



Reasonable Compensation

AN OVERVIEW OF “REASONABLE COMPENSATION” OF TRUSTEES

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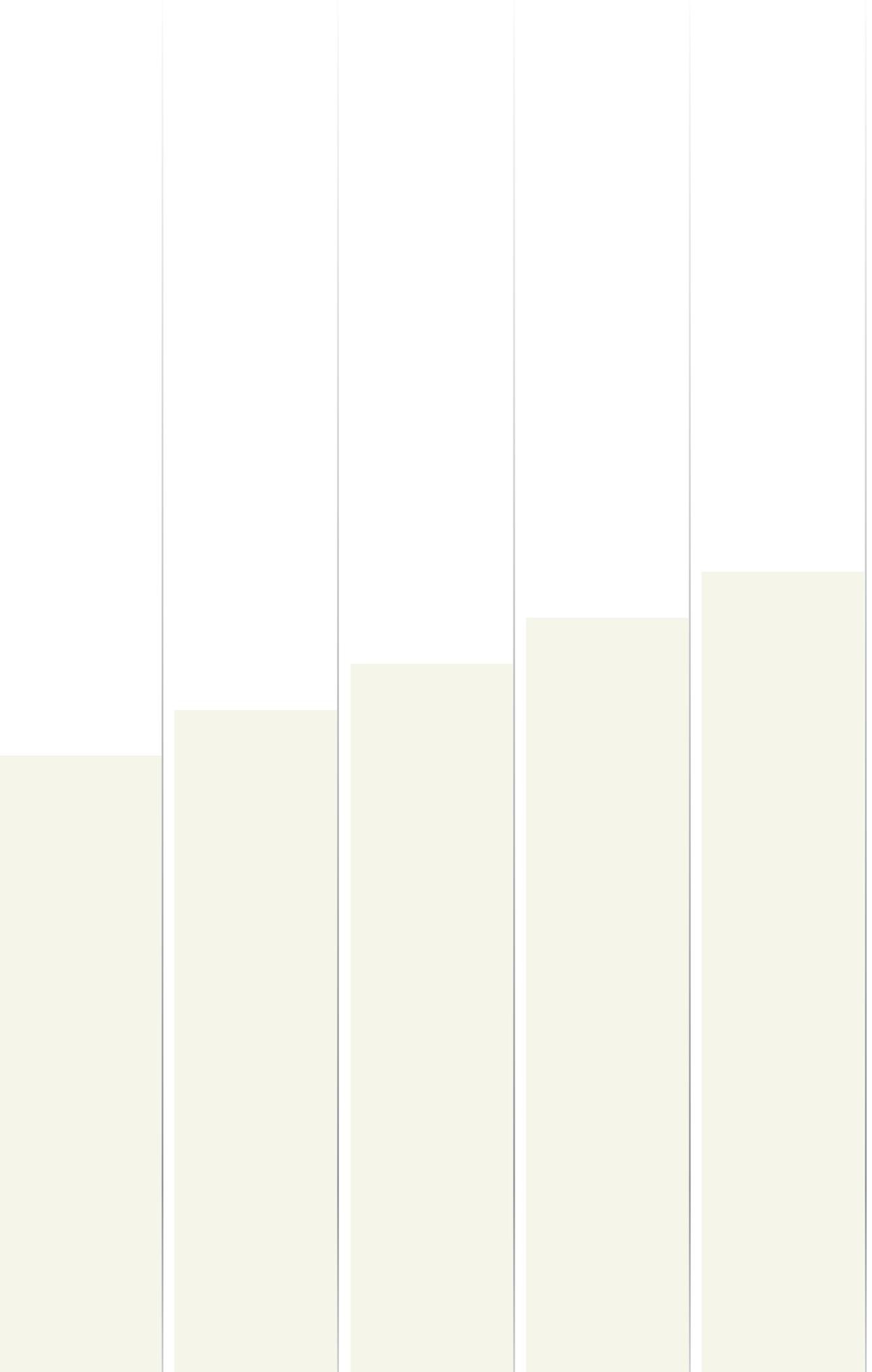
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An Overview of “Reasonable Compensation” of Trustees

Executive Summary

Trustee compensation statutes take one of two forms: either a “fee schedule” statute, where one or more schedules are used as an objective framework for establishing compensation, or a “reasonable compensation” statute, under which trustees are given more flexible guidelines as a basis for ascertaining what is reasonable under the circumstances. Many reasonable compensation statutes are based on the compensation standards established under the Uniform Trust Code.

In determining what is reasonable compensation, courts apply certain factors established by statutes and case law as to what constitutes reasonable compensation. Case law incorporates the standards set forth under the Restatement of Trusts. While the factors are somewhat uniform across jurisdictions, the interpretations applied by different courts may vary from jurisdiction to jurisdiction.

1. HISTORY

The standard adopted in the United States was initially based on the English standard.¹ It has evolved into one that recognizes that trustees, including individuals and corporate fiduciaries, are entitled to reasonable compensation.² In *Schrivver v. Frommel*,³ the court summarizes the evolution of the reasonable compensation standards in the United States:

Prior to the American Revolution it was the common-law rule that a trustee was not entitled to compensation for his services in respect of his trusteeship in the absence of any provision in the order of the court appointing him, or of a contract or stipulation with the parties, and this rule was enforced in this country and in this state at an early period as a rule of the common law. 39 Cyc. 480. But from the very first, the soundness of this rule was questioned in this country, and the accepted rule at the present time is that, unless otherwise regulated by statute or contract, courts of equity will exercise a just discretion and make or withhold allowance as they consider the particular circumstances require. 39 Cyc. 481.

