This article will examine Florida law concerning the recovery of attorneys' fees and costs from an estate for unsuccessfully offering a will for probate. The article will also offer practical suggestions for obtaining such an award.

Statutory Background

The sole basis for an award of attorneys’ fees and costs for unsuccessfully offering a will for probate is F.S. §733.106(2). The statute requires the payment of the nominated personal representative’s attorneys’ fees and costs for offering in good faith a will in due form even though probate is denied or revoked. If the personal representative named in the will does not act within a reasonable time, any proponent of a will may offer a will in due form for probate and claim attorneys’ fees and costs pursuant to the statute. A personal representative who is removed because the will under which he or she is appointed is determined to be invalid is also entitled to attorneys’ fees and costs pursuant to this subsection of the statute, provided he or she has acted in “good faith.”

Recent Legislative Changes

F.S. §733.106(2) underwent material change in the revision of the Florida Probate Code effective January 1, 2002. Under the prior version of the law, which first became effective July 31, 1975, an award of attorneys’ fees and costs to the good faith proponent for an unsuccessful effort was limited to the last known will of the decedent. The recent statutory amendments delete the limitation to the last known will and authorize an award of attorneys' fees and costs to the good faith proponent of any will, provided that it is “in due form.” The Probate Law Committee of the Real Property, Probate and Trust Law Section of The Florida Bar had substantial responsibility for the recent revision of the Florida Probate Code. With respect to the prior version of F.S. §733.106(2), the committee believed that the limitation on the recovery of attorneys' fees and costs to proponents of the last known will tended to discourage persons from propounding for probate wills which merited consideration by the courts. The committee's approach, as reflected in the recent amendment, is to give the trial court the authority to decide whether an unsuccessful effort to probate a will deserves an award of attorneys' fees and costs from the estate based upon a determination of the proponent's good faith in offering the document and other relevant factors.

Conditions to Recovery of Fees
The right of the personal representative or proponent of a will to attorneys' fees and costs for offering a will for probate if probate is denied or revoked is subject to three conditions: 1) the will must be “in due form”; 2) the fee arrangement between the personal representative (or other proponent) and the attorney cannot be a contingent one; and 3) the personal representative (or other proponent) must act “in good faith” in offering the will for probate. The Florida case law on these three conditions will be reviewed below.

Will in Due Form

In order for the proponent of a will to be entitled to fees under F.S. §733.106(2), the will offered must be “in due form.” The case law offers little guidance on the interpretation of this provision of the statute. Presumably, a “will in due form” must be properly executed in accordance with the provisions of F.S. §732.502 or other applicable law. One case has held that a copy of a will, offered in a proceeding to establish a lost or destroyed will, was not a “will in due form” within the meaning of the statute. Therefore, a “will in due form” must be an original document or, in the case of a nonresident decedent, an authenticated copy of a will filed in the domiciliary administration proceeding, and properly executed.

Absence of Agreement for Contingent Fee

Several Florida cases decided prior to the 1975 enactment of F.S. §733.106(2) suggest that when the proponent of a will has a contingent fee arrangement with his or her attorney, there is no right to an award of attorneys' fees from the estate for an unsuccessful offer of the will for probate. If the client's liability for attorneys' fees and costs is contingent upon successfully offering or defending the will, then the contingency has not occurred when the offer or defense is unsuccessful. The client who has no liability for fees under a contingent fee agreement cannot seek the recovery of such fees from the estate.

Research has not disclosed any cases decided after the enactment of F.S. §733.106(2) which have ruled directly on the issue of contingent fee agreements. Nevertheless, in the case of In re Estate of Hand, 475 So. 2d 1337, 1340 n.4, (Fla 3d DCA 1985), rev. denied, 484 So. 2d 7 (Fla. 1986), the Third District Court of Appeal suggested in a footnote that attorneys employed under a contingency agreement were not entitled to fees from the estate under F.S. §733.106(2) for the unsuccessful offer of the will at issue in that case.

