

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!

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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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- (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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