Following the adoption of this general rule, states began adopting trustee compensation rules either via statute or by court-made law.⁴ The standard has continued to evolve so that in most jurisdictions, fiduciaries are entitled to reasonable compensation based upon the specific facts and circumstances of a particular trust subject to discretion of the courts. Most states have adopted the compensation standards set forth in the Uniform Trust Code.

2. AUTHORITY

A. UTC Standards

The adoption of the Uniform Trust Code by an increasing number of states shows a shift toward a “reasonableness” standard with respect to trustee compensation. Section 708 (Compensation of Trustee) of the Uniform Trust Code reads as follows:

(a) If the terms of a trust do not specify the trustee’s compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

1 Radford, Bogert and Bogert, *supra* at 20, citing *Brooks v. Egbert*, 1840, 2 Del.Ch. 83; *State v. Platt*, 1844, 4 Har. (Del.) 154; *Constant v. Matteson*, 1859, 22 Ill. 546; *Huggins v. Rider*, 1875, 77 Ill. 360; *Cook v. Gilmore*, 1890, 24 N.E. 524, 133 Ill. 139; *Miles v. Bacon*, 1830, 4 J.J.Marsh. (Ky.) 457; *Warbass v. Armstrong*, 1886, 10 N.J. Eq. 263; *Green v. Winter*, 1814, 1 Johns.Ch. (N.Y.) 37, 7 Am.Dec. 475; *Boyd v. Hawkins*, 1837, 17 N.C. (2 Dev.Eq.) 195; *Gilbert v. Sutliff*, 1853, 3 Ohio St. 129.

2 Radford, Bogert and Bogert, *supra* at 20.

3 *Schrivver v. Frommel*, 183 Ky. 597, 210 S.W. 165 (1919).

4 Radford, Bogert and Bogert, *supra* at 20.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if: (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or (2) the compensation specified by the terms of the trust would be unreasonably low or high.

Under the Uniform Trust Code, compensation may be set forth based on the language in the governing instrument or in a separate written fee agreement signed by the settlor or a designee. UTC 708 Comments.

- The UTC Comments reference the Uniform Principal and Income Act providing that regular trustee compensation may be allocated half to principal and half to income.
- In some jurisdictions, if compensation is payable from principal, the governing instrument or the fee agreement must so provide.

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A court may adjust compensation up or down from the compensation set forth in the governing instrument or in a fee agreement if:

- Trustee's duties become substantially different from those contemplated.
- Agreed upon compensation would be unreasonable.
- Trustee performed extraordinary services.

If neither the governing instrument nor a separate written agreement sets forth a trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

In determining reasonable compensation the court may:

- Consider the market value of the trust
- Determine compensation as a fixed or graduated percentage of the trust's market value
- Allow compensation from income, principal, or both
- Determine the frequency of compensation payments
- Consider compensation levels in competitive markets, which are presumed reasonable absent compelling evidence to the contrary.

Trustees are entitled to reimbursement from the trust property with interest if appropriate for:

- Expenses properly incurred in the administration of the trust
- Expenses that were not properly incurred in the administration of the trust in order to prevent unjust enrichment. UTC 709.

Trustees may also advance funds for the protection of the trust, which creates a lien on trust assets to reimburse the advance with interest. UTC 709.

B. State Statutes

In absence of a fee provision in the governing instrument, courts will look to statutory law to determine the fees to which a trustee is entitled.⁵ There are two types of compensation statutes: (a) statutes providing for “reasonable compensation” of a trustee, and (b) statutes that set forth a fee schedule or scale for commissions and fees.⁶

Reasonable compensation statutes may, in addition to stating that the trustee is entitled to compensation that is reasonable under the circumstances, provide a list of factors to consider when determining if the trustee’s requested compensation is reasonable.⁷

With respect to what is deemed “reasonable compensation,” states’ statutes or court made standards offer little uniformity. In many states providing for “reasonable compensation” of trustees, there is not a stringent rule in place and courts instead conduct a fact-based inquiry to determine what is “reasonable” under the circumstances.⁸ In such states, the courts will consider a number of factors to determine reasonableness. Often courts cite the list of factors provided by the Restatement including the following:⁹

- local custom,
- trustee’s skill and expertise,
- time devoted to the trustee’s duties,
- amount and character of trust property,
- degree of difficulty,
- level and type of responsibility,
- risk assumed,
- nature and cost of the services, and
- quality of such party’s performance.

5 Id.

6 Id.

7 Radford, Bogert and Bogert, *supra* at 20.

8 Radford, Bogert and Bogert, *supra* at 20. Restatement (Third) of Trusts § 38 (2003).

9 Id.

Local Custom

Courts have determined trustees' fees by comparing the subject trustee's fees to those of multiple other trust companies in the area.¹⁰

Courts have authorized corporate trustees to receive commissions based on their published fee schedules so long as such schedules are reasonable.

Trustee's Skill and Expertise

Courts have recognized that the administration of certain trusts requires specialized knowledge of their trustees. Courts have acknowledged that a trustee may have a reputation for being a skilled and experienced trustee. However, one court noted that such skill does not excuse the trustee from providing other evidence to support the reasonableness of his compensation, including a report showing the hours spent administering the trust. The trustee has the burden of proof in showing the reasonableness of the requested compensation in light of the circumstances.

If the trustee claims he was selected to serve as trustee based on his special skill or expertise, he cannot claim that the settlor did not account for such skills and expertise when setting forth the fee schedule in the trust document.

