15 Attorneys' Fees: An Assessment of the Current Standards for Fee Awards

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I. OVERVIEW

A. [15.1] Introduction

The purpose of this chapter is to provide a clear, understandable evaluation of the current standards for awarding attorneys' fees in Illinois in estate administration and closely related matters, such as guardianship and will contest proceedings.

B. [15.2] Erosion of Fees

The current standards for determining attorneys' fees in estate administration and contested proceedings are satisfactory in the sense that profit is being made in providing services for these tasks. Revenues still exceed cost. However, in comparison to the competitive theories of supply and demand, current standards are not satisfactory.

Intuition leads to the conclusion that the net amount of fees being received on a relative basis is substantially lower than for the same product ten years ago and that there is too much uncertainty in the current system for both practitioners and beneficiaries. The reasons are numerous:

1. Technology has led to efficiency.

2. Hourly rates have increased, although not substantially, on a relative basis.

3. Premium billing for estate administration (through the old fee schedule concept) has either been pragmatically rendered useless or deemed unacceptable in the area.

4. At times, courts review the reasonableness of fees based on standards that have minimal rational connections to the quality or result provided, preventing attorneys from obtaining premium billing on matters that deserve fee premiums.

5. The public, thanks in part to the media's discussion of the abuses on fringe areas, has been led to a general distrust of attorneys' fees. For the most part, when attorneys' fees are based on hours, the public tends to distrust and question those reported hours. Occasionally, this distrust is perpetrated by the legal profession itself. For example, a four-hour time entry that reads, "Worked on estate administration matters," does not instill confidence in an attorney's fee. Nor, for that matter, does a one-hour description that reads, "Worked on draft of letter explaining executor duties." However, that latter entry when expanded to read, "Drafted five-page memorandum describing tax deadlines, determining income tax filing deadlines, strategizing initially regarding income tax matters, explaining transfer requirements for securities and claims procedure for creditors, etc.," would lend more credibility to particular fees charged to an estate. Perhaps the pendulum has swung in the wrong direction given that it had been the custom to base fees on the size of the estate, meaning that a fee award of three percent of the estate could be quite out of proportion to the efforts and achievements in a given estate.

C. Procedure for Payment of Fees

1. [15.3] Generally

An engagement letter between the attorney and the executor is recommended, though not required. The right to compensation "must rest on the terms of an express or implied contract of employment," and when the agreement with the executor is not in writing, the terms of the attorney's compensation could be more susceptible to dispute at the hearing on the attorney's fee petition. *Estate of Healy,* 137 Ill.App.3d 406, 484 N.E.2d 890, 892, 92 Ill.Dec. 159 (2d Dist. 1985). The engagement letter should set forth the professionals who will work on the project, their hourly rates, and what is expected in terms of payments (but see discussion below for the ultimate veto power of the court over any agreed-on fee).

Because fees can be subject to scrutiny by the courts (*e.g.,* via the objection of a beneficiary), the attorney may wish to consider whether the executor would agree to pay, individually, the differential between fees allowed by the court and those incurred by the attorney. Most executors, however, would not agree to this type of arrangement.

Further, the executor and the attorney both have a fiduciary duty to the beneficiaries. *See, e.g., In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1280, 111 Ill.Dec. 639 (1st Dist. 1987). Accordingly, any agreement entered into between the attorney and the executor also needs to have the best interests of the beneficiaries in mind. This requirement would be satisfied by acknowledgments in the engagement letter that the attorney represents the beneficiaries, as well as the executor, and that the attorney will assist the executor only to the extent that his or her representation protects and enhances the beneficiaries in the administration process.

Note that in the guardianship context, court approval ex ante of an engagement letter could be difficult to obtain. However, the courts will sometimes preapprove a range of fees and attorney hours as reasonable for specific projects (such as estate planning) with the final fee amount still subject to court approval. The preapproval serves both to notify the court of the project being undertaken as well as to give the practitioner reassurances that the fees and hours expected to be incurred are not substantially outside the realm of what the court foresees approving for that project.

There is one tax concern with regard to the timing of attorneys' fees during the administration period. Fees may constitute a deduction for income tax purposes. Accordingly, to the extent that it is possible, fees should be paid only in a year in which they can be used as deductions. Fees emanating from administration expenses cannot be rolled over from one year to the next but can be carried out as deductions to beneficiaries in the tax year the estate terminates.

2. [15.4] Initiating Payment Process

In independent administration, the attorney may send the invoice directly to the executor. If the executor believes that the beneficiaries will agree to the fees, the executor can pay the invoice currently out of estate funds. Alternatively, the independent executor can wait until formal (*e.g.,* at the time of the filing of the annual account or final report) or informal (*e.g.,* upon receipt of the beneficiaries' consent) approval of the invoice to pay it. Although fees are at risk in both independent and supervised administration, the courts tend not to become involved in an analysis of the fee amount in independent administration if all parties are in agreement. If the independent executor opts to wait, the attorney may seek immediate payment by filing a fee petition.

In supervised administration, the court always becomes involved in determining the reasonableness of the attorneys' fees. Therefore, it is prudent, though not always followed in practice, to procure payment of fees via the filing of a fee petition. *See, e.g., In re Estate of Thomson,* 139 Ill.App.3d 930, 487 N.E.2d 1193, 1200, 94 Ill.Dec. 316 (4th Dist. 1986) (remanding appellant's objections to accounting for reconsideration based in part on payment of attorneys' fees without fee petition when "the statute clearly contemplates that the representative will seek court approval," but implying that fees could still be approved on remand).

3. [15.5] Notice to Beneficiaries

In independent administration, the executor may pay fees without prior notice to the beneficiaries and without court approval. The beneficiaries receive ex post notice via the payment entry in the executor's accounting, of which the beneficiaries receive notice prior to the executor's discharge.

