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Estate Administration

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I. Overview

§10.1 The Estates and Protected Individuals Code became effective on April 1, 2000. This legislation did not make any significant change in the law pertaining to the compensation of attorneys who represent personal representatives. However, it does clarify the nature of the services that an attorney may render on behalf of a personal representative. A personal representative of an estate may retain “an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative’s administrative duties.” No court order is necessary. The attorney may be associated with the personal representative. MCL 700.3715(w).

The court rule governing the compensation of attorneys, MCR 8.303, was amended and renumbered as MCR 5.313 in 2002 to make substantial changes procedurally. One of those changes was limiting the application of the rule to decedent estates. *See* MCR 5.313. All fee agreements involving decedent estates are governed by MCR 5.313.

The author wishes to extend her thanks and appreciation to Everett R. Zack for his previous contributions to this chapter.

In addition, if a personal representative enters into a contingent fee agreement with an attorney (e.g., in connection with claims for personal injury, wrongful death, or no-fault benefits), that fee agreement is also governed by MCR 8.121. A contingent fee in excess of one-third of the net recovery is a “clearly excessive fee” in violation of MRPC 1.5(a) unless the fee “is received as a result of an award of attorney fees payable pursuant to MCL 500.3148, or other award or sanction made pursuant to statute, court rule, or the common law.” MCR 8.121(A).

The attorney who files an appearance on behalf of a personal representative represents the personal representative and not the estate or the beneficiaries. MCR 5.117(A). This is of particular significance for purposes of service. If the fiduciary dies, resigns, or is removed, the attorney-client relationship ends, and the attorney is no longer eligible to receive service on behalf of the fiduciary. *Wright v Estate of Treichel*, 36 Mich App 33, 193 NW2d 394 (1971).

II. Requirements of the Fee Agreement Under MCR 5.313

A. The Fee Must Be Reasonable

§10.2 The attorney who represents a personal representative is entitled to receive reasonable compensation for necessary legal services, advice, and assistance rendered to the personal representative. MCL 700.3715(w); MCR 5.313(A). MRPC 1.5(a) requires a court to consider a number of factors when determining the reasonableness of a fee. These factors include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

The reasonableness requirement applies to both hourly and percentage fee arrangements, and the burden of proof is on the attorney seeking compensation. *In re Krueger Estate*, 176 Mich App 241, 249, 438 NW2d 898 (1989). Further, to be compensable, the services must benefit the estate by either increasing or preserving the estate’s assets. *In re Sloan Estate*, 212 Mich App 357, 362, 538 NW2d 47 (1995). Special rules govern the reasonableness of contingent fees for wrongful death cases. MCR 8.121(A)–(B). For further discussion of what constitutes a reasonable fee and necessary legal services, see Richard J. Siriani, *Attorney Fees in Michigan*, Mich Prob & Est Plan J, Spring 2007, at 2, and James H. LoPrete, *Attorney Fees in Estate Settlement: What Is “Reasonable”?*, Mich Prob & Est Plan J, Fall 1987, at 9.

B. The Fee Agreement Must Be in Writing

§10.3 A written fee agreement between the attorney and the personal representative is mandatory and must be made at the beginning of the representation. A copy of the agreement must be provided to the personal representative. MCR 5.313(B). An attorney who fails to enter into a written fee agreement may not accept payment for services and costs without prior court approval. MCR 5.313(E).

Although the rule mandates a written fee agreement, it does not specify the agreement's form or contents. The fee agreement may therefore take the form of a formal contract or be embodied in a letter. If the latter, both the attorney and the personal representative should sign the letter. The fee agreement may be signed before the personal representative's actual appointment because MCR 5.313(B) refers to the "proposed personal representative" and MCL 700.3701 provides that beneficial actions taken by a personal representative before appointment are given the same effect as those occurring after appointment.

C. Records Requirements

§10.4 The attorney who represents a personal representative is required to maintain time records even if the fee arrangement is not based on time. The records must (1) identify the person performing the services, (2) state the date the services were performed, (3) state the amount of time spent performing the services, and (4) briefly describe the services. MCR 5.313(C). In a formal proceeding (e.g., a petition for allowance of an accounting or a petition or motion to approve the payment of attorney fees), a statement containing the above information must be appended to the accounting, petition, or motion seeking approval of fees unless all of the parties affected consent to the compensation. MCR 5.313(F). In supervised administration, the court must approve attorney fees. MCR 5.310(G). In unsupervised administration, court approval of fees is not required; however, the attorney is still required to maintain the records required by MCR 5.313(C). Maintaining accurate records is important because the burden of proof is on the attorney seeking compensation and without such records the probate court lacks the means to determine whether the fees are reasonable. *In re Kiebler's Estate*, 131 Mich App 441, 444, 345 NW2d 713 (1984). The probate court has broad discretion regarding the allowance of fees and its decision is reviewed only for an abuse of discretion. *In re Eddy Estate*, 354 Mich 334, 347–348, 92 NW2d 458 (1958); *In re Humphrey's Estate*, 141 Mich App 412, 439, 367 NW2d 873 (1985).

D. Notice Requirement

§10.5 Within 14 days after the personal representative's appointment or within 14 days after the personal representative retains the attorney, whichever is later, the personal representative must mail a copy of SCAO form PC 576, Notice Regarding Attorney Fees, and a copy of the fee agreement to those interested persons who will be affected by the payment of the fees. MCR 5.313(D). Presumably the interested persons will be the residuary beneficiaries in a testate estate and the heirs in an intestate estate. There is no longer a requirement to file a copy of PC

576 and a proof of service with the probate court. *See* MCR 5.104(A)(3), .313(B), (D).

E. Payment of Fees

§10.6 MCR 5.313(E) specifies the conditions that must be fulfilled before a personal representative can pay attorney fees without probate court approval. The following conditions must be fulfilled before payment:

1. There must be a written fee agreement.
2. A copy of the fee agreement and the notice required by MCR 5.313(D) must have been sent to each interested person who is affected by the payment.
3. A statement for services containing the information required by MCR 5.313(C) must have been sent to the personal representative and to each interested person who requested a copy.
4. No written, unresolved objection to the fees, current or past, has been served on the attorney and the personal representative.

If the above conditions are not fulfilled, the personal representative must obtain probate court approval before paying attorney fees. MCR 5.313(E) specifies the information that must be submitted to the probate court if probate court approval is requested or required. If attorney fees are paid without court approval, they remain subject to review by the court.

III. Drafting the Fee Agreement

§10.7 In addition to complying with the requirements of MCR 5.313 (see §§10.2–10.6), a probate fee agreement should address the following topics.

1. **The identity of the parties.** Identify the attorney or law firm and specify the fiduciary capacity of the fiduciary. If the nominated fiduciary is named as personal representative and as testamentary trustee, it would be best to specify whether the attorney will be representing the fiduciary in both capacities (even though MCR 5.313 does not apply to a testamentary trustee) or just in one capacity. Where the fiduciary is an individual, he or she may not appreciate the distinction in the two different positions. The fee agreement should be used to clarify this situation. For example, the fee agreement may state, “The attorney is representing Ms. Jones as personal representative only, and not as testamentary trustee.” The attorney should also make it clear that the attorney is representing the personal representative only in the personal representative’s official capacity and not in his, her, or its individual capacity.
2. **The scope of the engagement.** Define the scope of the engagement. If, for example, the attorney will be handling the estate administration but not the tax work, that should be specified. If there is a potential wrongful death or personal injury claim, indicate whether this claim is included or excluded from the attorney’s work under the agreement. If the claim is included, both matters (administration of the estate and the wrongful death or personal