Just as specialized skill is sometimes a basis for additional compensation, a relative lack of skill in matters of trust administration can be a factor in decreasing the fees sought by trustees.

Time Devoted to Trustee's Duties

While some courts will hold that itemized statements of time spent on trust work are unnecessary in ascertaining reasonable compensation,¹¹ other courts have relied more heavily on time records and required documentation in support of the time spent.¹²

Amount and Character of Trust Property

Due to the unique nature of a trust asset, courts have found it was reasonable to permit the payment of additional fees for the administration of unique assets such as real estate or business interests.

Degree of Difficulty & Risk Assumed

Increased risk to a trustee can warrant a higher fee. A delegation of a substantial amount of a trustee's duties can warrant a lower fee.

10 *In re Will of Crabtree*, 449 Mass. 128, 145, 865 N.E.2d 1119, 1134 (2007).

11 *See e.g. Wechter v. Chicago Title & Trust Co.*, 71 N.E.2d 924 (1947)

12 *See e.g. In Re D.M.B.*, *supra*.

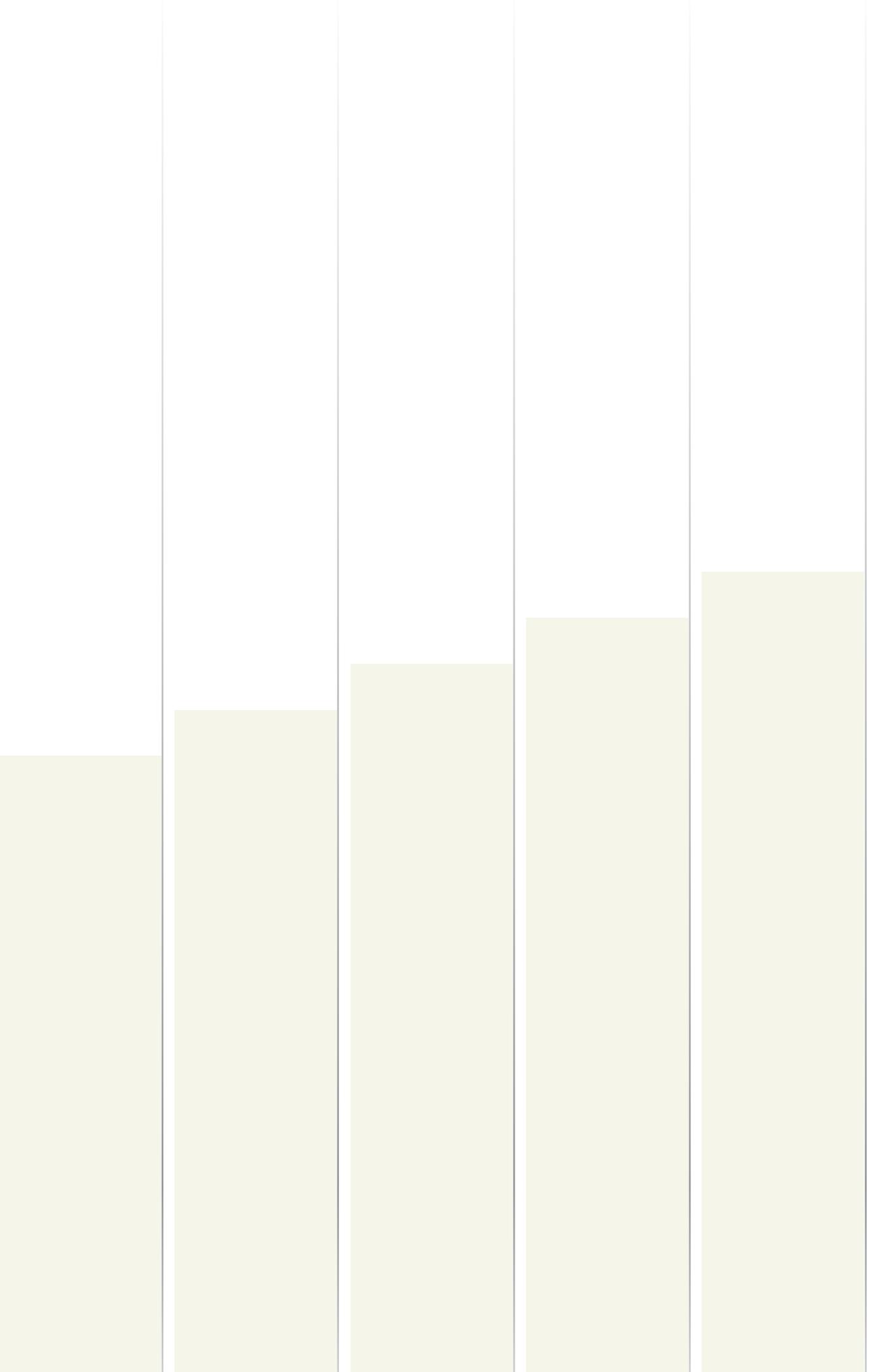
Promptitude, Results Achieved, & Quality of the Performance

A trustee's fees may be increased or decreased based on the "results achieved" factor and that, in considering the results achieved factor of the reasonableness test, courts must consider the diligence of the trustee at the time it is making decisions; not the overall performance of the subject security. This factor was taken into account where the trustee "show[ed] itself to have been conscientious, careful and qualified and to have used its best efforts in the overall management of the subject trust for the three year period under scrutiny".