However, if a petition for attorneys' fees is filed in independent or supervised administration, the beneficiaries and all parties of record are entitled to notice of the petition.

4. [15.6] Interim Fees

Before the close of independent administration, the executor may pay interim attorneys' fees, and attorneys need not petition the court for prior approval. However, as with any fee payment, it is advisable to ascertain informally whether beneficiaries are likely to object since the Illinois Probate Act (Probate Act), 755 ILCS 5/1, *et seq.,* gives beneficiaries the right to petition for a hearing on any estate administration matter; no matter when the fees are paid, the beneficiaries eventually will see that payment. See Probate Act §28-5. Should the attorneys' fees be paid without beneficiary approval and later reduced upon hearing, the overpayment will have to be refunded to the estate.

In supervised administration, interim fees can be allowed upon petition. *See In re Estate of Marks,* 74 Ill.App.3d 599, 393 N.E.2d 538, 542, 30 Ill.Dec. 502 (1st Dist. 1979) (denying challenge to interim fees based solely on desire to save time and efficiency); *In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 429, 432 (1st Dist. 1965) (holding that attorney was entitled to reasonable compensation on petition for partial fees even though outcome of litigation was still in question).

5. [15.7] Burden of Proof

In actions for attorney fee approval, the burden of proof rests on the attorney to establish his or her case. *Estate of Healy,* 137 Ill.App.3d 406, 484 N.E.2d 890, 893, 92 Ill.Dec. 159 (2d Dist. 1985). The court is not bound by the petitioning attorney's own opinion of the reasonableness of his or her fee. When an interested party raises objections to the fee, the petition "require[s] proof like any other claim . . . similar to cases where attorney's fees are the subject of a court order against an opposing party." *Id.*

6. [15.8] Evidence

Current Illinois practice is that an attorney must submit "detailed time records . . . to support the hours claimed" on a fee petition. *Estate of Healy,* 137 Ill.App.3d 406, 484 N.E.2d 890, 893, 92 Ill.Dec. 159 (2d Dist. 1985).

The court also will review other evidence if submitted, such as

a. correspondence exhibits (*id.*);

b. summaries of the types of estate assets requiring valuation and collection and the difficulty of the tasks undertaken (*In re Estate of Enos,* 69 Ill.App.3d 129, 386 N.E.2d 1147, 1149 – 1150, 25 Ill.Dec. 483 (5th Dist. 1979)); and

c. credentials of the attorneys whose time was incurred, results achieved by each project undertaken, and tax benefits to the estate from the work done (*In re Estate of Marks,* 74 Ill.App.3d 599, 393 N.E.2d 538, 542 – 543, 30 Ill.Dec. 502 (1st Dist. 1979)).

Typically, a practitioner will identify these areas in the body of the fee petition as part of the narrative. However, a better practice is to admit these items into evidence through both oral and written evidence at the actual fee petition hearing. Focusing the court's attention on the particularities and difficulties of each administration or litigation matter is the most strategic way to maximize payment.

Further, the courts are willing to review the evidence of experts in determining "the reasonable worth and value of the services rendered." *Healy, supra,* 484 N.E.2d at 893. However, the court is not governed entirely by the opinion of expert witnesses as to the value of services provided. *See In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 707, 15 Ill.Dec. 916 (1st Dist. 1978).

II. STATUTORY STANDARD FOR FEES

A. [15.9] The Statute

The Probate Act provides that "[t]he attorney for a representative is entitled to *reasonable* compensation for his services." [Emphasis added.] Probate Act §27-2. Illinois courts have the ultimate discretion as to the amount, if any, of fees to be paid from the estate.

This rule was clearly enunciated by *In re Estate of James,* 10 Ill.App.2d 232, 134 N.E.2d 638, 641 – 642 (3d Dist. 1956), in which the court, answering the argument that it did not have the power to set the fee of the attorney, stated:

> **This is not the law. The right of the Probate Court to allow an executor or administrator credit in his account for reasonable attorney's fees . . . is undoubted, but the amount paid for attorney's fees is to be determined by the court in exercise of judicial discretion.** *See also In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 111 Ill.Dec. 639 (1st Dist. 1987) (stating that "determination as to what constitutes reasonable compensation is a matter peculiarly within the discretion of the probate court").

Contractual provisions between an executor and the estate attorney that attempt to override the judicial authority to determine the appropriateness of attorneys' fees will be ignored, at least as to payment of attorneys' fees from the estate.

B. [15.10] Factors Cited in Applying the Statute

Courts interpret the term "reasonable" with wide latitude; meaning they do fairly much what they want. The commonly cited factors impacting the size of attorneys' fees awarded include

1. the size of the estate;

2. the work done;

3. the skill evidenced by the work;

4. the time expended;

5. the success of the efforts involved;

6. the degree of good faith; and

7. the efficiency with which the work was done (*see, e.g., In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994); *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998); *Estate of Venturelli v. Granville National Bank,* 54 Ill.App.3d 997, 370 N.E.2d 290, 295, 12 Ill.Dec. 667 (3d Dist. 1977)).

A different analysis is evidenced by the Illinois Rules of Professional Conduct (RPC), which list the following eight criteria for determining the reasonableness of a fee:

(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. RPC 1.5(a).

The cases do not specify the weight to be accorded each of the factors, nor do they evince an understanding of how these variables interplay with one another. Nevertheless, a recitation of the factors in the petition for attorneys' fees accompanied by each factor's applicability in the particular case is a prudent approach.

C. [15.11] Interpretation of These Standards: Generally

An attorney should reference the above standards when completing the fee petition, as well as provide specific details, to prevail on a fee petition. Courts generally will delve into the substance and hear evidence as to what work was being performed. There is uncertainty as to prevailing in any fee petition, regardless of the facts.

