ATTORNEY'S FEES IN PROBATE

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TABLE OF CONTENTS

I. Fees allowed in Texas – statute or contract 1

II. Probate cases 2

A. Creditors 2

B. Will contests 3

C. Other Estates Code Sections Awarding Attorney's Fees 5

D. Trust disputes 6

III. Declaratory Judgments Act 6

IV. Duty to Segregate 7

A. Texas law prior to 2006 7

B. The Chapa decision 8

C. Cases which have applied Chapa 9

D. Cases which have not applied Chapa 9

V. Testimony and Proof 10

A. "Reasonable and Necessary" 11

B. Lodestar 12

C. Oral testimony 12

D. Necessary documents 13

E. Paralegal fees 14

VI. Conclusion 15

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

In re Pan Am. General Hosp., LLC,
385 B.R. 855 (W.D. Tex. 2008) 12

TEXAS CASES

Alldridge v. Spell,
774 S.W.2d 707 (Tex. App.-Texarkana 1989, no writ) 3

Approach Resource I., L.P. v. Clayton,
360 S.W.3d 632 (Tex. App. – El Paso 2012, no pet.) 9, 10

Arthur Andersen & Co. v. Perry Equip. Corp.,
945 S.W.2d 812 (Tex. 1997) 11, 12, 13

Bair Chase Prop. Co. LLC v. S & K Development Co., Inc.,
260 S.W.3d 133 (Tex. App. – Austin 2008, pet. denied) 9

Barber v. Cangelosi,
2010 Tex. App. LEXIS 247 (Tex. App. – Houston [1st Dist.] January 14, 2010, no pet.) 5

Barrett v. Parchman,
675 S.W.2d 289 (Tex. App. – Dallas 1984, no writ) 12

Bates v. Randall County,
297 S.W.3d 828 (Tex. App. – Amarillo 2009, pet. denied) 13

Dilston House Condo. Ass'n v. White,
230 S.W.3d 714 (Tex. App. – Houston [14th Dist.] 2005, no pet.) 11

Dunn v. Southern Farm Bureau Cas. Ins. Co.,
991 S.W.2d 467 (Tex. App. – Tyler 1999, pet. denied) 13

El Apple I, Ltd. v. Olivas,
370 S.W.3d 757 (Tex. 2012) 12, 13, 14, 15

Garcia v. Gomez,
319 S.W.3d 638 (Tex. 2010) 12

Gill Savings Ass'n. v. Int'l Supply Co., Inc.,
759 S.W.2d 697 (Tex. App. – Dallas 1988, writ denied) 15

Goodyear Dunlop Tires N. Am. Ltd. v. Gamez,
151 S.W.3d 574 (Tex. App. – San Antonio 2004, no pet.) 12

Green Int'l, Inc. v. Solis,
951 S.W.2d 384 (Tex. 1997) 9

Greer v. Jenkins,
2004 Tex. App. LEXIS 2409 (Tex. App. – Dallas March 17, 2004, no pet.) 5

Hope v. Baumgartner,
111 S.W.3d 775 (Tex. App. – Fort Worth 2003, no pet.) 4

In the Interest of B.N.L.-B.,
375 S.W.3d 557 (Tex. App. – Dallas 2012, no pet.) 9

In re Estate of Johnson,
340 S.W.3d 769 (Tex. App. – San Antonio 2011, pet. dismissed) 5, 10

In the Estate of Vrana,
335 S.W.3d 322 (Tex. App. – San Antonio 2010, pet. denied) 10

Lindley v. McKnight, et al.,
349 S.W.3d 113 (Tex. App. – Fort Worth 2011, no pet.) 10

MBM Financial Corporation, et al. v. The Woodlands Operating Company, LP,
292 S.W.3d 660 (Tex. 2009) 1, 7

Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Southeast Tex.,
249 S.W.3d 480 (Tex. App. – Beaumont 2008, no pet.) 9

Sandles v. Howerton,
163 S.W.3d 829 (Tex. App. – Dallas 2005, no pet.) 11

Schindler v. Schindler,
119 S.W.3d 923 (Tex. App. – Dallas 2003, pet. denied) 3

Schulte v. Marik,
700 S.W.2d 685 (Tex. App. – Corpus Christi 1985, writ ref'd n.r.e.) 5

State & County Mut. Fire Ins. Co. ex. rel. S. United General Agency of Tex. v. Walker,
228 S.W.3d 404 (Tex. App. – Fort Worth 2007, no pet.) 12

Stewart Title Guar. Co. v. Sterling,
822 S.W.2d 1 (Tex. 1991) 8, 9

Texas Commerce Bank, Nat'l Ass'n v. New,
3 S.W.3d 515 (Tex. 1999) 13

Tony Gullo Motors I, L.P. v. Chapa,
212 S.W.3d 299 (Tex. 2006) 1, 8, 9, 10, 14, 15

