

PROBATE CORNER

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ARTICLE: Attorney's Fees For Rendering Services To An Estate

Sec. 733.106(3) provides: "Any attorney who has rendered services to an estate may be awarded reasonable compensation from the estate." This statute is not restricted to services that bring about an enhancement in value or an increase in the assets of the estate, but also includes services that are successful in effectuating the testamentary intention set forth in the will, that prevent the appointment of a personal representative, or that obtain the removal of a personal representative.

I. ATTORNEY'S FEES ALLOWED:

When is an attorney entitled to an award of attorney's fees pursuant to §733.106(3)?

✓ *In re Estate of Lewis*, 442 So.2d 290 (Fla. 4th DCA 1983). In *Lewis*, a beneficiary whose devise was being contested by the personal representative on the basis of undue influence was entitled to an award of attorney's fees when the personal representative voluntarily dismissed his petition.

✓ *Duncombe v. Adderly*, 2008 Fla. App. LEXIS 15405 (Fla. 4th DCA 10/8/08). A beneficiary who prevents the appointment of a designated personal representative or that obtains the removal of a personal representative is entitled to an award of attorney's fees.

✓ *Menz v. Estate of Menz*, 381 So.2d 375 (Fla. 1st DCA 1980). In *Menz*, the surviving spouse was entitled to her recover attorney's fees necessitated by the personal representative's failure to satisfy his duty to file a petition to determine the amount of the elective share after a proper election had been made because the attorney's efforts on the widow's behalf resulted in a change in the distribution under the will.

✓ *Johnson v. Burlison*, 61 So.2d 170 (Fla. 1952). In *Johnson*, the surviving spouse was entitled to recover her attorney's fees where the legal services were necessary to require a personal representative to carry out the provisions of a will and give the surviving spouse the income as directed in the will.

✓ *In re Estate of Griffis*, 366 So.2d 80 (Fla. 4th DCA 1978). In *Griffis*, a beneficiary who successfully argued that decedent's destruction of two later codicils revived the provisions of the first codicil was entitled to recover his attorney's fees because the ultimate will was determined and the estate was benefitted because the beneficiaries whom the testator intended are the ones who receive their legacies and bequests

✓ *Baumer v. Howard*, 542 So.2d 400 (Fla. 1st DCA 1989). In *Baumer*, a beneficiary was entitled to recover attorney's fees by establishing that the widow unlawfully and intentionally killed the decedent because the interest of the decedent in the entireties

property passed to his estate instead of to the surviving spouse. Additionally, the attorneys benefited the estate by ensuring that the estate property was divided and distributed according to the decedent's intent.

✓ *Tillman v. Smith*, 526 So. 2d 730 (Fla. 5th DCA 1988). A beneficiary may recover attorney's fees for those services which resulted in tax savings to the estate.

II. ATTORNEY'S FEES NOT ALLOWED

When is an attorney not entitled to an award of attorney's fees pursuant to §733.106(3)?

✓ *In re Estate of Hand*, 475 So.2d 1337 (Fla. 3d DCA 1985) and *Onofrio v. Johnston & Sasser, P.A.*, 782 So.2d 1019 (Fla. 5th DCA 2001). A proponent of a will who is found to have procured it through undue influence is not entitled to be awarded attorneys' fees from the decedent's estate because the services rendered by the attorney are of no benefit to the estate. However, the proponent's attorney would be entitled to recover his fees for the services that benefit the estate, such as publishing notice to creditors, protecting assets, and considering and dealing with tax issues.

✓ *In re Estate of Simon*, 549 So.2d 210 (Fla. 3d DCA 1989) and *Dew v. Nerreter*, 664 So. 2d 1179 (Fla. 5th DCA 1995). Attorney's fees will not be awarded if a court determines that the attorney's actions were a detriment rather than a benefit to the estate, i.e., if the services tend to break down, subtract from, or dissipate the estate.

✓ *Samuels v. Estate of Ahern*, 436 So.2d 1096 (Fla. 4th DCA 1983). A party is not entitled to recover attorney's fees from an estate for successfully litigating entitlement to a bank account jointly held with the decedent because the bank account was not a probate asset and thus was not part of the estate.

✓ *Franklin v. Stettin*, 579 So.2d 245 (Fla. 3d DCA 1991). Services rendered by an attorney that are duplicative of the curator's efforts are not beneficial to the estate.

✓ *In re Estate of Freedman*, 340 So.2d 1275 (Fla. 3d DCA 1977). In *Freedman*, attorney's fees were denied for successfully pursuing an independent action to impress a constructive trust on legacies bequeathed by the deceased to her two half-sisters. The appellate court reasoned that because a constructive trust was placed on the funds by means of a separate action in the civil division, the estate was not benefited.

✓ *Tillman v. Smith*, 526 So. 2d 730 (Fla. 5th DCA 1988). In *Tillman*, attorney's fees were not allowed to the widow for successfully challenging the validity of an antenuptial agreement that was specifically referenced in the will. The appellate court reasoned that the litigation clearly thwarted the decedent's intention as expressed in his will; the decedent clearly intended the antenuptial agreement to control and for his widow to receive only a small interest in his estate. See also *Harding v. Rosoff*, 951 So.2d 912 (Fla. 4th DCA 2007)(litigation over the validity of the power of appointment thwarted the testator's intent as expressed in his will).