Some pitfalls to avoid are illustrated by *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 111 Ill.Dec. 639 (1st Dist. 1987). In *Halas,* the petitioner's fees were reduced from $957,099 to $535,000 based on several factors. First, the record demonstrated bad faith on the petitioner's part, including the failure to notify beneficiaries of a reorganization of estate stock that affected the estate's rights as was ordered by the probate court, the payment of the petitioner's fees out of estate funds without prior authorization from the executors, and delays in transferring files to a successor attorney upon the petitioner's termination. 512 N.E.2d at 1281 – 1282.

Second, the court reduced the fees based on inefficiencies arising out of having 41 different attorneys involved on the case, which the court found to result in "duplication of effort, over-conferencing, and extra review time of the work done by other individuals." 512 N.E.2d at 1284. For example, the petitioner sent multiple attorneys to court appearances that were routine enough to be handled by one or two attorneys. 512 N.E.2d at 1285.

Third, research that appeared to be unnecessary did not merit compensation. The court held that inexperienced associates had been educated at the expense of the estate. In particular, attorneys may not recover fees for researching "problems which should be within the general knowledge of experienced practitioners, and which [do] not involve complex or novel matters." 512 N.E.2d at 1284.

Fourth, the work done and the time expended were not adequately supported in the attorneys' time records. Narratives for hundreds of hours listing only "work on estate" did not provide enough detail to the court. Further, notations of conference time were missing details as to which persons attended, what topics were discussed, and what conclusions were reached. The court held that although records may be substantiated ex post, contemporaneous records are entitled to greater weight. 512 N.E.2d at 1285.

III. RHETORIC ASIDE, WHAT ARE THE COURTS REALLY DOING?

A. [15.12] Emphasis on Hours: Generally

The current practice in most localities in Illinois is to determine attorneys' fees based on time records. *See In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994) (stating that "[t]he amount of time expended by a party requesting a fee is the most important factor in determining reasonable compensation" and reducing fees for services as executor performed by attorney from $80,000 to $15,967); *In re Estate of Weber,* 59 Ill.App.3d 274, 375 N.E.2d 569, 571, 16 Ill.Dec. 696 (3d Dist. 1978) (noting time expended as shown by detailed time record is greatest factor in determining attorneys' fees). A fee petition must therefore set forth the number of hours expended and the hourly rate claimed.

B. [15.13] Descriptions in Time Records

The necessity of adequate time records cannot be overemphasized. *See Flynn v. Kucharski,* 59 Ill.2d 61, 319 N.E.2d 1, 4 (1974) (noting "the time expended in such a case is not to be relegated to a secondary or minor position; it is a highly significant factor in determining the fee" and attorneys' preference for contingent fee over hourly fee "does not excuse their failure to keep adequate records").

In examining an attorney's time records, a court will consider the lack of itemized time entries and the inconsistency of (untimed) attorney diary entries with the total hours claimed. *In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994); *Cf. In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328, 336 – 337 (1st Dist. 1974) (upholding fee award despite absence of time records).

The widely cited case *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 430, 115 Ill.Dec. 899 (1st Dist. 1987), endorses a line-by-line review of an attorney's time records. The court denied fees that it concluded were related to the "review and organization of file documents . . . office conferences and memoranda . . . redrafts, revisions and corrections." 518 N.E.2d at 430 – 431. Furthermore, although the lack of detail in time records did not forfeit fees, the court expressed disapproval of the aggregation of all time on a given day into a single time entry in lieu of the breakdown of each task performed by the attorney and noted that the lack of detail made review difficult. *Id.*

The practitioner may distinguish the *Kaiser* standards on the grounds that *Kaiser* involved the application of a fee clause in a lease against the party filing the action. In other words, perhaps a higher level of scrutiny and detail is appropriate when the attorney's incentives run against the payor's interests, but such a close examination is not necessary when the attorney's and the payor's interests run more in tandem. *See, e.g., Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 740 N.E.2d 501, 508, 251 Ill.Dec. 420 (1st Dist. 2000) (noting in dicta, with regard to *Kaiser,* "[A]n additional policy consideration in cases involving 'fee-shifting' provisions is that the attorney for the successful litigant has no individual right to seek payment from the losing party. Stricter scrutiny by the trial court is warranted in these circumstances because the attorney submitting billing statements for approval by the trial court has no fiduciary relationship with the party ultimately liable for payment of the fees.").

A case decided around the same time as *Kaiser, In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1285, 111 Ill.Dec. 639 (1st Dist. 1987), held that a reduction in fees for inefficiency was proper in "the absence of sufficiently detailed descriptions in the time records." However, the court did not mention or insist on the high standard of task-by-task time entries within a single day. Rather, the court indicated that details of the following type would be useful in evaluating conference time, *e.g.,* "the identification of persons attending, topics discussed, or conclusions reached." *Id.*

C. Necessity of Benefiting the Estate

1. [15.14] Generally

Attorneys' fees will not be payable out of the estate if the work is not in the interest of or of benefit to the estate. *See In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978).

2. [15.15] Representation of Fiduciary Individually vs. Representative

No fees will be allowed for representation of a fiduciary's individual interest. Courts will compare what was accomplished against the time records to make sure that fees charged match the work an attorney puts into a particular estate. For example, in *Estate of Dyniewicz v. Freitag,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1083, 208 Ill.Dec. 154 (1st Dist. 1995), the court refused to allow fees when the attorneys initially maintained that they represented the co-guardians individually but later attempted to backtrack by claiming a benefit to the guardianship estate. The case showed how important it is that the representation structure be set up correctly ab initio to obtain attorneys' fees.