Nature and Cost of the Services

Certain trust services may be unique and require the trustee to seek the services of experts and service providers. In these cases, the trustee must select a service provider and monitor the service provider. For example, when real estate is part of the trust assets and the trust document explicitly directs the trustee to sell such assets, it is implied that the trustee is empowered to hire a broker (to be paid by the trust) to carry out such sale(s).¹³ In such cases, the trustee should be entitled to additional compensation.

13 *Appeal of Burke*, 378 Pa. 616, 628, 108 A.2d 58, 65 (1954).



An Overview of “Reasonable Compensation” of Trustees

II

While today it is taken for granted that trustees should generally be entitled to compensation for their duties, the question plaguing many fiduciaries in the United States is just what level of compensation is justified and proper.

Today, almost all states have their own statute addressing trustee compensation. Those statutes take one of two forms: either a “fee schedule” statute, in which one or more schedules are used as an objective framework for establishing compensation, or a “reasonable compensation” statute under which trustees are given various, somewhat more flexible, guidelines to ascertain the level of compensation that is reasonable under the circumstances. The modern trend is to eschew fee schedules in favor of a reasonableness standard and many reasonable compensation statutes are based, either loosely or exactly, on the model reasonable compensation statute provided under the Uniform Trust Code. Seemingly, a “reasonableness” standard is better suited to modern use because it offers flexibility to adapt fees to real-life circumstances, unlike a rigid fee schedule.

Often, case law in each state will develop a list of factors for courts to consider, based on the list provided in the Restatement of Trusts, in order to determine what level of compensation would be considered reasonable. While the factors may show some uniformity across jurisdictions, the various courts’ treatment of such factors does not.

1. HISTORY OF FIDUCIARY FEES

Fiduciaries are often challenged by the fact that no bright line rule exists to establish clear-cut guidelines for establishing fiduciary compensation across the United States; however, it is undisputed that fiduciaries are entitled to compensation for their services.¹⁴ The struggle lies in determining exactly what level of compensation is due to fiduciaries for their services. To be certain, the concept of compensating fiduciaries seems entrenched into the law today, but this was not always the case.

While the origins of the trust, and its adoption and development by the English common law are disputed, the concept of the trust appears to be rooted in Roman law where it was used as a mechanism for testamentary transfer.¹⁵ While scholars suggest that evidence of the concept of the trust can be found in Germanic and Islamic law, it appears well settled that it is the courts of England that developed the concept and incorporated it into the usable system of trusts that is the basis for modern US law.¹⁶ Early English common law did not recognize the concept of the trust; however, there are many circumstances that are said to have laid the framework for this concept.¹⁷

One theory is that when landowners left to fight in the crusades, they transferred title to their property to another person to manage the affairs related to the land while the transferor was away.¹⁸ Upon return, the original landowner was left with no recourse if the transferee refused to re-convey the land to him since such transferee was the legal owner of title to such land.

A second circumstance said to have paved the way for the informal use of trust-like arrangements was the existence of strict rules regarding the transfer of real property upon death of a landowner. This meant that land could only pass to the decedent's oldest male heir. In many circumstances, if such heir was under the age of 21, his feudal lord took the land into wardship and held it until the heir turned 21.¹⁹ During such time, the lord was entitled to keep all the profits from the land until such time as the heir reached the age of 21.²⁰

In order to circumvent this rigid framework, landowners began the practice of passing legal title to a small group of individuals for the benefit of the landowner during his life and a

14 Restatement (Third) of Trusts § 38 (2003).

15 Seipp, David J. *Trust and Fiduciary Duty in the Early Common Law*, BU Law Review
<http://www.bu.edu/law/journals-archive/bulr/documents/seipp.pdf>

16 Id.

17 Id.

18 Id.

19 Id.

20 Id.

named designee upon his death.²¹ The holders of legal title could ensure the land did not pass to an heir until he reached the age of 21 thus avoiding the concept of the wardship.²²

Religion is also an influencing factor in the birth of trusts. Those who had taken a vow of poverty to the church could not hold title to land and, instead, had to transfer legal title to such land to someone else, thereby creating the need for a trust-like arrangement.²³ The “use” emerged as an early “trust” relationship and was an effective way to transfer land according to the wishes of a landowner instead of by the rigid confines of the law.²⁴

The custom of “feoffment to uses” emerged where a settlor, then-referred to as a “feoffor”, transferred legal title to real property to a “feoffee” (today, the trustee) and instructed the feoffee of the permitted uses and conditions to holding of the land for the benefit of the “cestui que use.”²⁵ The essence of the feoffment to uses structure was an informal relationship and, while this informality was the only way the feoffment to uses could function within the confines of the common law, it also left an opportunity for the feoffee to take advantage of the scheme, leaving little recourse for the feoffor or cestui.²⁶

During the early years of this practice, the courts of law did not recognize the concept of feoffment to uses and feoffors relied solely on the goodness of the feoffee.²⁷ At the time, while no legal remedy was available, England’s Chancery Courts existed as a separate judicial system to provide equitable relief where no remedy at law was available.²⁸ It was the courts of equity that fostered the development of the early trust law because, as time went on, feoffees often went against the wishes of the feoffor.²⁹ Beneficiaries with no legal remedy could seek an equitable one.³⁰ It was the Chancellor’s recognition of the division of ownership into legal title and equitable title that laid the foundation for modern trust law.³¹ When the courts of equity and courts of law were merged, the precedent was set for recognition of the trust concept under English law.³²

21 Id.

22 Id.

23 Id.

24 M.W. Lau. *The Nature of the Beneficial Interest - Historical and Economic Perspectives*. Available at http://www.law.harvard.edu/programs/about/private-law/related-content/the_nature_of_the_beneficial_interest-historical_and_economic_perspectives.pdf

