

# January/February 2021 Advocate Correction

The Top 10 Tips article that appeared on page 9 was written by Bridget O'Brien Swartz, Esq. and not Leroy Cook.

We apologize for the error.

Below is another great column in her series.

## Yes, A Contingent Fee Agreement Can Be Determined Reasonable In Probate Court!

By Bridget O'Brien Swartz, Esq. and Robert L. Beckett, Esq.



**Bridget O'Brien Swartz,**  
Senior Counsel at Dyer  
Bregman & Ferris, PLLC.  
Certified Elder Law Attorney,  
National Elder Law  
Foundation and Fellow, the  
American College of Trust &  
Estate Counsel

**Robert L. Beckett,** fellow  
Senior Counsel at Dyer  
Bregman & Ferris, PLLC

You have carefully prepared your petition to approve the settlement of a personal injury claim in accordance with A.R.S. § 14-5424.D and Rule 53 of the Arizona Rules of Probate Procedure (A.R.P.P.). You have crafted your request for relief with consideration to the options now specifically spelled out in Rule 53. In preparing the petition, perhaps you have taken time to review previous articles in this publication's column. *See* (1) *Settlement Options Other Than A Conservatorship – Thank you*, Nov-Dec. 2020; and (2) *Top Ten Tips Leading To Settlement Approval in Probate Court*, Feb. 2021.

Your petition asks for approval of your fees and costs in accordance with your contingent fee agreement. What information does the court need to assess the reasonableness of your fees and costs?

This article will review the statutes, rules, and case law relating to the reasonableness of contingent fee agreements. Underlying the entirety of the law on this particular issue are these basic principles:

1. Contingent fee agreements are proper and have substantial social utility providing a method by which people of ordinary means can pursue a claim.
2. Even if a contingent fee agreement is proper when contracted for, the contingent fee may ultimately be excessive.
3. A court will look at the following factors

when determining the reasonableness of a fee based on a contingent fee agreement:

- a. the degree of uncertainty or contingency with respect to liability, amount of damages potentially recovered, or the funds available from which to collect any judgment;
- b. the difficulty of the case and the skill required to handle it;
- c. the time expended in pursuing it; and
- d. the results obtained.

Now let's go through the statutes, laws, case law. The author recommends that every time you start your fee statement, you review the following statutes, rules and case law in light of the particular case at hand and to make sure you are looking at current law.

1. Read A.R.S. § 14-5109 and, in particular, understand the probate court will be assessing reasonableness of a fee based on a contingent fee agreement with a focus on these factors set forth in A.R.S. § 14-5109:

- C2. The usual and customary fees charged in the relevant professional community for the services.
- C4. The extent that the services were provided in a reasonable, efficient and cost-effective manner.
- D. The person seeking compensation has the burden of proving the

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reasonableness and necessity of compensation and expenses sought.

2. Then read Rule 33 A.R.P.P., with particular focus on:

(b) **Content of Request for Approval.** Any request for approval of compensation must be accompanied by statements that include the following information:

(2) If requested fees are not based on hourly rates, the statement must include an explanation of the fee arrangement and a computation of the fee for which approval is sought.

(3) If the request includes reimbursement of costs, the statement must specify each cost, the date the cost was incurred, the purpose of the cost, and the amount of reimbursement requested, . . .

(g) Fee guidelines. When determining whether compensation is reasonable, the court must follow statewide fee guidelines contained in the Arizona Code of Judicial Administration (A.C.J.A.) Section 3-3-303.