Attorneys representing fiduciaries who are performing poorly, whether that malfeasance is tantamount to negligence or fraud, could have a problem with obtaining fees. *See In re Estate of Devoy,* 231 Ill.App.3d 883, 596 N.E.2d 1339, 1343, 173 Ill.Dec. 460 (5th Dist. 1992) (reversing award of attorneys' fees because attorney did not inform court of breaches of fiduciary duty). Moreover, an attorney may have a duty to take steps toward the removal of a negligent administrator. *Id.*

D. [15.16] Hourly Rate

Some courts will limit an attorney to the standard rate in the relevant jurisdiction. *In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 317, 199 Ill.Dec. 475 (2d Dist. 1994) (reducing hourly rate from $200 to $150, even though $200 rate requested was lower than petitioner's normal hourly fee, because $150 was standard rate in jurisdiction, while not reducing hourly fee further for petitioner's inexperience in probate matters). For the practitioner, determining this standard rate is not always feasible because it is often a moving target.

The reasonableness of the hourly rate tends to be determined independently of the value of the services rendered. An extraordinarily efficient attorney may still face a de facto ceiling on his or her hourly rate, even if the average attorney would have incurred more hours at a lower rate to accomplish the same result, thus yielding a higher overall fee. It is difficult to demonstrate that particular services were provided more efficiently than average and that an attorney deserves a premium for that efficiency, while it is relatively easy for objectors to show that an attorney's hourly rate is higher than the community average.

If an attorney's services have provided unique value to the estate, one argument that can be raised to obtain a premium rate is that "the hourly rate should be commensurate with the undertaking and should not be so low as to discourage participation in such cases by highly qualified counsel." *Leader v. Cullerton,* 62 Ill.2d 483, 343 N.E.2d 897, 901 – 902 (1976), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 914, 213 Ill.Dec. 563 (1995). *Leader* held that an hourly rate of $100 was reasonable for work performed from approximately 1970 to 1972. *Leader, supra,* 343 N.E.2d at 902. At a growth rate of 6 percent, this hourly amount would be equivalent to $542 in 2000 terms, or $412 at a 5-percent cumulative growth rate.

Even with only cost-of-living adjustments from 1972 to 2000, using the U.S. Department of Labor Consumer Price Index for All Urban Consumers, a $100 hourly rate would be equivalent to a $312 hourly rate in 2000. Not all the jurisdictions are ready to approve hourly rates of $312, let alone $542.

E. [15.17] Size of the Estate

The size of the estate often functions as a baseline for the reasonable level of fees and, all other factors being equal, it may serve as a ceiling on fees. This concept was demonstrated in the past by the courts' reliance on fee schedules, which are no longer accepted by the courts. *See In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 709, 15 Ill.Dec. 916 (1st Dist. 1978) (approving use of fee schedule based on percentage of estate's gross value as starting point and reference point for appropriate level of fees).

However, courts often still use the fee schedule concept implicitly by using a percentage of the estate as a ceiling. In this regard, attorneys' fees equal to 2 percent of the gross probate estate value have a superficial appearance of reasonableness, although a court may permit higher percentages based on other factors under consideration. *See, e.g., Estate of Brown, supra,* 374 N.E.2d at 708 – 710 (sustaining fees of $33,800 in $1.6 million estate, or approximately 2 percent); *In re Estate of Enos,* 69 Ill.App.3d 129, 386 N.E.2d 1147, 1149 – 1150, 25 Ill.Dec. 483 (5th Dist. 1979) (reducing requested fee from 6 percent to 2 percent when fee petition lacked itemized statement of services and when no extraordinary services were required); *In re Estate of Grabow,* 74 Ill.App.3d 336, 392 N.E.2d 980, 984 – 985, 30 Ill.Dec. 215 (3d Dist. 1979) (allowing 3.8-percent attorney fee when results obtained were particularly advantageous to estate).

In order to obtain substantial attorneys' fees in relation to the size of the estate, attorneys must show the economic value provided to the estate. For example, in *In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328 (1st Dist. 1974), the court upheld an award of attorneys' fees of approximately 13 percent based on the results obtained for the estate. 321 N.E.2d at 336 – 337. In that case, the attorney had incorporated, managed, and brokered the sale of a basketball team and demonstrated to the court that through the coordinated efforts of the attorney and coexecutors (one of whom was the attorney, who took no separate fee as coexecutor) the value of the estate's primary asset was almost doubled within one year of the date of death. The attorney introduced further evidence that earnings had increased tenfold. 321 N.E.2d at 336.

F. [15.18] Estate Complexity

The courts also will consider the complexity of the estate. It is essential that the practitioner bring this complexity to the court's attention. For example, in *In re Estate of Marshall,* 167 Ill.App.3d 549, 521 N.E.2d 637, 639 – 640, 118 Ill.Dec. 355 (4th Dist. 1988), the court reduced the attorneys' fees from 2.8 percent to 1.7 percent because the estate was not complex enough to justify the hours expended, based on the court's review of the attorney's time records. Similarly, in *In re Estate of Weber,* 59 Ill.App.3d 274, 375 N.E.2d 569, 572, 16 Ill.Dec. 696 (3d Dist. 1978), the court reversed a fee award approximating nearly 10 percent of the estate when the record did not reveal any complex transactions. *Cf. In re Estate of Hall,* 127 Ill.App.3d 1031, 469 N.E.2d 378, 380 – 381, 82 Ill.Dec. 844 (4th Dist. 1984) (upholding fee of 4.6 percent of gross estate value when bankruptcy of tenant farmer on estate's real property and two years of will construction litigation complicated administrative duties).

G. Work Covered and Not Covered

1. [15.19] Duplication

The current view is that to the extent the services rendered are duplicative, either no fees will be allowed, or fees will be adjusted to reflect the duplication of effort. *See Leader v. Cullerton,* 62 Ill.2d 483, 343 N.E.2d 897, 900 – 901 (1976) (reducing fee award for duplicative time incurred by three different law firms representing same class of plaintiffs, *e.g.,* multiple appearances at routine hearings), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 913 – 914, 213 Ill.Dec. 563 (1995); *Continental Illinois National Bank & Trust Co. v. Llewellyn,* 86 Ill.App.2d 1, 229 N.E.2d 334, 339 – 340 (1st Dist. 1967) (disallowing fees for attorneys of beneficiary's assignee when assigning beneficiary also had counsel in will construction litigation and interests were aligned, but allowing such fees on matters in which they were not duplicative because assigning beneficiary's interests were adverse to assignee's interests); *In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 708, 15 Ill.Dec. 916 (1st Dist. 1978) (stating "a charge may not be made for duplicated work" as between executor and its attorney).