STATUTES

Texas Estates Code

§32.001 2

§32.005 2

§51.055 5

§113.252(a) 4

§124.018 5

§152.051.....5

§351.003.....6

§351.152.....6

§352.051.....1, 6

§352.052.....3, 4, 5, 7, 11

§355.003.....2, 6

§355.102.....4

§404.003(c).....6

§404.003(d).....6

§404.004(a).....5

§405.003.....6

Texas Probate Code

§4A.....2

§4F.....2

§34A.....5

§113.....5

§149C(c).....6

§149C(d).....6

§149F.....6

§154(a).....5

§233.....6

§242.....1, 6

§243.....3, 4, 5, 7, 11

§245.....6

§307.....2, 6

§322.....4

§322A.....5

§442.....4

Texas Property Code

§22.001.....7

§114.064.....6

Texas Business & Commerce Code

§17.50(d).....11

Texas Civil Practice & Remedies Code

§37.004.....7

§37.005.....7

§37.009.....11

§38.001.....11

RULES

Rule 1.04; Texas Rules of Professional Conduct.....11, 13

ATTORNEY'S FEES IN PROBATE

Litigating disputes in probate matters is just as expensive and time-consuming as litigation in other types of cases. However, because most probate lawyers do not handle contested matters in probate courts on a regular basis, recovering attorney's fees and expenses can be very confusing. The statutes and rules which apply to attorney's fees in probate matters are difficult to locate and even harder to understand. The purpose of this paper is to discuss various matters that may be litigated in probate courts and how, or if, the litigants can recover attorney's fees. This paper will cover matters involving decedent's estates but not those involving guardianships, although many of the concepts will be identical. Further, since fees incurred by a personal representative can generally be charged to the Estate under Estates Code §352.051 [Probate Code §242], this article will focus on the fees which may be recoverable for litigants such as beneficiaries and creditors. The Estates Code is not effective until January 1, 2014. Therefore, parallel cites are provided to the Probate Code.

There is a cautionary note to keep in mind when a cause of action allows the recovery of attorney's fees. The attorney must be careful when explaining this concept to the client. While the client may, through an engagement letter, become obligated to pay fees to the attorney, the client must understand that every dollar that the client owes to the attorney may not be recoverable in the litigation – even if there is a statute that allows the recovery. First, the court or the jury may not award everything that is supported by the admissible evidence. Second, the trust or the estate may not have sufficient funds to pay the full judgment. Third, even in rare cases when fees are charged against the losing party, that party may be judgment-proof. In other words, the client must distinguish between the fees owed to the attorney according to the engagement letter and the amount that may be recoverable after trial or settlement.

I. Fees allowed in Texas – statute or contract

In Texas, as a general rule attorney's fees cannot be awarded to a litigant by a court unless either (1) a statute authorizes the award or (2) a contract between the Decedent and the creditor authorized the recovery of attorney's fees in the event of a suit brought pursuant to the contract. This statement represents what is known as the "American Rule" and has been followed in Texas for many decades. *MBM Financial Corporation, et al. v. The Woodlands Operating Company, LP*, 292 S.W.3d 660 (Tex. 2009), citing *Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 310-11 (Tex. 2006). For this reason, it is incumbent on litigants to realize that the award of attorney's fees is not automatic. Pleadings must be clear that attorney's fees are being sought as a result of reliance

upon a statute or upon a contract between the parties. After the pleadings are properly filed, the party must introduce admissible evidence regarding the fees and must secure affirmative fact findings by the court or by the jury.

II. Probate cases

The types of contested matters that can be heard in a probate court are vast. A Statutory Probate Court can hear any type of case if it is "related to" a probate matter. Estates Code §§32.001 and 32.005 [Probate Code §§4A and 4F]. While the reach of County Courts at Law and Constitutional County Courts is not quite as broad, the cases can still run the gamut. Some of those cases allow all parties to seek attorney's fees. In others, only one party has a possibility of recovering fees while the other party does not.

A. Creditors

No specific Estates Code provision allows a creditor to collect attorney's fees in addition to the amount in controversy. Therefore, to collect attorney's fees, the creditor must be either relying on a pre-death contract with the Decedent or on a non-Estates Code statute which allows the recovery. For example, if the creditor has filed suit on a promissory note or contract signed by the decedent, the terms of the note or contract likely allow the recovery of attorney's fees in the event of default. Estates Code §355.003 [Probate Code §307]. In similar fashion, a creditor seeking recovery on a credit card debt or open account might also be entitled to attorney's fees because of the underlying agreement with the decedent.

If the creditor already has a judgment against a decedent prior to death, and then must attempt to collect the judgment through the probate court, the law is murky. There is no specific statute in Texas which allows creditors in this situation to get attorney's fees. A judgment rendered prior to the decedent's death which awarded attorney's fees would typically have awarded "trial" fees and perhaps "appellate" fees, but judgments seldom award additional fees to cover the cost of collecting the judgment.

