legal work for which the lawyers are paid.

Elsewhere I have written to you suggesting that the state depart from use of a statutory fee because, in my opinion, the statutory fee results in the problem B&P Code §6148.5 seeks to cure. In unusual estates with large value, a statutory fee may result in fees that are extremely lucrative. In my opinion, that is a rare situation. In fact, less than two percent of estates are required to file federal estate tax returns and it is only in those estates that there is a risk fees will be excessive.

The fact is that most estates are small. The fact is that most small estates have more disputes and more complicated problems than large estates. The fact is that with statutory fees most lawyers lose money on a formal probate unless the matter can be handled as a summary probate under Division 8, Part 1 and Part 2. The result is that many lawyers handle small probate matters as a pro bono activity or at a loss. The present fee structure discourages probate specialists from handling small estates where the expertise of a specialist is needed because the small estate can less easily afford the errors committed by inexperienced lawyers, errors that go uncompensated because the small estate beneficiary cannot afford to bring a malpractice action.

I was consulted on such a matter recently. The error involved $2,500 in an estate of $26,000. I advised that the fees to pursue the $2,500 would exceed the amount at issue (when you consider that the lawyer will be defended by an insurance company). In short, we need a fee structure that properly compensates the expert and encourages the expert to handle small estates.

The present statutory fee structure (coupled with a rule against fees for both legal work and serving as a fiduciary going to one lawyer) works to the detriment of the people who need the help most. One of the reasons knowledgeable lawyers are getting out of the probate business is because of inadequate fees.

The attitude of Memo 88-32 and Memo 88-33 is that fees are too high. The fact is that fees are too low. The fact is that the statutory fee procedure is doing a great disservice to the public.

Yours sincerely,

Luther J. Avery

LJA:bal
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