In *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 111 Ill.Dec. 639 (1st Dist. 1987), the court reduced fees for "over-conferencing" caused by having 41 attorneys involved in the estate and noted that conference time should be accompanied by entries showing the persons attending, the topics discussed, and the conclusions reached. The court also reduced fees for unnecessary research time. 512 N.E.2d at 1285 (contrasting research time on matters of general knowledge to experienced attorneys, which cannot be billed, against research about complex or novel matters). Similarly, in *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987), the court reduced attorneys' fees by over 51 percent in part because the time records showed that 70 of the 330 total hours billed were for interoffice conferences and memoranda. 518 N.E.2d at 426 – 427.

Although these cases preclude fees for duplication, they do not prohibit all fees for attorney conferences or research. To prevail on this point, the practitioner will need to distinguish its research and interoffice conference time from abusive situations in cases like *Halas* and *Kaiser.* To a degree, duplication is going to occur if utilization of professional staff within the lawyer's office is properly handled. If a senior attorney does legal research, it may be too expensive for the client. However, if the lawyer employs a younger attorney to do it, the research can be done economically, but the younger attorney will require supervision and guidance. Overlap may occur, but the real result is savings to the client. A review of the economics often will demonstrate that overlap is efficient and value-added to the client. The petition to the court and, more importantly, the specific time entries that form the basis of the invoices must emphasize and demonstrate why interoffice conferences were necessary and how they saved fees for the estate.

2. [15.20] Multiple Capacities

Typically, an attorney is entitled to compensation for both legal and nonlegal services performed. *In re Estate of Hackett,* 51 Ill.App.3d 474, 366 N.E.2d 1103, 1106, 9 Ill.Dec. 592 (4th Dist. 1977) (permitting attorney-representative to take executor's fee on top of his attorney's fee already awarded). *See also In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328, 337 (1st Dist. 1974) (considering value of attorney's nonlegal services in permitting high fee award). "The best practice [is] to include that [dual] compensation in a single fee." *Hackett, supra.*

H. [15.21] Who Performs the Work

Fees are *not* limited to legal representatives and their counsel. *In re Estate of Freund,* 63 Ill.App.3d 1, 379 N.E.2d 935, 936 – 937, 20 Ill.Dec. 102 (2d Dist. 1978) (upholding payment of legal fees to attorneys for heir when they wound up matters that enabled estate to be closed). *Cf. Continental Illinois National Bank & Trust Co. of Chicago v. Bailey,* 104 Ill.App.3d 1131, 433 N.E.2d 1098, 60 Ill.Dec. 860 (1st Dist. 1982) (disallowing fees for counsel of beneficiaries when provisions in dispute were unambiguous and beneficiaries forced trustee to file petition for instructions).

However, if a petitioner other than the representative brings an action that involves the estate or trust but seeks only personal benefits, that party is not entitled to fees. *Boldenweck v. City National Bank & Trust Co. of Chicago,* 343 Ill.App. 569, 99 N.E.2d 692, 702 (1st Dist. 1951) (holding that lack of ambiguity in document reduces construction suit to standard adversarial proceeding, in which losing party may not recover fees out of trust funds; *i.e.,* petitioner represents personal interests rather than trust's interests when document is unambiguous).

I. [15.22] Appellate Review

The general rule is that "[t]he trial court has broad discretion to determine the 'reasonable compensation' to be allowed an attorney." *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998). *See also In re Estate of Thorp,* 282 Ill.App.3d 612, 669 N.E.2d 359, 364, 218 Ill.Dec. 416 (4th Dist. 1996) (noting trial court's broad discretion is based on its possession of requisite skill and knowledge to determine fair and reasonable compensation).

Appellate courts are not likely to overturn the lower court's determination on fees. *See In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 707, 15 Ill.Dec. 916 (1st Dist. 1978) (noting standard on appeal is manifest or palpable error in trial court's exercise of its discretion); *In re Estate of Dudek,* 87 Ill.App.3d 528, 409 N.E.2d 418, 420, 42 Ill.Dec. 803 (3d Dist. 1980) (upholding reduction of fees from $13,500 to $8,500 based on a finding that "the amount of time expended was not justified under the circumstances," despite lower court's contemporaneous findings that attorneys were skillful and acted in good faith and that petitioners actually expended all hours recorded in fee petition).

Although seeking appellate review of a lower court's seemingly unreasonable fee reduction may appear desirable, it likely will not be productive because of the deferential standard applied and noted above.

IV. [15.23] FEES IN DISPUTED CASES

Contested proceedings can take a variety of forms, such as the construction of a will or trust, the determination of the validity of portions or all of a will or trust, formal proof of a will under Probate Act §6-21, the determination of who should act as administrator in intestacy situations, and citation proceedings.

A. [15.24] Construction Cases

In *Orme v. Northern Trust Co.*, 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962), the Illinois Supreme Court set forth the general rule for payment of attorneys' fees in contested estates as follows:

> **In will construction cases the costs of litigation are borne by the estate on the theory that the testator expressed his intention so ambiguously as to necessitate construction of the instrument in order to resolve adverse claims to the property. Legal fees are allowed to a party even though the construction adopted is adverse to his claim. However, such fees should not be authorized where such construction is unnecessary.** [Citations omitted.]