If a creditor has obtained a judgment against a Decedent prior to death, the "evidence" to be used in the probate court would consist simply of the judgment. If judgment has not been rendered prior to death, the creditor basically starts from the beginning of the process to pursue the claim. The specific steps to be taken by the creditor will depend upon whether the personal representative is "independent" or "dependent."

In situations where the creditor is aware that death is imminent, it might be preferable to delay taking a judgment until the probate case has been initiated for one simple reason. If a judgment is

rendered prior to death, it might be difficult to seek additional attorney's fees that would be incurred in the probate proceeding. On the other hand, if judgment has not been rendered prior to death, the creditor should be able to seek all attorney's fees, whether incurred before or after death, as part of what the authorizing statute or contract allows.

B. Will contests

In many Will contest cases, a litigant can recover attorney's fees even in a losing effort. However, the ability to recover fees is limited. Section 352.052 of the Estates Code [Probate Code §243] governs attorney's fees in a Will contest case. Only in two instances can a litigant recover those fees. First, §352.052(a) states that a person designated as executor in a Will or in an alleged Will can prosecute a proceeding to have the Will admitted to probate and can be awarded attorney's fees and expenses – win or lose. In fact, the statute states that a court *shall* make the award if there is a fact finding that the executor or designated-executor brought or defended the action "in good faith and with just cause." *Alldridge v. Spell*, 774 S.W.2d 707 (Tex. App.-Texarkana 1989, no writ).

Section 352.052(b) puts a slight twist on the situation when the litigant is merely the beneficiary under a Will or under an alleged Will. Such a person, if seeking to probate a Will or defend a Will previously admitted to probate, can also recover attorney's fees and expenses – win or lose. However, the statute states that the court *may* (not *shall)* award the fees. Thus, even with a "good faith" finding, the beneficiary-litigant may not recover his fees and expenses.

As with subsection (a), the litigant must be found to have brought or defended the action "in good faith and with just cause." Nothing in §352.052 or in the cases which have interpreted it explains why subsection (a) is mandatory while subsection (b) is discretionary. *Alldridge* makes it clear that the party who wants attorney's fees must have pleadings supporting "good faith and just cause" and must submit a question to the jury. *Id.* at 711. If the trial is to the bench, "good faith and just cause" should be part of the proposed findings of fact and conclusions of law. Also, §352.052 allows the recovery of attorney's fees but only if those fees are found to be "reasonable." The evidence necessary to prove whether fees are reasonable will be discussed later in this paper.

Fees and expenses awarded under §352.052 are payable by the Estate and not by the litigants. *Schindler v. Schindler,* 119 S.W.3d 923, (Tex. App. – Dallas 2003, pet. denied). *Schindler* holds that there is no support for a court assessing the attorney's fees against the losing party under this statute. Since the

fees are payable by the Estate, the following issues should be examined carefully before a contest is filed.

i. A beneficiary who wins the case may not care about attorney's fees if he is set to receive the entire estate anyway. In this scenario, an award of fees would be akin to the beneficiary paying himself.

ii. A beneficiary of only a portion of the estate should consider at the outset that the attorney's fees to be incurred in the battle might exceed the inheritance.

iii. A designated-executor who loses the case, and who is not also a beneficiary, faces the daunting task of paying out-of-pocket to litigate the dispute unless there is a finding of "good faith and just cause." Similarly, a previously-appointed executor, who is not also a beneficiary, who later loses a contest to a previously-admitted Will might be personally liable for fees and expenses without the "good faith and just cause" finding.

If the only probate assets are exempt from creditor's claims – such as a house, car and personal property – there is no "estate" out of which to pay attorney's fees to a litigant who does not inherit those exempt assets. Estates Code §113.252(a) [Probate Code §442] allows creditors to collect debts from nontestamentary accounts if the estate is otherwise insufficient, but the section specifically applies to "debts, taxes and expenses of administration."

Prior to September 1, 2003, the award of attorney's fees and expenses in a Will contest under §352.052 [Probate Code §243] were not considered as "expenses of administration" and were not classified as a "Class 2" claim. Instead, such an award was a Class 8 claim. *Hope v. Baumgartner,* 111 S.W.3d 775 (Tex. App. – Fort Worth 2003, no pet.). On September 1, 2003, the emphasized language below was added to Probate Code §322 [Estates Code §355.102]:

> Class 2. Expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate, **including fees and expenses awarded under Section 243** [Estates Code §352.052] of this code… .

Thus, contrary to the holding in *Hope,* litigants in a Will contest who qualify for an award of attorney's fees under §352.052 will have priority for payment from estate assets over all debts except funeral expenses and the expenses of last illness up to $15,000.00 (Class 1).

Section 352.052 [Probate Code §243] is confusing in one other way. In both subsections (a) and (b), the following language is repeated:

> (a) A person designated as executor in a will or an alleged will, **or as administrator with the will or alleged will annexed**… .
>
> (b) A person designated as a devisee in or beneficiary of a will or an alleged will, **or as administrator with the will or alleged will annexed**… .