The Requirement of “Good Faith”

F.S. §733.106(2) limits awards of fees to proponents of a will to persons “in good faith justified in offering” the will for probate. What does “good faith” mean in this context? Or, to pose the question more precisely, what evidence demonstrates the absence of “good faith” sufficient to support the denial of attorneys' fees and costs to the proponent of a will incurred in the unsuccessful offer of the will? To answer this question, it will be helpful to review the Florida cases which have considered an award of fees and costs to the unsuccessful proponent of a will. To facilitate the analysis, the cases will be grouped into two categories. The first category, in which an award of attorneys' fees was denied, all involve undue influence or other improper conduct by the proponent of the will. The second category, in which an award of attorneys' fees was granted, generally concern questions of the testamentary capacity of the decedent or other issues unrelated to the conduct of the proponent of the will.

Proponent Unsuccessful: Fees Denied

The earliest case on this issue is Watts v. Newport, 6 So. 2d 829 (Fla. 1941), involving the estate of Letitia V. Graham. After the death of Mrs. Graham at the age of 94, a document purporting to be her will was produced by a nonrelative, Beatrice Newport,
under suspicious circumstances. The will gave most of the estate to Mrs. Newport, who promptly petitioned for probate of the will. The trial court found that the will was a fraud and a forgery created by or at the instigation of Mrs. Newport. The will could not have been executed in the manner to which Mrs. Newport and the witnesses testified, the trial court found, because of the decedent's physical and mental infirmities at the time of its alleged execution. Although the finding of forgery was sufficient to invalidate the alleged will, the trial court went on to find that the decedent lacked testamentary capacity at the time of the alleged execution of the will. Based upon these and similar findings of fact, the trial court denied probate of the last will. On appeal to the Supreme Court of Florida, the trial court's decision was approved.

Because of her participation in the forgery of the will, Mrs. Newport's bad faith in offering the will for probate was clear. This fact doomed her attorney's bid for fees under former *38 F.S. §732.14. Under this statute, the court could award attorneys' fees and costs for an unsuccessful offer of a will in due form when it appeared that the named executor was “prima facie justified” in offering the will for probate.  

The case of In re Estate of Hand is the first case on this issue to deny an award of fees decided after the 1975 enactment of F.S. §733.106(2). Ahlman, the proponent of the will, a substantial beneficiary, and the personal representative named therein, was found to have procured the will by undue influence. The trial court granted Ahlman's motion for fees and costs upon a finding that the services rendered by Ahlman's attorneys benefited the estate. The decedent's next of kin took an appeal, and the Third District Court of Appeal reversed. Ahlman was not entitled to fees and costs for his attorneys under F.S. §733.106(2) because he could not meet the “good faith” requirement. The court explained that “one who is guilty of procuring a will by undue influence cannot act in good faith in offering the will for probate.” Moreover, the attorneys for Ahlman were not entitled to fees in their own right under F.S. §733.106(3) because their services rendered in the unsuccessful defense of the last known will did not benefit the estate. The appellate court pointed out, however, that “the fact that attorneys are disentitled to fees and costs under subsection three does not mean that a proponent cannot recover fees and costs under subsection two in those instances where the will, although rejected, was offered in good faith.”

Additional cases in which fee awards were denied to proponents who were found to be guilty of procuring the wills at issue through the exercise of undue influence include In re Estate of Rayhill, 489 So. 2d 87 (Fla. 3d DCA 1986), rev. denied, 496 So. 2d 143 (Fla. 1986); In re Estate of MacPhee, 216 So. 2d 489 (Fla. 2d DCA 1986); and In re Gleason's Estate, 74 So. 2d 360 (Fla. 1954). The result is similar even if the attorney for the bad faith proponent of the will has already been paid. In a recent case, a personal representative was removed after the will under which he was appointed was found to be invalid on account of undue influence exerted by the personal representative. The attorneys for the removed personal representative were required, pursuant to F.S. §733.6175, to refund to the estate fees already paid them to the extent that their services did not benefit the estate.