The determination of whether there is an ambiguity is based in part on "whether or not there is an honest difference of opinion." *Ingalsbe v. Gough,* 2 Ill.App.3d 681, 277 N.E.2d 149, 150 (4th Dist. 1971). When the representative "did not feel that he could safely proceed with the administration without a judicial construction of the will" and the heir presented an opposing interpretation in good faith, the heir's attorney could recover fees from the estate even though the heir's position did not prevail. *Id. Accord Northern Trust Co. v. Tarre,* 83 Ill.App.3d 684, 404 N.E.2d 882, 889, 39 Ill.Dec. 291 (1st Dist. 1980) (upholding award of all parties' attorneys' fees from estate when litigation was result of honest differences of opinion), *rev'd on other grounds,* 86 Ill.2d 441 (1981); *Strauss v. Strauss,* 293 Ill.App. 364, 12 N.E.2d 701, 703 (3d Dist. 1938) (accepting "the well-settled rule of law" that "where the will of a deceased testator must be judicially construed, reasonable solicitors' fees of necessary parties may be allowed by the court").

1. [15.25] Winning

Being successful typically allows the attorney to recover fees. *See, e.g., In re Estate of Roberts,* 99 Ill.App.3d 993, 426 N.E.2d 269, 272 – 273, 55 Ill.Dec. 294 (5th Dist. 1981) (awarding attorneys' fees to counsel for guardian of estate when it prevailed in suit to require trustee to pay trust income to guardian following settlor-beneficiary's incompetency).

2. [15.26] Losing

Provided the litigation emanated from the above standard — an honest attempt to resolve an ambiguity — all parties who have an interest and a reasonable involvement in the case are entitled to attorneys' fees.

The court considered the issue of whether a party has an "interest" in *Hinckley v. Beardsley,* 28 Ill.App.2d 379, 171 N.E.2d 401 (2d Dist. 1961), which involved the circuit court's allowance of attorneys' fees to unsuccessful litigants. The unsuccessful litigants were charities seeking distribution of estate funds under the cy pres doctrine. One of the charities was a residuary legatee, while the other was a voluntary intervenor. The lower court allowed the petition to intervene but distributed the funds to a third charity; nevertheless, it awarded attorneys' fees to the two unsuccessful charities. 171 N.E.2d at 402 – 403. The appellate court upheld the fee award to the residuary legatee but reversed the fee award to the intervenor, reasoning that the residuary legatee had no choice about becoming involved in the construction suit and had a sufficient interest in the funds to justify its claim. By contrast, the court found no authority "which authorizes the payment of attorney fees and expenses to an unsuccessful voluntary intervenor." 171 N.E.2d at 404 – 405.

When a suit is groundless, legal fees and trustee expenses in defense of the suit "are to be paid out of the share of the complainant in the trust estate, and not charged against the estate generally nor a general fund by which cobeneficiaries would have to contribute." *Patterson v. Northern Trust Co.*, 286 Ill. 564, 122 N.E. 55, 56 (1919). *Accord Webbe v. First National Bank & Trust Company of Barrington,* 139 Ill.App.3d 806, 487 N.E.2d 711, 715, 93 Ill.Dec 886 (2d Dist. 1985) (holding that legal fees and costs incurred by trustee and other beneficiaries in defending suit were fully chargeable to unsuccessful plaintiff-beneficiary's share of trust but, in absence of statutory authority, not to such person individually).

Attorneys' fees can be awarded to both sides in a construction suit if the litigation is the result of an honest difference of opinion between the parties that results in a deadlock. *Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1072, 1 Ill.Dec. 767 (1st Dist. 1976) (holding individual cotrustees were entitled to litigation expenses and fees because of irreconcilable conflict between corporate and individual trustees). *See also In re Estate of Hall,* 127 Ill.App.3d 1031, 469 N.E.2d 378, 381, 82 Ill.Dec. 844 (4th Dist. 1984) (upholding attorneys' fees for remainder beneficiary's separate counsel when construction of will was primary issue underlying theory of litigation).

3. [15.27] Ambiguity

If there is little or no dispute, ambiguity, or question, no fees will be granted to the party creating the disagreement, whether it was the petitioner or respondent. *See McCabe v. Hebner,* 410 Ill. 557, 102 N.E.2d 794, 799 (1951); *Continental Illinois National Bank & Trust Company of Chicago v. Bailey,* 104 Ill.App.3d 1131, 433 N.E.2d 1098, 1104, 60 Ill.Dec. 860 (1st Dist. 1982) (disallowing fees to counsel for beneficiaries-respondents, even though trustee was party bringing construction suit, when trustee was forced to bring suit by reason of beneficiaries' claims against trust funds in case when trust was unambiguous).

Courts will pay attention to whether the ambiguity is genuine or fallacious. Veiled attempts to generate an ambiguity for the sole purpose of instituting a construction suit will result in nonpayment of attorneys' fees to the unsuccessful litigant. For example, *Ingalsbe v. Gough,* 2 Ill.App.3d 681, 277 N.E.2d 149 (4th Dist. 1971), involved an heir of the decedent asserting the lapse of bequests under the will in order to take an interest by intestacy. The court noted that the will was not ambiguous on its face but found that a latent ambiguity arose from the prior deaths of five of the nine residuary legatees with no contingent gift provision. The court then applied an anti-lapse statute to the disposition rather than allowing partial intestacy. 277 N.E.2d at 149 – 150.

The court applied a two-part test: (a) whether an ambiguity exists in the document; and (b) whether there is an honest difference of opinion between the parties as to the application of the statutes to this ambiguity. In awarding fees to the heir's attorney, the court seemed to be persuaded on the sincerity prong by the fact that the heir became a party to the executor's construction suit involuntarily. 277 N.E.2d at 149.