[Emphasis added.]

By definition, an administrator "with will annexed" is a personal representative who was not named in the Will. Estates Code §404.004(a). [Probate Code §154(a).] Section 352.052 gives no interpretation of the emphasized phrases, and no Texas case has interpreted them. Perhaps the meaning is that a group of designated executors, or a group of named beneficiaries, selects a "straw man" to prosecute the suit for them on the promise that the "straw man" will be appointed as "administrator with will annexed" if the preferred Will is admitted to probate. However, to have a chance at recovering attorney's fees, anyone designated as an executor in an offered Will would not need to complicate things by dealing with the "administrator with will annexed" language. On the other hand, beneficiaries of a competing Will that is offered for probate might select such a straw man, but there is no logical reason for doing so since the beneficiaries are eligible to recover attorney's fees anyway in their capacity as beneficiaries.

Section 352.052, by omission, makes it clear that a person who challenges a Will in court cannot recover attorney's fees and expenses UNLESS another Will is simultaneously offered for probate which either (1) names the contestant as executor or (2) names the contestant as beneficiary. *Barber v. Cangelosi,* 2010 Tex. App. LEXIS 247 (Tex. App. – Houston [1st] January 14, 2010, no pet.). *Greer v. Jenkins,* 2004 Tex. App. LEXIS 2409 (Tex. App. – Dallas March 17, 2004, no pet.). At least one court has held that a person named as an alternate executor who was not appointed as a result of the contest was not entitled to recover fees and expenses. *Schulte v. Marik,* 700 S.W.2d 685 (Tex. App. – Corpus Christi 1985, writ ref'd n.r.e.).

Also, grandchildren who were not direct beneficiaries under a Will but who were beneficiaries of testamentary trusts have been held to be entitled to an award of their fees and expenses under Probate Code §243 [Estates Code §352.052]. *In re Estate of Johnson*, 340 S.W.3d 769 (Tex. App. – San Antonio 2011, pet. dismissed).

C. Other Estates Code Sections Awarding Attorney's Fees

i. Estates Code §51.055 [Probate Code §34A] - Fees to be awarded to an attorney ad litem are considered court costs after being set by the court.

ii. Estates Code §124.018 [Probate Code §322A] – If a dispute arises as to the apportionment of estate taxes, the prevailing party can be awarded his or her attorney's fees.

iii. Estates Code §152.051 [Probate Code §113] - A litigant who files an emergency intervention motion to pay funeral and burial expenses is entitled to recover reasonable and necessary attorney's fees.

iv. Estates Code §351.003 [Probate Code §245] – A litigant who successfully sues a personal representative for neglect of duty, or to remove the personal representative, can recover attorney's fees. Such fees are payable by the personal representative and not by the Estate.

v. Estates Code §351.152 [Probate Code §233] – An attorney can represent the personal representative on a contingent fee, but the fee must be approved by the court if it exceeds 1/3 of the potential recovery. This section applies to both dependent and independent administrations.

vi. Estates Code §352.051 [Probate Code §242] – On satisfactory proof to the court, a personal representative is entitled to reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the estate.

vii. Estates Code §355.003 [Probate Code §307] – Claimants can include fees incurred in preparing, presenting and collecting their claim if the underlying instrument on which the claim is based provides for fees.

viii. Estates Code §404.003(c) [Probate Code §149C(c)] – In an action to remove an executor, the executor shall be allowed reasonable and necessary attorney's fees from the estate for a good-faith defense even if the defense is unsuccessful.

ix. Estates Code §404.003(d) [Probate Code §149C(d)] – A person bringing an action to remove an executor may recover fees from the estate if the executor was serving without bond.

x. Estates Code §405.003 [Probate Code §149F] – An executor who seeks a judicial discharge is entitled to recover fees incurred in preparing the final account, but the fees must be approved by the court.

D. Trust disputes

Litigation involving trusts can involve suits to modify, terminate or interpret the document. Suits can also be brought to appoint a successor trustee or to remove a trustee. Attorney's fees for litigants in these actions are governed by one section of the Property Code. Section 114.064 states "[i]n any proceeding under this code, the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Therefore, while this statutory language does not require a party to win in order to get fees, it is clear that the court has discretion as to whether to make an award or not. Plus, any fees awarded must be both "reasonable and necessary" and "equitable and just."

III. Declaratory Judgments Act

The Declaratory Judgments Act is found in Chapter 37 of the Texas Civil Practice & Remedies Code. There are two sections that describe the type of

actions which might appropriately be brought under the Act in a probate court. Section 37.004 states:

> (a) A person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.
> (b) A contract may be construed before or after there has been a breach.
> (c) Notwithstanding Section 22.001, Property Code, a person described by Subsection (a) may obtain a determination under this chapter when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties.