**Proponent Unsuccessful: Fees Awarded**

Conversely, in the case of In re Weinstein's Estate, 339 So. 2d 700 (Fla. 3d DCA 1976), the trial court awarded fees in favor of the attorneys for a proponent and sole beneficiary of a will apparently found to be invalid on grounds of lack of testamentary capacity. The trial court found that the proponent was justified in offering the will for probate. Affirming the fee award, the appellate court explained that substantial evidence in the record supported the trial court's finding that the proponent was justified in offering the contested will for probate. In the case of In re Estate of Gaspelin, 542 So. 2d 10213 (Fla. 2d DCA 1989), the Second District Court of Appeal held that beneficiaries of an estate who unsuccessfully defended a will in litigation with the decedent's widow were entitled to fees “to the extent that they acted in good faith as proponents of the will.” Referring to the policy considerations underlying F.S. §733.106(2), the appellate court noted that the unsuccessful beneficiaries should not have been expected “to provide the sole defense of the will at the expense of their personal assets.”
Similarly, in *Cushing v. Estate of Reynolds*, 489 So. 2d 1204 (Fla. 3d DCA 1986), the Third District Court of Appeal reversed a trial court's assessment of costs against the proponents who acted in good faith in an unsuccessful offer of a will for probate. Pursuant to F.S. §733.106(2), the court held, the unsuccessful proponents of the will who acted in good faith were “to recover, rather than be liable for, costs.”

Of particular interest to the legal profession are two cases in which an attorney draftsman of a last will later became the unsuccessful proponent of the will in the contest. In the first case, the trial court found that the decedent lacked testamentary capacity to execute the will and refused to admit it to probate. Although the trial court invalidated the will on grounds of lack of testamentary capacity, it also awarded fees to the attorney draftsman of the will pursuant to former F.S. §732.14. (This former version of the statute was mentioned previously in connection with the discussion of the Graham estate litigation.) The trial court found that “while indicia of irregularities existed they were not sufficient to show such bad faith as would disqualify the appellant [the attorney draftsman] from applying for compensation.”

In the second case, the decedent bequeathed her entire estate to her attorney and named his law partner as executor. The law partner petitioned for probate of the will. The will was ultimately invalidated on grounds of undue influence. Nevertheless, the trial court awarded fees to the named executor and his attorneys for services rendered in the probate and will contest proceedings.

**Meaning of “Good Faith”**

The foregoing review of the cases permits an answer to the question previously posed: What evidence demonstrates the absence of “good faith” sufficient to support the denial of fees and costs to the proponent of a will incurred in the unsuccessful offer of the will for probate? In the reported Florida cases which have denied fees to the proponent of a will based upon the lack of “good faith” prior to the recent amendment to F.S. §733.106(2), two determinative factors have been present in every case. First, the proponent of the will was a major beneficiary, if not the sole beneficiary, under the challenged will. Second, the proponent of the challenged will was directly and actively involved in procuring the will found to be invalid, either by forgery as in the early cases involving the Graham estate, or by undue influence exerted by the proponent on the testator/testatrix as in the other cases reviewed. Thus, under the Florida cases, proof of the active and direct involvement of a substantial beneficiary in procuring the execution of the will found to be invalid is sufficient to show the absence of “good faith” to support a denial of fees under F.S. §733.106(2).

Until January 1, 2002, the statute limited an award of fees for unsuccessfully offering or defending a will to the last known will of the decedent. The elimination of this restriction makes the unsuccessful proponent of any will in due form eligible to apply for an award of attorneys' fees and costs. This is likely to result in a significant expansion of the case law construing the term “good faith” in the context of offering a will for probate. The last will of a decedent generally revokes all prior wills. Courts are unlikely to be sympathetic to fee requests from unsuccessful proponents of a prior will unless the proponents have a very good reason for contesting the last will. Accordingly, in order to establish “good faith” under the current version of the statute, the proponent of a prior will should demonstrate not only the absence of improper conduct relative to procuring the will offered for probate, but also a substantial basis for offering a prior will instead of the last will.