25 Id.

26 Lau, *supra* at 11.

27 Seipp, *supra* at 2.

28 Id.

29 Id.

30 Id.

31 Lau, *supra* at 11.

32 Seipp, *supra* at 2.

The English Rule: The English law of trusts is founded on the principle that trustees are expected to serve without compensation.³³ The idea underlying this principle is that an inherent conflict of interest would exist if trustees received payment for their services. Such supposed conflict would arise where the trustee's inclination to charge the trust for unnecessary services or other self-interested actions might prevail over the trustee's moral obligation to administer the estate for the benefit of the beneficiary.³⁴ Such actions might be undertaken under the pretense of care, but result in loss of time and do a disservice to the beneficiaries.³⁵

The rise in popularity of corporate trustees and evolution of the use of trusts has given way to a multitude of exceptions to this general rule.³⁶ Today, English courts will recognize trust language calling for compensation of a trustee and courts have the power to order compensation for any corporate trustee regardless of the language of the trust instrument.³⁷ Additionally, the Trustee Act 2000 reads an implied "professional charging clause," a clause which calls for remuneration of a corporate trustee, into any non-charitable trust (unless the trustee is a professional trustee such as a lawyer or banker, as these professionals must obtain permission), regardless of whether such trust includes a provision calling for compensation of the corporate trustee.³⁸ English courts may also permit compensation for a corporate trustee even if a lay person could have performed the same services.³⁹

The United States Rule. While the United States initially adopted the English standard,⁴⁰ the standard has evolved into one that recognizes that trustees, including individuals and corporate fiduciaries, are entitled to compensation.⁴¹ In *Schrivver v. Frommel*,⁴² the court summarizes the evolution as follows:

Prior to the American Revolution it was the common-law rule that a trustee was not entitled to compensation for his services in respect of his trusteeship, in the absence of any provision in the order of the court appointing him,

33 Radford, Mary F., Bogert, George Gleason, Bogert, George Taylor. *The Law Of Trusts And Trustees* § 975.

34 Scott, Austin W, William F. Fratcher, Mark L. Ascher, and Austin W. Scott. *Scott and Ascher on Trusts*. §21.1. New York, NY: Aspen Publishers, 2006.

35 Id.

36 Id.

37 Id.

38 Radford, Bogert and Bogert, *supra* at 20.

39 Id.

40 Radford, Bogert and Bogert, *supra* at 20, citing *Brooks v. Egbert*, 1840, 2 Del.Ch. 83; *State v. Platt*, 1844, 4 Har. (Del.) 154; *Constant v. Matteson*, 1859, 22 Ill. 546; *Huggins v. Rider*, 1875, 77 Ill. 360; *Cook v. Gilmore*, 1890, 24 N.E. 524, 133 Ill. 139; *Miles v. Bacon*, 1830, 4 J.J.Marsh. (Ky.) 457; *Warbass v. Armstrong*, 1886, 10 N.J. Eq. 263; *Green v. Winter*, 1814, 1 Johns.Ch. (N.Y.) 37, 7 Am. Dec. 475; *Boyd v. Hawkins*, 1837, 17 N.C. (2 Dev.Eq.) 195; *Gilbert v. Sutliff*, 1853, 3 Ohio St. 129.

41 Radford, Bogert and Bogert, *supra* at 20.

42 *Schrivver v. Frommel*, 183 Ky. 597, 210 S.W. 165 (1919).

or of a contract or stipulation with the parties, and this rule was enforced in this country and in this state at an early period as a rule of the common law. 39 Cyc. 480. But from the very first, the soundness of this rule was questioned in this country, and the accepted rule at the present time is that, unless otherwise regulated by statute or contract, courts of equity will exercise a just discretion and make or withhold allowance as they consider the particular circumstances require. 39 Cyc. 481.

Subsequent to the adoption of this general rule, states began adopting trustee compensation rules either via statute or by court-made law.⁴³ Following this evolution, the question plaguing corporate fiduciaries today is what compensation is permitted.

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The first place for the trustee to look when determining the allowable compensation is the terms of the trust document.⁴⁴ Where the trust document is silent regarding fees, the next place to look is the legal framework in the relevant jurisdiction.⁴⁵ Trustee compensation is set by state law or, in absence of a statute, by case law.⁴⁶ While the statutory framework in the United States still includes a few “fee schedule” statutes, by and large, the trend is that statutes will permit the trustee to charge “reasonable compensation.”⁴⁷

2. THE EVOLUTION OF THE REASONABLENESS STANDARD

As noted above, if the terms of the trust set compensation at a certain level, the terms of the trust will generally be used to determine the allowed compensation.⁴⁸ On the other hand, if the trust provides that a trustee is not to receive any compensation, the trust terms will generally be held as enforceable.⁴⁹

Courts are sometimes willing to award more than the level of compensation specified in the trust document if a change of circumstances has occurred that the settlor did not foresee and that makes the existing compensation level unfair to the trustee.⁵⁰ Courts have been increasingly lenient in allowing extra compensation to trustees if the compensation called for under the trust document is determined to be unreasonably low.⁵¹ If compensa-

43 Radford, Bogert and Bogert, *supra* at 20.

44 Radford, Mary F., Bogert, George Gleason, Bogert, George Taylor. *The Law Of Trusts And Trustees* § 976.

45 *Id.*

46 *Id.*

47 See: Exhibit A

48 Radford, Bogert and Bogert, *supra* at 31.

49 Radford, Bogert and Bogert, *supra* at 20.

50 *Id.*

51 *Id.*

tion in the trust document appears unreasonably high, courts will not disrupt such compensation levels unless an abuse of discretion or breach of fiduciary duty has been found and where such abuse or breach is deemed to have been the cause of or reason for the excessive compensation.⁵²

