By Jamie B. Schwinghamer, Esq.

The saga of a $24,600,000.00 trustee fee

When eclectic artist, philanthropist and multi-millionaire Robert Rauschenberg died at the age of 82 on May 12, 2008, in Captiva Island, Florida, no one could have predicted that his Trustees would be pitted against his Foundation in a bitter legal battle over trustee fees. Center stage in the dispute is the 1958 Florida Supreme Court case, *West Coast Hosp. Ass'n v. Florida National Bank of Jacksonville,* 100 So. 2d 807 (Fla. 1958), which remains the seminal case in Florida addressing the calculation of trustee fees where the trust document is silent. Although many Florida attorneys have long questioned *West Coast Hospital's* continued application, the Florida Second District Court of Appeal recently affirmed its applicability, and a $24,600,000 trustee fee, in *Robert Rauschenberg Found. v. Grutman, et al.,* 2016 WL 56456 (Fla. 2nd DCA Jan. 6, 2016).

The Trustees, Bennet Grutman, Bill Goldston and Darryl Pottorff, friends and colleagues of Rauschenberg, managed the Trust's assets for several years after Rauschenberg's death. Eventually the assets were transferred to the Robert Rauschenberg Foundation, the sole remainder beneficiary of the Trust. The evidence presented in the trial court showed that under the Trustees' stewardship, the value of the Trust's assets increased from $605,645,595 to $2,179,000,000. Applying the factors outlined in *West Coast Hospital,* the Trustees argued that they were entitled to a trustee fee of between $51,000,000 and $55,000,000. These factors include: (a) the amount of the capital and income received and disbursed by the trustee; (b) the wages or salary customarily granted to agents or servants for performing like work in the community; (c) the success or failure of the administration of the trustee; (d) any unusual skill or experience which the trustee in question may have brought to his work; (e) the fidelity or disloyalty displayed by the trustee; (f) the amount of risk and responsibility assumed; (g) the time consumed in carrying out the trust; (h) the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; (i) the character of the work done in the course of administration, whether routine or involving skill or judgment; (j) any estimate which the trustee has given of the value of his own services; and (k) payments made by the cestuis to the trustee and intended to be applied toward his compensation.

The Foundation claimed that the Trustees were owed no more than $375,000 pursuant to the lodestar method of fee calculation set forth in *Florida Patient's Comp. Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), *modified, Standard Guar. Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990). The lodestar method is a two-step process. The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar. The lodestar can then be increased or decreased to take into account the results obtained by the party seeking fees.

The trial court ultimately disagreed with the Foundation. On August 1, 2014, Lee County Circuit Court Judge Jay B. Rosman ruled that *West Coast Hospital* applied, and awarded a $24,600,000 trustee fee. The Foundation appealed, arguing that the legislative intent behind the use of the phrase "reasonable under the circumstances" in Florida Statutes § 736.0708(1), was to abrogate *West Coast Hospital*, and instead direct Florida courts to apply the *Rowe* lodestar factors. The *Rowe* lodestar factors, however, had only previously been applied to attorney and personal representative fees, and not to trustee fees. The Second District Court of Appeal, citing to 2006 Senate Staff Analyses, held that the legislature intended for the courts to continue to apply the *West Coast Hospital* factors when determining trustee fees, and that "...the trial court correctly refused to calculate the Trustees' fees using the lodestar method."

Not surprisingly, the Foundation is not taking the loss in stride, and on January 20, 2016, filed a Motion for Rehearing, Motion for Rehearing En Banc and Motion for Certification to the Florida Supreme Court. At the time of submission of this article, the Second District Court of Appeal had not yet ruled on the Foundation's post-opinion motions. Stay tuned as this saga unfolds, because final outcome will undoubtedly affect Florida trustees, their counsel, and drafting attorneys alike.

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