Section 37.005 states:

> A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:
> (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
> (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;
> (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or
> (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

It is quite common in a probate context to see that a party has tried to claim that his or her suit is brought under the Declaratory Judgments Act. This step is frequently taken to try and convert a case on which attorney's fees are not normally recoverable into a case where attorney's fees might be recoverable. However, Texas law is quite clear that every lawsuit cannot be seen as a declaratory judgment action. In other words, a party cannot use the Declaratory Judgments Act as a vehicle to obtain otherwise impermissible attorney's fees. *MBM Financial Corporation, et al. v. The Woodlands Operating Company, LP*, 292 S.W.3d 660 (Tex. 2009). For example, a party who decides to contest a Will and who is not an "executor" or "beneficiary" within the meaning of Estates Code §352.052 [Probate Code §243] would likely not be able to get relief by claiming that the suit is being brought under the Declaratory Judgments Act.

IV. Duty to Segregate

A. Texas law prior to 2006

Often a suit will involve causes of action on which attorney's fees are recoverable along with causes of action on which attorney's fees are not recoverable. In addition, the plaintiff might have sued multiple defendants and have alleged different causes of action against each. Prior to 2006, there was a "loose" requirement that the plaintiff seeking attorney's fees should segregate time and expenses between the various defendants and according to the

causes of action alleged against each. Otherwise, the jury would not be able to assess attorney's fees to only those causes of action which allowed fees and between the defendants against whom liability on those particular claims was found.

As an alternative, the plaintiff could provide convincing testimony that the work against all of the defendants and on all of the causes of action was so "inextricably intertwined" that segregation was impossible. In the latter instance, the jury could award 100% of the fees and expenses supported by the pleadings and evidence with no requirement to reduce the award for the portion of the work done on causes of action that did not allow the recovery of attorney's fees. Similarly, the jury could assess fees against all defendants even if some of the defendants' liability was predicated on a cause of action that did not allow attorney's fees to be recovered.

The leading case in this regard was *Stewart Title Guar. Co. v. Sterling,* 822 S.W.2d 1 (Tex. 1991). It held that segregation was not required when the "causes of action involved in the suit are dependent upon the same set of facts or circumstance and thus are 'intertwined to the point of being inseparable'." *Sterling,* 822 S.W.2d at 11.

B. The *Chapa* decision

In 2006, the Supreme Court issued its decision in *Chapa.* In that opinion, the standard for segregation was changed. The Court discussed the fact that *Sterling* had created a situation where potentially all attorney's fees were to be recoverable in every type of case, regardless of the causes of action, even though Texas law did not allow fees for many of those causes of action. The Court examined a wide range of decisions between 1991 and 2006 and found that the "inextricably intertwined" exception had swallowed the rule because (1) the determination of whether multiple claims are "inextricably intertwined" is difficult for the courts because so much of the attorney's work is protected by the attorney-client privilege, and (2) the exception is hard to apply because the various courts of appeal disagree about what makes multiple claims "inextricably intertwined." Some of the courts of appeal focused on the underlying facts, others on the elements that must be proved, and still others on some combination of the two. *Chapa,* 212 S.W.3d at 312.

Chapa held that while an attorney's work might be dependent upon the same set of facts or circumstances, each of the claims does not necessarily require "the same research, discovery, proof, or legal expertise." *Id.* The court described the plaintiff as having sued for breach of contract, fraud and violations of the Deceptive Trade Practices Act. Though the Court of Appeals had said in its ruling that no segregation was required, the Supreme Court stated

that time spent by the plaintiff's attorney in drafting pleadings and the jury charge relating to the fraud claim were not recoverable.

The new standard requires attorney's fees to be segregated unless the "discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id.* at 313-14. However, if there are fees which relate solely to a claim for which fees are unrecoverable, the claimant must segregate time spent on the "recoverable" from the time spent on the "unrecoverable" claim. *In the Interest of B.N.L.-B.,* 375 S.W.3d 557 (Tex. App. – Dallas 2012, no pet.) (citing *Chapa,* 212 S.W.3d at 313).

The party attempting to recover fees and expenses naturally has the burden of proof to offer proper evidence. If the party believes that segregation is not required, the party also carries that burden of proof. *Sterling,* 822 S.W.2d at 10. If fees are not segregated but there is no objection from the opposing party, the objection is deemed to have been waived. In that situation, a jury finding that awards fees can be disregarded only if it is unsupported by the evidence or is immaterial. *Green Int'l, Inc. v. Solis,* 951 S.W.2d 384, 389 (Tex. 1997).