**Practical Considerations**
The recovery of attorneys' fees and costs under F.S. §733.106(2) for propounding a will for which probate is denied or revoked has to date generally been determined by the interest and activity of the proponent relative to the will. Because the proponent of the will is most often the personal representative named in the document, preparation for the recovery of attorneys' fees and costs begins with the drafting of the will itself. The selection of an independent third party as personal representative should be considered. Ideally, the personal representative nominated in the will should have no interest under the will and no involvement in its preparation or execution.

In the event of a will contest, the attorney who is asked to represent the proponent of a will should bear in mind that a contingent fee agreement with the client will make it impossible to recover fees and costs from the estate in the event the contingency does not materialize. The attorney employed to represent the proponent of a will should not proceed without a detailed, written fee agreement. Bar rules require a written fee agreement for any contingent fee arrangement. An attorney employed on an hourly rate or other noncontingent fee arrangement should have a written fee agreement in order to be able to rebut any assertion that the fee arrangement was actually contingent.

Counsel should recognize that a proponent of a will who is a substantial beneficiary under the document and who also had some degree of involvement in its preparation or execution may very well be denied an award of attorneys' fees and costs from the estate for an unsuccessful effort to probate the will. Therefore, counsel who contemplate representing such persons may not wish to undertake the representation without a substantial retainer or other assurances that the client will pay the fees and costs independently of any recovery from the estate.

It may also be prudent for counsel to document the file at the outset of the case by outlining the specific facts and legal theories supporting the validity of the will to be offered and the proponent's decision to propound it for probate. Although the self-serving nature of such a document is apparent, a detailed memorandum for the file prepared at the time the decision to offer the will is made would very likely be useful as part of the support for the proponent's claim of good faith in the event of an adverse result at trial.

Counsel must be careful to file the petition for attorneys' fees and costs pursuant to F.S. §733.106(2) in the name of the client and not in the name of the attorney or law firm. Unlike the third subsection of the statute, the right to the recovery of attorneys' fees and costs under the second subsection belongs to the client, not the attorney. In Cushing, the trial court denied an award of fees to the former attorneys for the named personal representative (who was one of the unsuccessful proponents) because they had applied for fees on their own behalf. Affirming, the appellate court specifically noted that if the petition for fees owed or paid by the named personal representative to the former attorneys had been filed on the personal representative's behalf instead of on behalf of her attorneys, the result would have been different. The attorney who applies for fees in his or her own name under F.S. §733.106(2) dooms the client's opportunity to recover attorneys' fees and costs, and thus the attorney's opportunity as well. Of course, as with any application for attorneys' fees, the presentation of detailed, contemporaneous time records is essential to obtaining an adequate award.

Conclusion

The recovery of attorneys' fees and costs for the unsuccessful offer or defense of a will of the decedent pursuant to F.S. §733.106(2) represents one of very few instances in Florida law in which a court-ordered award of attorneys' fees and costs may be made to the losing party. Counsel must give close attention to the substantive and procedural aspects of the statute in order to be able to obtain an award of attorneys' fees and costs from the estate as some measure of consolation for defeat at the trial of the will contest.
Footnotes

1. Douglas A. Wallace is a sole practitioner in Bradenton. He graduated from Princeton University in 1969 and received his J.D. from Yale Law School in 1972. This column is submitted on behalf of the Real Property, Probate and Trust Law Section, J. Michael Swaine, chair, and S. Dresden Brunner and William P. Sklar, editors.

The current version of the statute provides: “A person nominated as personal representative, or any proponent of a will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive costs and attorneys' fees from the estate even though probate is denied or revoked.” By way of contrast, there are multiple Florida statutes which authorize the recovery of attorneys' fees and costs for the successful offer of a will for probate or the defense of a will against a petition for revocation of probate. An attorney rendering such services may apply to the court for compensation in his own right pursuant to FLA. STAT. §733.106(3). See In re Estate of Paris, 699 So. 2d 301 (Fla. 2d D.C.A. 1997); and In re Estate of Lewis, 442 So. 2d 290 (Fla 4th D.C.A. 1983). Involvement in a will contest is an extraordinary service for which the attorney for the personal representative may be compensated pursuant to FLA. STAT. §733.6171(4)(a). The successful proponent of a will “in due form” may also recover attorneys' fees and costs from the estate pursuant to the statute under review, FLA. STAT. §733.106(2).

