

## Probate Fees - How Much are They?

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### Overview

One of the reasons that people give for transferring property to a revocable trust during life is to avoid probate at death. That can be accomplished if all of the decedent's property has been transferred to the trust before death. To make sure that occurs, the trust is often accompanied with a pour-over will. The property that hasn't been retitled into the name of the trustee of the trust is "poured over" into the trust at death.

But just how much are probate fees? How are they determined? That's the topic of today's post.

### Establishing Probate Fees

The avoidance of probate is often tied to the desire to avoid probate fees and maintain privacy. As for fees, how much can be anticipated? The answer depends. The more complex the estate, and/or the more issues that come up post-death, the estate can anticipate incurring more probate fees. The converse is also true. In some states, a flat percentage of the gross estate value can be charged as an attorney fee for the estate. That can range anywhere from about 1.5 percent to 6 percent or even higher.

**Kansas probate fees.** In Kansas, state law specifies that, "every fiduciary shall be allowed his or her necessary expenses incurred in the execution of his or her trust and shall have such compensation for services and those of his or her attorneys as shall be just and reasonable." *Kan. Stat. Ann. §59-1717*. There is no statute in Kansas that allows for a percentage fee for handling a decedent's estate. It's not specifically disallowed if the percentage amount is backed up with itemized time sheets and is ultimately deemed reasonable by the probate court. In essence, then, probate fees are based on an hourly rate for the amount of hours reasonably spent working on the estate. In addition, an attorney's fee for handling a decedent's estate is also based on the eight factors of the Kansas Rules of Professional Conduct (KRPC). The probate court considers these eight factors when determining whether a fee is appropriate.

The eight factors are:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;



- The fee customarily charged in the locality for similar legal services;
- The amount involved and the results obtained;
- The time limitations imposed by the client or by the circumstances;
- The nature and length of the professional relationship with the client;
- The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- Whether the fee is fixed or contingent. *KRPC 1.5(a)*

**Kansas case.** A recent Kansas county district court decision involved the application of the factors. In *In re Estate of Appleby, No. CQ-2023-CV-000008 (Chautauqua Co. Dist. Ct., Nov. 9, 2023)*, from 2014 until death in 2021, the decedent had been the subject of a conservatorship. The person that would become the executor of the decedent's estate was the conservator. The attorney that represented the executor for the decedent's eventual estate, represented the conservator during the conservatorship. The annual billing statements submitted to the conservator for the legal work in the conservatorship were itemized and detailed. The itemized billing statements listed each date services were performed; a description of the services performed on each date; the amount of time worked on each date; the amount charged for the services performed on each date; the total amount of time worked during the billing period; and the total amount charged for work performed during the billing period. The conservator reviewed the statements, the court approved them and the conservator paid.

However, for estate administration work, the attorney did not provide the executor with a written representation agreement and did not communicate the basis or rate of the fee he intended to charge the estate. The executor believed the attorney would bill his time hourly, just as he had done for the previous seven years in the conservatorship matter.

The decedent died on July 6, 2021, with a gross estate value of \$4,570,521.11. However, the attorney only first informed the executor on May 2, 2022, that a fee of three percent of the estate's gross value would be charged. The executor informed the attorney that the fee should be based on an hourly rate. The attorney replied as follows:

"I feel comfortable asking for a fee based upon 3%. If you want to oppose it, that's fine. Please remember that our... service to her predates your appointment as her conservator. [We]...did quite a bit of "off the books" work for [the decedent] during her lifetime, ... and... it would all even out when we handled the estate. Honestly, that's a common approach taken by attorneys when they know they'll be handling an estate at a later date. So, I don't know what I can say. I respect your views and your being upfront with me, but I know what the common practice has been and what we've always done."

Ultimately, on May 30, 2023, the attorney generated a billing statement. The billing statement included descriptions of the work performed between the date of the decedent's death and May 2023, but the descriptions were not tied to specific dates and did not include the amount of time spent performing any task on any date. The May 30 billing statement concludes with the application of a 3% fee to the \$4,570,521.11 value of the estate assets for a total fee of \$137,115.63. The local magistrate judge awarded the fee on June 5, 2023, and the executor appealed.



On appeal, the attorney estimated that he spent between 420 and 560 hours on the estate at a rate of \$240 per hour. Only specific tasks, based on the review of the emails, amounted to 174-242 hours. The court then applied the eight factors of Rule 1.5(a) of the KRPC to the facts of the case. The court noted that the attorney didn't keep time records, even though being on notice that the executor wanted to know the amount of time that was being billed. No time records kept. There was also no engagement letter that had been entered into with the client. The work on the estate, the court noted, did not involve difficult issues and a paralegal performed much of the work. The fact that the attorney had billed on a percentage basis for 40 years was severely mitigated by subsequent caselaw specifying that, ""fees which are not supported by meticulous, contemporaneous time records that show the specific tasks being billed should not be allowed." See, e.g., *In re Estate of Trembley*, 220 P.3d 1114 (Kan. Ct. App. 2009). The court also noted that the attorney had a previous 7-year relationship with executor as conservator and billed hourly for the work on the conservatorship.

Ultimately, the court approved what it deemed to be a reasonable fee of fee of \$58,080 (down from the \$137,115.63 requested). In percentage terms, the approved fee worked out to be slightly less than 1.3 percent of the estate value.

In reaching its decision, the court noted that approving attorney fees for work on an estate is a fact-based determination. The fees must be supported by contemporaneous time records. If they aren't, an "award of...fees based on a percentage of an estate is not reasonable, regardless of the local custom."

**Note:** The court also pointed out that the attorney involved "serves on the Kansas Board of Discipline for Attorneys."

## Conclusion

The fear of large and outrageous attorney fees for handling estates in Kansas is largely not justified. The courts operate as an effective "brake" on attorneys trying to charge unjustified fees – at least that's been the case in Kansas since 2009. But, that may not be true in other states. So, for those wanting to avoid probate fees, a revocable trust (or some other type of trust) might be an appropriate estate planning tool. But, it's important to understand just how attorney fees in probate are established. One wonders how many estates in Kansas have been unjustly overbilled since 2009 by the attorney involved in the case. All it took was one well-informed executor to get the right result.

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