C. Cases which have applied *Chapa*

Despite *Chapa,* the courts have not been consistent in applying the new standard. In appeals where the appellate court determined that the fees should have been segregated, the "penalty" assessed against the attorney who failed to segregate came in the form of a remand of that portion of the case for a new trial regarding the attorney's fees. An example is *Bair Chase Prop. Co. LLC v. S & K Development Co., Inc.,* 260 S.W.3d 133 (Tex. App. – Austin 2008, pet. denied), where the appellate court remanded the attorney's fee issue to the trial court with instructions to separate the fees incurred in correcting usury violations from those incurred in pursuing the recoverable claim. In *Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Southeast Tex.,* 249 S.W.3d 480 (Tex. App. – Beaumont 2008, no pet.), the case was remanded so that the trial court could consider evidence segregating fees incurred in pursuing a fraud claim and an unsuccessful DTPA claim from the one successful claim (breach of contract) that allowed for attorney's fees.

In *Approach Resource I., L.P. v. Clayton,* 360 S.W.3d 632 (Tex. App. – El Paso 2012, no pet.), the trial court refused to award fees when the attorney failed to properly segregate the work, even after being instructed to do so. The appellate court affirmed the decision.

D. Cases which have not applied *Chapa*

At least one probate case has addressed the *Chapa* requirement of segregation but did not apply it.

In the case of *In the Estate of Vrana,* 335 S.W.3d 322 (Tex. App. – San Antonio 2010, pet. denied), the beneficiaries of the estate claimed that their "ultimate objective" was the removal of the Executor. While the Probate Code allows the recovery of attorney's fees in a removal action, the testifying attorney acknowledged that there were causes of action on which fees were not recoverable. The court was persuaded, however, that the work done on the non-recoverable claims (fraud, embezzlement, breach of fiduciary duty) were "inextricably intertwined" with the "removal" cause of action and did not need to be segregated. The trial court awarded fees, and the decision was upheld on appeal.

Another probate case where *Chapa* was discussed was *Lindley v. McKnight, et al.*, 349 S.W.3d 113 (Tex. App. – Fort Worth 2011, no pet.). In *Lindley*, the appellant complained on appeal that the trial court had not required segregation of attorney's fees between claims on which fees were recoverable and those on which fees were not recoverable. The Court of Appeals disagreed, finding that the work done on the "nonrecoverable" claims (fraud; breach of fiduciary duty) were totally dependent upon the work done to defeat the declaratory judgments act claim and that, therefore, there was no requirement to segregate.

Other than *Vrana,* the San Antonio court has considered other cases and has applied the *Chapa* standard. In one of those cases, the appellants challenged the fee award in another probate matter by alleging that the segregation had been improper. *In re Estate of Johnson,* 340 S.W.3d 769 (Tex. App. – San Antonio 2011, pet. dismissed). After reviewing the evidence, the appellate court found that there was sufficient testimony of the segregation of fees between "recoverable" and "non-recoverable" causes of action to support the award. *Id.,* at 791.

To litigants, the refusal by a litigant to properly follow the *Chapa* decision and segregate fees between recoverable and non-recoverable claims leads to three possible outcomes, and two of them are bad. First, the trial court might refuse to allow the jury to hear the testimony or, if allowed, might refuse to submit a question to the jury regarding fees. That decision could be affirmed on appeal as was the situation in *Clayton.* Second, the question to the jury could be answered favorably only to have the appellate court remand the issue back to the trial court. Third, the non-segregating litigant might prevail. However, the risk of possibly two bad outcomes will cost time and money, and a client might not be willing to pay his attorney for two separate trials which deal with attorney's fees.

V. Testimony and Proof

The attorney who wishes to recover fees must do more than simply segregate time between recoverable

and non-recoverable claims. The testimony must also prove that the fees are "reasonable." *Dilston House Condo. Ass'n v. White,* 230 S.W.3d 714, 716-18 (Tex. App. – Houston [14th Dist.] 2005, no pet.). Even when the fees are allowed by statute, testimony regarding "reasonableness" is a requirement, and "necessary" also appears in some of the primary statutes.

The term "reasonable" is included as a measurement in Estates Code §352.052 [Probate Code §243] (a party *shall/may* recover "reasonable" attorney's fees in Will contest cases), in TEX. CIV. PRAC. & REM CODE §38.001 (a prevailing party *may* recover "reasonable" attorney's fees in contract cases), in TEX. BUS. & COM. CODE §17.50(d) (a prevailing party *shall* be awarded "reasonable and necessary" attorney's fees in DTPA cases) and in TEX. CIV. PRAC. & REM. CODE §37.009 (any party *may* be awarded "reasonable and necessary" attorney's fees in declaratory judgment actions). Thus, any litigant must be prepared to carry his or her burden of proof regarding the reasonableness of the fees.