In absence of fee setting language in a trust document, courts will look to statutory law to determine the fees to which a trustee is entitled.⁵³ There are two types of compensation statutes: (a) statutes providing for “reasonable compensation” of a trustee, and (b) statutes that set forth a fee schedule or scale for commissions and fees.⁵⁴

The Uniform Trust Code provides that the trustee or personal representative is entitled to reasonable compensation and the reasonableness standard is the prevailing standard today.⁵⁵ Thirty-two states have adopted the Uniform Trust Code or a modified version which follows the reasonable compensation standard with respect to trustees.⁵⁶ Reasonable compensation statutes may, in addition to provisions that the trustee is entitled to compensation that is reasonable under the circumstances, provide a list of factors to consider when determining if the trustee’s requested compensation is reasonable.⁵⁷ In absence of such statutory language, courts may adapt a similar list of considerations.⁵⁸ See Exhibit C for an overview of the statutory scheme governing fiduciary fees in the United States.

Alternatively, fee schedule statutes might grant the trustee a percentage of trust income or an annual commission based on the fair market value of the trust assets.⁵⁹ Notwithstanding the existence of a fee schedule, courts may supersede the statute and allow for a greater or lesser amount of compensation as they deem the circumstances require.⁶⁰ For example, courts might determine that a fee schedule does not apply if a trustee’s duties are negligible, or in the alternative, may increase the fees payable if the trustee performs extraordinary duties.⁶¹ States with fee schedules found in their statutes include Georgia, Hawaii, Kentucky, Maryland and New York (Delaware also has a fee schedule that only applies to individual trustees; corporate trustees are subject to a reasonableness standard).⁶²

52 Id.

53 Id.

54 Id.

55 § 708. Compensation of Trustee., Unif.Trust Code § 708.

56 Uniform Law Commission. *Acts: Trust Code*. Available at <http://www.uniformlaws.org/Act.aspx?title=Trust%20Code>.

57 Radford, Bogert and Bogert, *supra* at 20.

58 Id.

59 Id.

60 Id.

61 Id.

62 Id.

In addition to deviating from statutory fee schedules in certain instances, courts will also modify the fees set forth in a trust document if the circumstances so dictate.⁶³ The Uniform Trust Code permits the court to increase or decrease the allowed compensation if the compensation set forth in the trust document is deemed unreasonable or if the trustee's actual duties differ significantly from what the settlor contemplated.⁶⁴ However, often, the court will rule that, if a trust document contains limitations on compensation and the trustee knowingly accepted the trusteeship despite such limitations, the trustee is thereby bound by the direction of the settlor.⁶⁵ Notwithstanding the foregoing, if the compensation set forth in the agreement is grossly inadequate for the sake of proper administration, the court has jurisdiction to adjust such compensation as the court has inherent jurisdiction over all trusts.⁶⁶

The adoption of the Uniform Trust Code by an increasing number of states shows a shift toward a "reasonableness" standard with respect to trustee compensation. Section 708 (Compensation of Trustee) of the Uniform Trust Code reads as follows:

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances. (b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if: (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or (2) the compensation specified by the terms of the trust would be unreasonably low or high.

With respect to what is deemed "reasonable compensation," states' statutes or court made standards offer little uniformity. In many states providing for "reasonable compensation" of trustees, there is not a stringent rule in place, and courts instead conduct a fact-based inquiry to determine what is "reasonable" in the circumstances.⁶⁷ In such states, the courts will consider a number of factors to determine reasonableness. Often courts cite the list of factors provided by the Restatement including the following:⁶⁸

- local custom,
- trustee's skill and expertise,
- time devoted to the trustee's duties,
- amount and character of trust property,

63 Id.

64 Id. Citing UTC § 708.

65 Radford, Bogert and Bogert, *supra* at 20.

66 Id.

67 Radford, Bogert and Bogert, *supra* at 20. Restatement (Third) of Trusts § 38 (2003).

68 Id.

- degree of difficulty,
- level and type of responsibility,
- risk assumed,
- nature and cost of the services, and
- quality of such party's performance.

3. CASE LAW

In states with a statute calling for “reasonable compensation” with respect to fiduciary fees, and absent a fee agreement or language in the trust document, courts will consider a range of factors to determine whether fiduciary fees are reasonable under the circumstances. Generally, it is a case-specific inquiry and is fact-specific. As such, it is well settled that trial courts are best suited to make such determination and have broad discretion in determining the reasonableness of fiduciary fees.⁶⁹ Their decisions will generally only be overturned on appeal if there has been an abuse of discretion.⁷⁰

While courts often cite the factors provided by the Restatement, the factors that courts actually consider differ across states. For example, in Connecticut, the court in *Hayward v. Plant* announced nine factors that courts should weigh to determine what constitutes reasonable compensation:

(1) the size of the estate; (2) the responsibilities involved; (3) the character of the work required; (4) the special problems and difficulties met in doing the work; (5) the results achieved; (6) the knowledge, skill and judgment required of and used by the executors; (7) the manner and promptitude with which the estate has been settled; (8) the time and service required; and (9) any other circumstances which may appear in the case and are relevant and material to this determination.⁷¹

Applying these factors, the Appellate Court of Connecticut gave weight to the fact that the estate and trust in question were particularly fraught with litigation and discord among the beneficiaries and the attorney serving as executor, trustee and attorney to the estate was entitled to fees approximating \$300,000 in an estate containing liquid assets worth