4. [15.28] Neutrality

When the fiduciaries pick sides, they may not be entitled to have their attorneys' fees reimbursed from the estate. A representative may properly seek construction of an ambiguous provision, but if it supports an interpretation that favors one group of beneficiaries over another, it breaches its duty of impartiality. *Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 965, 148 Ill.Dec. 364 (1st Dist. 1990). In such a case, fees will be denied if they are "in excess of those incurred in

preparing and filing the complaint for construction . . . and in gathering and presenting the information necessary to interpret the [document]." *Id.*

Similarly, courts will not allow fees for the appeals of construction cases to be borne by the estate as to the unsuccessful litigant. *See Rosenthal v. First National Bank of Chicago,* 127 Ill.App.2d 371, 262 N.E.2d 262, 264 – 265 (1st Dist. 1970) (reversing fee award to counsel for party prosecuting unsuccessful appeals from both trial court and appellate court rulings as to hours incurred in preparation of appeals); *Cf. Estate of Knight v. Knight,* 202 Ill.App.3d 258, 559 N.E.2d 891, 894, 147 Ill.Dec. 551 (1st Dist. 1990) (denying attorneys' fees for unsuccessful appeal from trial court's finding that will was unambiguous and holding that "[e]ven where construction of a will is necessary, . . . the losing party who decides to appeal litigates at his or her own risk and is not entitled to attorney fees and costs").

The general rule as to appeals is implied by the Illinois Supreme Court's holding in *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 448 – 449 (1948), as follows:

> **When the will has been construed by a court having jurisdiction of the subject matter and the parties, its decree affords authority to all interested persons for the administration thereunder according to its terms unless it be modified or set aside by a court of superior jurisdiction. The construction placed upon a will by the lower court may not be satisfactory to some of the parties and they may be able to have it changed on appeal, but, should they feel disposed to litigate beyond the court of original jurisdiction, this they must do at their own risk and costs.**

B. [15.29] Contested Guardianships

In the case of guardianships, the well-accepted general rule is that "an attorney for a person seeking a conservatorship is entitled to attorney fees whether the petition is successful or not." *In re Estate of Johnson,* 219 Ill.App.3d 962, 579 N.E.2d 1206, 1210, 162 Ill.Dec. 392 (5th Dist. 1991). This allowance is crucial, given the number of contested guardianships and the importance of giving the court the opportunity to hear evidence from opposing parties.

A typical fact pattern is provided by *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 230 Ill.Dec. 360 (4th Dist. 1998). There, the ward's grandnephew hired an attorney to file a petition for temporary guardianship and plenary guardianship of the ward's person and estate. When the grandnephew discovered that the ward's grandson also desired to serve as guardian of the person, the attorney negotiated a stipulation between the parties specifying the terms of visitation, medical treatments, and a selection of a corporate estate guardian. Under the stipulation, the grandnephew would not serve as guardian of the person or estate. 693 N.E.2d at 490 – 491. The court held:

> **As a result of** [the grandnephew]**'s petitioning for temporary and plenary guardianship in this case,** [the ward]**'s personal welfare and her estate were ultimately protected and benefited by the appointment of** [the grandson] **as the guardian of her person and Magna Bank as the guardian of her estate. In addition, the fact that** [the grandnephew] **and** [the grandson] **negotiated and agreed to a stipulation of guardianship minimized both the time and expense involved in the guardianship proceeding.** 693 N.E.2d at 492.

Accordingly, the court reversed and remanded the lower court's allowance of only $500 on the $3,365.25 fee petition of the grandnephew's attorney. 693 N.E.2d at 493 – 494.

In *In re Estate of Byrd,* 227 Ill.App.3d 632, 592 N.E.2d 259, 169 Ill.Dec. 772 (1st Dist. 1992), two parties petitioned to be appointed as guardian of the estate for a disabled person, and the attorney for the unsuccessful petitioner was awarded fees. The guardian appealed on the grounds that the attorney's services did not benefit the estate. 592 N.E.2d at 261 – 262. The court upheld the lower court's determination that the mere filing of the petition for guardianship by the unsuccessful litigant benefited the estate. 592 N.E.2d at 264. The court was willing to adhere to the benefit-to-the-estate standard, but interpreted it literally. The benefit to the estate included the freezing of the alleged disabled person's assets during the pendency of the litigation and, according to the trial court (whose finding was upheld in dicta), the presentation of evidence that permitted the trial court to evaluate more fully who would best serve as guardian. 592 N.E.2d at 264 – 265.

C. [15.30] Fees for Different Attorneys Representing Different Fiduciaries

Multiple representatives may or may not recover fees if they retain separate counsel. The general rule appears to be that "co-executors and co-trustees must act as an entity in matters pertaining to the administration of the estate; any other rule would lead to confusion and chaos and create unnecessary charges against estate funds." *In re Estate of Greenberg,* 15 Ill.App.2d 414, 146 N.E.2d 404, 408 (1st Dist. 1957). *Greenberg* further noted that the fees of lawyers retained by individual coexecutors should not be awarded out of the estate unless their employment was necessary to protect the estate. 146 N.E.2d at 409.

Such fees may be awarded, however, if the employment of separate counsel is necessary to the administration of the estate. *See Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1072, 1 Ill.Dec. 767 (1st Dist. 1976), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502 (1977). In *Northern Trust,* the trust required a majority of the trustees to make a determination on charitable distributions by a date certain. 356 N.E.2d at 1054. The two individual trustees were in a deadlock against the corporate trustee, and the trust instrument, as interpreted by the court, required the corporate trustee to be one of the members of the majority if fewer than all trustees consented to a decision. 356 N.E.2d at 1065. The court held that "irreconcilable conflict between the corporate and individual trustees necessitated a final judicial resolution" and that this honest difference of opinion justified the retention of separate counsel at the expense of the trust. 356 N.E.2d at 1071.