3. The A.C.J.A. Section 3-303 consists of statewide fee guidelines and requirements applicable to the Court in determining the reasonableness of fees for services rendered by attorneys in Title 14 proceedings. While most of these statewide guidelines and requirements may not seem particularly relevant to a personal injury matter involving a

contingent fee agreement, read Section 3-303 or have your paralegal read this section in its entirety. Here are some Section 3-303 provisions that do directly impact fees and costs based on contingent fee agreements:

a. Section 3-303.D.4.b. specifically recognizes the propriety of properly executed contingent fee agreements with respect to personal injury claims.

b. Even in contingent fee arrangements, the Court generally expects hourly billing statements meeting the requirements of Section 303.D.2. The time spent on a case is one criteria in determining the reasonableness of a fee based on a contingent fee agreement. *See Swartz, supra*. If for any reason, itemized time has not been provided, consider a summary reconstruction of the time in your fee statement with enough specificity to support the time claimed. If you do not submit time or an adequate summary reconstruction of time, the judicial officer may require you to do so. This may cause a delay in having your fees, and possibly the settlement, approved.

d. The court expects that costs will be within the parameters of D.2.h. The list includes but is not limited to

(1) Goods or services obtained by or consumed by the Estate;

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- (2) Postage and shipping fees;
  - (3) Deposition and transcript costs;
  - (4) Fees charged by a process server;
  - (5) Publication fees;
  - (6) Expert Witness fees;
  - (7) Messenger Costs;
  - (8) Case-specific funds;
  - (9) Electronic database fees charged by an outside vendor (for example, Westlaw, LexisNexis, PACER) except for charges to research Arizona (or other applicable) statutes, case law, and regulations.
4. And, now, after you have looked at probate law and current rules, go back to the fundamental principles. Arizona Supreme Court Justice Feldman's decision in The Matter of Swartz, 141 Ariz. 266, 686 P.2d. 1236 (Ariz. 1984) has stood the test of time and remains the guiding light. Specifically:
- a. Swartz expressly finds that contingent fee agreements "are proper and has substantial social utility because such arrangements are often the only method by which a person of ordinary means may prosecute a just claim to judgment (pg. 1242).
  - b. Such a contingent fee agreement must be reasonable under all the circumstances of the case and should always be subject to the supervision of the court as to its

- reasonableness (pg. 1242).
- c. "Either a fixed or contingent fee, proper when contracted for, may later turn out to be excessive" (pg. 1243 [cites omitted]).
  - d. "The (contingent fee) may be much larger than that which the attorney or others in the community would have charged had they been retained and paid on a time basis" (pg. 1243).
  - e. The reasonableness of the contingent fee is properly the subject of a number of factors including:
    - (1) the degree of uncertainty or contingency with respect to liability, amount of damages which may be recovered, or the funds available from which to collect any judgment;
    - (2) the difficulty of the case and the skill required to handle it;
    - (3) the time expended in pursuing it; and
    - (4) the results obtained.

After preparing final drafts of your petition and fee statement in consideration of the foregoing, ask yourself whether the petition is transparent as to all math calculations? Consider including in your draft petition for approval of the settlement, a summary of the math:

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Gross settlement – less fees – less costs – less liens = net settlement. Make it easy for you and the court to assess the net amount to the client. And do not forget to advise the court of lien negotiations which resulted in an increased net amount to the minor/protected person.

Then, go back to the fee and cost statement, and make sure you have stated clearly the basis for the reasonableness of the fee including the four factors set forth immediately above.

Obtaining approval of the settlement in the probate court including approval of fees and costs is all part of the contingent fee agreement involving a minor/protected person at the outset of the representation. In general, the probate court is going to consider the time spent in accomplishing approval as part of the fee covered by the contingent fee agreement<sup>1</sup>. So, take care with this part of the personal injury case – demonstrating to the court, client, and other parties, the success to your client and the reasonableness of your fees in arriving at that success. ■

<sup>1</sup> There will be cases where ongoing administration and government benefit programs will require that the personal injury attorney bring in attorneys whose practice focuses on conservatorship/Trust administration and preservation of government benefits. These cases may involve probate pleadings far beyond a minor's net settlement of say, \$15,000 wherein the probate court approves settlement, fees and costs and orders the net settlement deposited into a restricted bank account until the minor reaches the age of 18. In such cases, the attorney services provided above and beyond typical minor's settlements may be properly chargeable to the client's net settlement.