69 See e.g. *McGrath v. Gallant*, 143 Conn. App. 129, 69 A.3d 968 (2013); *Strickler Estate*, 354 Pa. 276 (1946).

70 *Id.*

71 *McGrath v. Gallant*, 143 Conn. App. 129, 134, 69 A.3d 968, 972 (2013) (citing *Hayward v. Plant*, 98 Conn. 374, 384-5 (1923)).

approximately \$850,000 and real property that was valued at approximately \$800,000 though it decreased significantly in value following the decedent’s death. The attorney and law firm faced issues from the sibling beneficiaries including requests for advances or loans from the trust, contesting the selected real estate agent for the sale of the real property, the sale price of the real property, avoiding a will contest in the Bahamas and Connecticut and access to the real property by the beneficiaries. The plaintiffs argued that the “promptitude” and “results achieved” factors were not given ample weight by the trial court; however, on appeal the court pointed out that the failure of the fiduciary to promptly sell the real property, and failure to secure a higher sale price, were largely due to the impediments posed by the beneficiaries. The court found no abuse of discretion in applying the *Hayward* factors.

In a separate Connecticut decision, the court put much emphasis on the size of the estate in determining the reasonableness of fees. The *In Re Estate of Bernadine Ordner and Estate of William Ordner*⁷² judge reduced attorney’s fees in a particularly litigious estate proceeding, stating that “there simply must be a practical limit to the percentage of an estate claimed by attorney’s and fiduciary fees.” In such proceeding, the fees were reduced from 50% of the value of the estate to 28%. The *McGrath* court did not support a reduction of the fees, as the judge in *McGrath* declined to make a law providing for retroactive reduction of fees due to attorneys and fiduciaries, explaining that the *Hayward* court provided nine factors and the size of the estate should be considered as only one of such nine factors.

It is important to note that, while the terms of the trust may modify trustee’s compensation away from a reasonableness standard, unless the trust document explicitly states that a trustee is to serve without compensation or the trustee agrees to waive compensation, such trustee will be entitled to reasonable compensation for services rendered.⁷³ This issue is addressed by the Supreme Court of Arkansas, which explained that Arkansas adopted the “American rule” that trustees are entitled to reasonable compensation. Where the trust document stated that the corporate trustee was entitled to reasonable compensation, but was silent regarding the individual trustee’s compensation, such individual trustee was entitled to reasonable compensation under the state statute. Such compensation was to be based on an analysis of the following factors:

the time consumed in carrying out duties under the trust; the costs the trustee may have incurred; the nature of the services performed, including whether such services were routine or required skill and judgment; fees received by the trustee from beneficiaries to compensate the trustee; the fidelity or disloyalty displayed by the trustee; and the value of the services offered by the trustee in light of the trustee’s experience and skill level.⁷⁴

72 22 Quinnipiac Prob. L.J. 104 (2009). Moreover, even if a trust document states that a trustee is not entitled to fees, such provision may not be enforceable. See e.g. *Hill v. Zanone*, 184 Ark. 594 (1931).

73 *Alexander v. McEwen*, 367 Ark. at 247.

74 *Id.*

Hayward is just one example of the courts exercising discretion to undertake a fact-based inquiry in determining the reasonableness of fees and *McEwen* provides evidence of the prominence of the reasonableness standard, as well as showing how explicit the trust instrument must be in overriding such standard. The factors considered may differ among states but are generally based on those set forth in the Restatement (Third) of Trusts.⁷⁵

Local Custom

Courts sometimes look to only one of the factors to determine reasonable compensation. In a 2007 case, the Supreme Judicial Court of Massachusetts upheld the trial court's reduction of trustees' fees where the trial court reached its decision simply by comparing the subject trustee's fees to those of multiple other trust companies in the area.⁷⁶ The trial court based its award of fees on the fee schedules for eight other trust companies. While the awarded fees were on the low end of such scales, the Court explained that this was not unreasonable, especially in light of the trustee's breach of fiduciary duty with respect to the trust.

While fee comparisons were used in Massachusetts to set reasonable trustees' fees, the U.S. Supreme Court cautioned that courts must be wary of making such comparisons in the context of investment adviser fees.⁷⁷ The Court explained that the fees an investment adviser charges a mutual fund cannot necessarily be compared to those it charges its institutional clients because the nature of the services differs; however, the Court also noted that courts can give some weight, the amount of which will differ according to the circumstances, to fee comparisons and a blanket rule prohibiting such comparisons would not be appropriate.

The Supreme Court affirmed the applicability of the *Gartenberg*⁷⁸ test, which provides that investment adviser compensation must be consistent with what would have been negotiated in an arms length transaction in order for an adviser to fulfill its fiduciary duty with respect to compensation under the Investment Company Act of 1940. The Act does not ensure that fees will be the same for mutual funds as they will be for institutional investors. Comparing fees charged, the court held that to face liability under the Investment Company Act of 1940 for breach of fiduciary duty with respect to the receipt of compensation for services, an investment adviser to a mutual fund must charge a fee that, under all of the circumstances, is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining.

75 Note that certain state statutes have exclusions from the general rules discussed herein. This paper is intended as a primer on national standards only and is not intended as legal advice. Please consult local counsel with respect to your specific legal inquiry.

76 *In re Will of Crabtree*, 449 Mass. 128, 145, 865 N.E.2d 1119, 1134 (2007).

77 *Jones v. Harris Associates L.P.*, 559 U.S. 335, 130 S. Ct. 1418, 176 L. Ed. 2d 265 (2010).