D. [15.31] Fees for Defending Challenges to Documents

The general rule is that a fiduciary's defense of a will or trust document, absent undue influence by the fiduciary in the first place to procure the document, entitles the fiduciary to recover attorneys' fees from the estate. "It is the duty of the representative to defend a proceeding to contest the validity of the will." Probate Act §8-1(e). Moreover, because "the employment of counsel is considered indispensable to the reasonable discharge of [a fiduciary's] duty . . . the court may authorize attorney's fees to be paid from the assets of the estate." [Citations omitted.] *In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464, 468 (1st Dist. 1975). *See also In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 430 – 431 (1st Dist. 1965) (noting in absence of executor's bad faith, attorneys' fees for defense of will are recoverable regardless of outcome).

However, the executor may be excused from defending a document when he or she "has reasonable grounds to believe the will is invalid." *Lipchik, supra. Accord In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 650, 17 Ill.Dec. 501 (1st Dist. 1978).

E. [15.32] Appointment of Representative

In *Estate of Roselli,* 70 Ill.App.3d 116, 388 N.E.2d 87, 89, 26 Ill.Dec. 463 (1st Dist. 1979), two nephews having equal preference petitioned to be appointed as administrator of a decedent's estate, and the court appointed one nephew based solely on the preferences of a group of coheirs of the estate. The court then awarded attorneys' fees to the unsuccessful petitioner under the provision now codified at Probate Act §27-2, despite his non-appointment as administrator. The court applied a broad definition of "representative" as "simply one who represents," rather than limiting "representative" to those persons legally appointed to act for the estate, per the definition used in Probate Act §1-2.15. 388 N.E.2d at 92.

Roselli goes one step further in expanding the scope of recoverable fees. It has been the practice of many probate courts not even to consider fees for attorney hours incurred prior to the attorney's first appearance on behalf of a party, whether the appearance be in person or in writing. In effect, the services required to prepare the petition for appointment and obtain information for the supporting filings are treated as voluntary. *Roselli,* however, upheld a fee award for time incurred by the attorney from the first contact by the unsuccessful litigant on August 27, 1976, even though the first round of fees related to advice on a guardianship proceeding that was not initiated prior to the decedent's death. 388 N.E.2d at 89 – 90. The court specifically held that arrangements to petition for the appointment of a guardian are services that benefit the estate, even if the petition, *i.e.,* the official court appearance, is never filed. 388 N.E.2d at 93.

V. [15.33] IS PREMIUM BILLING AVAILABLE TO OFFSET RISK OF FEE REDUCTION?

At one time, Illinois had legislatively set fees in probate matters. *Ill.Rev.Stat.* (1937), c. 3, ¶135 (providing cap on representatives' fees of six percent of personal estate and three percent of proceeds from real estate, plus costs). Many states still use this system as to both probate and trust matters (especially in states subjecting trusts to court review, similar to supervised administration in Illinois). From a competitive standpoint, percentages are probably permissible and likely result in a more thorough product.

Goldfarb vs. Virginia State Bar, 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004, 2008, 2009 (1975) (holding that publication of fee schedules constituted price-fixing in violation of Sherman Act when ethics opinions exhorted practitioners not to charge fees lower than scheduled rates and when practitioners' behavior resulted in price floor in area), together with the Illinois Supreme Court decisions in *Flynn v. Kucharski,* 59 Ill.2d 61, 319 N.E.2d 1, 4 (1974) (reducing fee award of $750,000 to $560,000 based on time actually expended by attorneys), *Leader v. Cullerton,* 62 Ill.2d 483, 343 N.E.2d 897, 899 – 902 (1976) (applying lodestar method to calculate fee award based on starting point of time expended multiplied by reasonable hourly rate with adjustments for benefits obtained and contingent nature of undertaking, rather than based on percentage of recovery), and *Fiorito v. Jones,* 72 Ill.2d 73, 377 N.E.2d 1019, 1025 – 1027, 18 Ill.Dec. 383 (1978) (applying lodestar method), have led to much confusion in the probate area. *Cf. Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 914, 213 Ill.Dec. 563 (1995) (abrogating *Flynn, Leader,* and *Fiorito* in holding that trial court has discretion to apply either lodestar method or percentage-of-recovery method in determining appropriate award of attorneys' fees).

Some courts will interpret this precedent as a blanket prohibition on fee schedules. *See, e.g., Estate of Venturelli v. Granville National Bank,* 54 Ill.App.3d 997, 370 N.E.2d 290, 295, 12 Ill.Dec. 667 (3d Dist. 1977) (stating that U.S. Supreme Court mandated discontinuance of bar association fee schedules). A closer examination of the facts of each case should provide the practitioner avenues for distinguishing the precedent. Moreover, provided that an executor or attorney does not rely solely on any such schedule in determination of fees, it is acceptable to use a fee schedule as a starting point. *See In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 709, 15 Ill.Dec. 916 (1st Dist. 1978).

VI. [15.34] RECOVERY FROM NON-PROBATE ASSETS

Often the attorney is called on to render services with reference to assets not included in the probate estate, such as assets owned partly by the decedent and partly by another in joint tenancy or assets deemed owned by the decedent in a revocable trust or under a power of appointment.

When services are rendered with reference to assets not included in the probate estate, the attorney should present charges for his or her services to the persons receiving the benefit of those non-probate assets, rather than to the estate. *See In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 436 (1st Dist. 1965) (holding that "fees incurred on behalf of the probate estate can never be assessed to the non-probate assets if there is no benefit to such assets, and where the services are of benefit to both the probate and non-probate assets, the fees would have to be apportioned").

Note, however, that in *Breault,* the court allowed the attorneys' fees incurred by the executor to be charged against the non-probate property because the decedent exercised a power of appointment over that non-probate property. 211 N.E.2d at 428, 430, 435. The court held that the executor was under a duty to perform certain acts that benefited the non-probate property and accordingly allowed the attorneys' fees to be charged against trust property that was not part of the probate estate. 211 N.E.2d at 433.