A. "Reasonable and Necessary"

Guidance regarding the proof needed to establish "reasonable and necessary" is found in two places. The Supreme Court, in *Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812, 818 (Tex. 1997), published a non-exclusive list of eight factors that are relevant. The list set out by the court is also found in Rule 1.04 of the Texas Rules of Professional Conduct. They are as follows:

i. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

ii. the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

iii. the fee customarily charged in the locality for similar legal services;

iv. the amount involved and the results obtained;

v. the time limitations imposed by the client or by the circumstances;

vi. the nature and length of the professional relationship with the client;

vii. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

viii. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Not every factor needs to be included in every case. The court must consider the entire record and the common knowledge of the lawyers and judges. *Sandles v. Howerton,* 163 S.W.3d 829, 838-39 (Tex. App. – Dallas 2005, no pet.).

Some fees that are billed by the attorney might not be reasonable in the eyes of the court or jury. In *Goodyear Dunlop Tires N. Am. Ltd. v. Gamez,* 151 S.W.3d 574 (Tex. App. – San Antonio 2004, no pet.), the court refused to award fees to an ad litem for reviewing all discovery motions and depositions and for attending all hearings without regard to the relevance of those matters to the ad litem's client's (a minor child's) interests. Redundant billing, such as having multiple attorneys confer in the office on a matter, will not necessarily be deemed "reasonable." *In re Pan Am. General Hosp., LLC,* 385 B.R. 855 (W.D. Tex. 2008).

B. Lodestar

Courts in Texas often apply the "lodestar method" when making an award of attorney's fees. "Lodestar" simply means a calculation in which the hours worked are multiplied by the prevailing hourly rate in the community for similar legal work. *El Apple I, Ltd. v. Olivas,* 370 S.W.3d 757 (Tex. 2012). The *El Apple* decision also stated that the other applicable *Arthur Andersen* factors should be considered, and the lodestar amount can be adjusted based upon those factors.

According to *El Apple,* determining the award is a two-step process. The first is to calculate accurately the fee by the formula described in the preceding paragraph, and the second is to adjust the result if some additional factors are present. The discussion below will focus only on the first step under the assumption that the extra multiplier will likely not be applicable in probate-related disputes.

C. Oral testimony

In general, expert testimony is required to establish a claim for attorney's fees. *Barrett v. Parchman,* 675 S.W.2d 289, 291 (Tex. App. – Dallas 1984, no writ). The witness does not need to be a third-party expert; in fact, the testimony is normally provided by the attorney who is handling the case. The testimony should be based upon the attorney's "personal knowledge about the underlying work and its particular value to the client." *Garcia v. Gomez,* 319 S.W.3d 638, 641 (Tex. 2010). The *Arthur Andersen* factors should at least be considered when formulating the testimony, but it is not necessary to mention each of the factors during the presentation.

A case from the Fort Worth Court of Appeals contains an excellent template for what could be included in the testimony. *State & County Mut. Fire Ins. Co. ex. rel. S. United General Agency of Tex. v. Walker,* 228 S.W.3d 404, 408-09 (Tex. App. – Fort Worth 2007, no pet.). In that case, the witness described the following:

1. the length of time he had been practicing;
2. the county where he practiced;
3. that he was familiar with the reasonable charges for attorney's fees in that county;

4. an itemization of the amount of time each attorney who worked on the case spent and their billable rates;
5. that the work done for the fees requested was for claims for which attorney's fees are recoverable (time records had been reviewed); and
6. generally, that the fees were reasonable and necessary.

If the fee arrangement is hourly, the testimony would conclude by providing the calculation of the reasonable number of hours worked times the reasonable hourly rate. *Bates v. Randall County,* 297 S.W.3d 828, 838 (Tex. App. – Amarillo 2009, pet. denied).

There is no legal or ethical requirement that the hourly fee agreement with the client be in writing. For a contingent fee, the testimony requirement is different. Unlike an hourly fee arrangement, a contingent fee contract with the client "shall" be in writing. Rule 1.04(d), Texas Rules of Professional Conduct. Also, even though the client agreed to pay the attorney a portion of the ultimate recovery, it is not sufficient to simply tell the jury that the fees to be awarded should be a percentage of the damages awarded. *Dunn v. Southern Farm Bureau Cas. Ins. Co.,* 991 S.W.2d 467 (Tex. App. – Tyler 1999, pet. denied). The attorney must prove that there is a written contingent fee agreement, but the *Arthur Andersen* factors must also be provided so that the jury or the court can award a specific dollar amount. *Arthur Andersen,* 945 S.W.2d at 819. Thus, an attorney working on a contingent fee must nevertheless keep track of the hours worked, and the expenses incurred, in order to recover those amounts at trial.

D. Necessary documents

In the recent *El Apple* decision, the Supreme Court suggested in no uncertain terms that documentary evidence of the fees must be presented at trial. The case involved employment discrimination and retaliation under the Texas Commission on Human Rights Act. After securing a judgment, the plaintiff's attorneys submitted their fees for consideration by using affidavits. The affidavits relied upon the *Arthur Andersen* factors and the lodestar method to calculate the fees. The court then enhanced the calculated amount by using a 2.0 multiplier and assessed the enhanced fees against El Apple. At the Court of Appeals, El Apple complained about the sufficiency of the evidence to support the fee award. However, the award was affirmed.