2. Kelley, Compensation Disputes §11.6, LITIGATION UNDER FLORIDA PROBATE CODE (Fla. Bar CLE, 3d ed.).

3. 2001 Fla. Laws ch. 226, §82.

4. Prior to its recent amendment, FLA. STAT. §733.106(2), which first became effective in 1975, provided: “A person nominated as personal representative of the last known will, or any proponent of the will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive his or her costs and attorney fees out of the estate even though he or she is unsuccessful.”


7. See In re Gleason's Estate, 74 So. 2d 360 (Fla. 1954); In re Graham's Estate, 23 So. 2d 485 (1945); and In re Estate of MacPhee, 216 So. 2d 489 (Fla. 2d D.C.A. 1968). But see Watts v. Newport, 9 So. 2d 417 (Fla. 1942). A case directly to the contrary is In re Estate of Whitehead, 287 So. 2d 9 (Fla. 1973), where the Supreme Court of Florida approved an award of fees to the unsuccessful proponent of an earlier will despite the contingent nature of the fee arrangement.

8. Watts, 6 So. 2d 829 at 832.


12. Hand, 475 So. 2d at 1339.

13. Id. at 1339-40. The court's analysis in Hand explains the interplay between the second and third subsections of FLA. STAT. §733.106. See generally Kelley, supra note 2.

14. Hand, 475 So. 2d at 1340.
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16 Gaspelin, 542 So. 2d at 1026.

17 Id.

18 Id.

19 Reported as Williams v. Kane, 88 So. 2d 599 (Fla. 1956); and Williams v. Kane, 88 So. 2d 603 (Fla. 1956).

20 Affirmed, 88 So. 2d 599.

21 Affirmed, 88 So. 2d 603. A recent unreported circuit court decision reaches a different result on somewhat similar facts. Order entered October 21, 1998, In re Estate of Guest, Manatee Circuit Court Case No. 1996-CP-000826. The attorney draftsman of the will in this case was named as personal representative in the last known will of the decedent. He later became the proponent of the will in a contest. The trial court invalidated the will on grounds of lack of testamentary capacity and undue influence and admitted an earlier will to probate. The draftsman of the last will petitioned for attorneys’ fees and costs pursuant to FLA. STAT. §733.106(2) for the defense of the last known will. The attorney was not a beneficiary under the last known will, and the trial court specifically found that he had not been part of any conspiracy to commit undue influence on the testatrix. Nevertheless, the trial court denied the attorney’s request for fees and costs on the theory that the attorney should have known that the testatrix lacked testamentary capacity. The trial court concluded that the attorney draftsman did not act in good faith either because he should not have drawn the will in the first place, or, having prepared the will and supervised its execution, ought not to have propounded it for probate. On appeal, the trial court’s order denying the fee request was upheld in per curiam affirmance without opinion. In re Estate of Guest, 754 So. 2d 36 (Fla. 2d D.C.A. 2000).

22 In re Estate of Reid, 138 So. 2d 342 (Fla. 3d D.C.A. 1962); and In re Estate of Reid, 182 So. 2d 54 (Fla. 3d D.C.A. 1966).

23 Affirmed, 182 So. 2d 54.

24 In a slightly different context, Florida courts have compared “the exposure of an estate to the offer of spurious wills and the attendant claims of personal representatives and beneficiaries named therein” to “exposure to contagious disease.” In re Estate of Hand, 475 So. 2d at 1339-40, citing In re Graham’s Estate, 23 So. 2d at 489-90.

25 Rule 4-1.5 (f)(1), Rules Regulating The Florida Bar.

26 Cushing, 489 So. 2d at 1206 n.4. See generally Kelley, supra note 2.

27 See generally HAUSER, ATTORNEY’S FEES IN FLORIDA, Chapter 5 (2d ed.).

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