

**Opinion No. 45-4671**

March 6, 1945

**BY:** C. C. McCULLOH, Attorney General

**TO:** Earle Kerr, Director Succession Tax Division Bureau of Revenue Santa Fe, New Mexico. Attention: Sylvan A. Floersheim, Auditor

{\*30} I have your letter of March 3, 1945 wherein you request an opinion of this office concerning whether or not the court has authority to increase the amount of executors' fees as provided in Section 33-1001 of the New Mexico 1941 Compilation.

You do not indicate whether or not the will itself provides the amount of the fees. While this question has not been passed upon directly, it would appear to have at least been inferred in the case of *In Re Keel's Estate*, 37 N.M. 569, 25 Pac. 2d 806 that the fees prescribed {\*31} in Section 33-1001 of the 1941 Compilation would be binding upon the court and that the court would have no jurisdiction to increase such fees. This is further indicated by reading Section 33-1004 in connection with Section 33-1001 wherein in Section 33-1004 it is specifically provided that the attorneys' fees would be the same as executors' fees except as may otherwise be fixed by the court. Since this provision is absent from Section 33-1001, it would appear that the court would have no jurisdiction to otherwise fix the fees unless a different rate of compensation is provided in the will.

It seems to be established, at least by implication, in our statute that if fees are fixed at a higher rate than the statutory rate in the will that the court may allow such fees.

By HARRY L. BIGBEE,

Asst. Atty. General