At the Supreme Court, El Apple again complained about the sufficiency of the evidence, contending that the plaintiff had failed to submit any documentary evidence of attorney's fees. In response, the plaintiff argued that no Texas court had ever required documentation as a condition precedent to a fee award and cited *Texas Commerce Bank, Nat'l Ass'n v. New,* 3 S.W.3d 515, 517-18 (Tex. 1999) and

other cases which held that affidavits regarding fees were sufficient to support an award. The Supreme Court, in response, stated that the requirement of documentary evidence has merit in contested cases under the lodestar approach. *El Apple,* 370 S.W.3d at 762.

Though the plaintiff's lawyers had testified to having worked 890 hours on the case, the Court noted that there was no indication of how the time was spent. No portion of the affidavits stated the number of hours devoted to particular tasks. There were no time records included with the affidavits, and the affidavit testimony did not mention that time records had even been reviewed during the preparation of the affidavits. The Supreme Court said that the affidavits were merely generalities which did not give sufficient detail to the trial court on which a lodestar award could have been based. Further, if multiple attorneys and/or paralegals are involved in a case, the testimony should identify the person who performed each task. For "lodestar" purposes, the Court held that the applicant must at least produce documentation of the services performed, who performed them and at what hourly rate.

In his concurrence, Justice Hecht stated that the "failure to produce any records supporting the hours [an applicant] claimed to have spent on the case is fatal to their fee application." *Id.* at 766. The time spent by the attorney should be on billing records which are recorded at or near the time the work was performed. *Id.* at 763. Further, the applicant should supply the court with "sufficient information to make a meaningful evaluation" and exclude hours that are duplicative, excessive, redundant, inadequately documented or otherwise unnecessary. *Id.* at 762.

The "reach" of the *El Apple* decision is not yet known. It dealt with fees under a specific statute, and the Court did not state whether its ruling would apply to other "fee" statutes. Plus, it is unclear if timesheets are required, how much redaction will be allowed. In the *Chapa* decision, the same Supreme Court had said that nothing more than the opinion of an expert would be required. *Chapa*, 212 S.W.3d at 314. However, the *El Apple* version of the Court now wants documentation of the specific tasks performed, who performed them and what hourly rates were used for each person. Mere opinion testimony may no longer be enough – at least in contested cases.

E. Paralegal fees

Many probate attorneys have paralegals on staff to do a portion of the legal work. If paralegals help with litigation in areas where attorney's fees are recoverable, the evidence necessary to recover paralegal's time is different than what is required for an attorney. While being precise in this area will

likely not matter in uncontested cases, it can be a minefield in a contested case.

The State Bar of Texas has a Paralegal Division, and it has its own standards as to what constitutes a paralegal. The definition of a "paralegal" is:

> …a person, qualified through various combinations of education, training, or work experience, who is employed or engaged by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of a licensed attorney, of specifically delegated **substantive legal work**, which work, for the most part, requires a sufficient knowledge of legal principles and procedures that, absent such a person, an attorney would be required to perform the task.

http://txpd.org/page.asp?p=Paralegal Definition and Standards. [Emphasis added.] "Substantive legal work" does not include clerical or administrative work that might be done by a legal assistant, and a court might refuse to allow recovery of so-called "paralegal" time for such non-substantive work. *Gill Savings Ass'n. v. Int'l Supply Co., Inc.,* 759 S.W.2d 697, 705 (Tex. App. – Dallas 1988, writ denied).

In *El Apple*, the Supreme Court noted that, when obtaining payment for work done by paralegals or legal assistants, Texas courts have required more information, such as:

> (1) [T]he qualifications of the legal assistant to perform substantive legal work;
> (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney;
> (3) the nature of the legal work performed;
> (4) the legal assistant's hourly rate; and
> (5) the number of hours expended by the legal assistant.

El Apple, at 763 (citations omitted).

VI. Conclusion

Structuring pleadings, discovery and evidence to allow the recovery of attorney's fees in probate cases, where permitted, should be at the forefront of any legal strategy. Unfortunately, too many attorneys fail to focus on recovering their fees until the last minute – perhaps waiting to think about the process until it is time to provide the testimony. At that point, the records of time spent on various tasks, and how it is allocated to various defendants and causes of action, may be lacking or nonexistent. Attorneys should, at the outset of litigation, examine the various Estates Code (or Probate Code) provisions allowing the recovery of attorney's fees.

Thus, while decisions such as *Chapa* and *El Apple* did not hold unequivocally that attorney's fees must always be segregated between causes of action and parties, it is clear that the failure to keep accurate records and to present evidence that segregates fees between recoverable and unrecoverable claims will now be done at the peril of the presenting attorney. Since failing to segregate could lead to the failure to collect an award of fees, serious consideration should be given at the outset of any litigation to keeping and maintaining proper records.