78 *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923, 928 (CA2).

In *In re Beal*⁷⁹, the court explained that corporate trustees are generally permitted to receive commissions based on their published fee schedules so long as such schedules are reasonable.

Trustee's Skill and Expertise

In *In Re D.M.B.*⁸⁰ the trustee, in support of his petition for compensation equal to 1% of the value of the trust, explained that special needs trusts require specialized knowledge of their beneficiaries in matters such as governmental benefits. Moreover, the trustee cited, and court acknowledged, that the trustee had a reputation for being a skilled and experienced trustee. However, the court noted that such skill does not excuse the trustee from providing other evidence to support the reasonableness of his compensation, including a report showing the hours spent administering the trust.

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The court also cited local custom to provide that the trustee's hourly rate of \$300 per hour that it charged for services was unreasonable because the hours cited by the trustee included those of support staff and a less-experienced associate attorney. As such, the trustee, who bore the burden of proof in showing the reasonableness of the requested compensation, failed to prove that his fees to the special needs trust at issue here were reasonable in light of the circumstances and, on appeal, the court found that no abuse of discretion occurred with respect to determining the reasonableness of such fees.

Where a trust document provided a fee schedule, Morris, the trustee, failed in his attempt to claim additional compensation based on his special skills or expertise. Here, the trustee claimed that he was selected by the decedent to serve as trustee because of his knowledge of decedent's farming operations.⁸¹ The Missouri Court of Appeals rejected this claim, citing the fee schedule found in the trust document and noting, importantly, that the trustee never petitioned the court to consider additional fees because the fee schedule was unreasonably low. Moreover, the activities carried out by the trustee and billed to the trust, including visiting and maintaining the farm property, arranging for trash pickup and cleaning out a shed, did not require special skills or expertise nor did they constitute extraordinary services.

An entity named as successor trustee if Morris failed to serve testified that it would have charged the trust half of what Morris charged, and the court also found multiple breaches of Morris' fiduciary duties to the trust. Moreover, the court heard evidence that examples of extraordinary services might include active management of a farm, dealing with partition actions, dealing with quiet title actions, doing actual farm maintenance and negotiating a sale of the farm by acting as a sales agent. None of the services for which the trust was charged were of the nature described as "extraordinary" by such testimony. The court explained that, if the trustee claims he was selected to serve as trustee based on his special skill or expertise, he cannot claim

79 *In re Beal*, No. TR 2-99, 2005 WL 1118153, at *4 (D.C. Super. Ct. May 11, 2005).

80 979 A.2d 15 (D.C. 2009).

81 *Hanks v. Morris*, Missouri Court Of Appeals, 432 S.W.3d 293, June 3, 2014.

that the settlor did not account for such skills and expertise when setting forth the fee schedule in the trust document.

Just as specialized skill is sometimes a basis for additional compensation, a relative lack of skill in matters of trust administration can be a factor in decreasing the fees sought by trustees. In *In re Estate of Gaeta*,⁸² the court found that the trustees' relative lack of skill and expertise in handling matters of the trust was a factor in awarding a fee of only \$20 per hour. The court also implied that significant time and expense might have been saved if the settlors had elected to hire a corporate trustee.

Time Devoted to Trustee's Duties

As noted above, the *In Re D.M.B.* court stated that merely citing special skill or expertise of a trustee does not excuse the trustee from providing an accounting of the time devoted to serving the trust in order to support a claim for compensation. While some courts will hold that itemized statements of time spent on trust work are unnecessary in ascertaining reasonable compensation,⁸³ other courts have relied more heavily on this factor and required such documentation.⁸⁴

In re Estate of Gaeta shows an instance where the significant time devoted to trust administration was a detracting factor from the claim for excess fees. The court in such case explained that a large amount of time was wasted with insignificant matters and potentially avoidable litigation due to the lack of experience of the trustees.⁸⁵

To the contrary, a trustee who spent a large amount of time handling trust matters brought about by particularly litigious beneficiaries who put up many road blocks and created a particularly contentious setting in which the trustee was forced to administer the trust. As such, the trustee's fees, which were higher than might have been anticipated by the trustee, were reasonable in light of the circumstances.⁸⁶

Amount and Character of Trust Property

When a trustee sold a newspaper for over \$7 million, the court found it reasonable to award the trustee a fee of \$150,000 despite the fact that the trust was not about to terminate.⁸⁷ Due to the unique nature of the trust asset, and the fact that selling such newspaper required significant amounts of effort, and the fact that the terms of the sale were highly advantageous to the trust, the court found it was reasonable to permit this fee to be paid to the trustee out of the trust corpus.

82 859 N.W.2d 672 (Iowa Ct. App. 2014).

83 See e.g. *Wechter v. Chicago Title & Trust Co.*, 71 N.E.2d 924 (1947)

84 See e.g. *In Re D.M.B.*, supra.

85 859 N.W.2d 672 (Iowa Ct. App. 2014).

86 *McGrath v. Gallant*, 143 Conn. App. 129, 137, 69 A.3d 968, 974 (2013)

87 *McLean v. Am. Sec. & Trust Co.*, 113 F. Supp. 427, 428 (D.D.C 1953).

Degree of Difficulty & Risk Assumed

The *McGrath* court explained that the difficulty faced by the trustee might arise due to discord among the trustees.⁸⁸ Here, the trustees disagreed over many factors regarding the sale of trust-owned real property.⁸⁹ In *Hayward v. Plant*,⁹⁰ the court explained that the particular difficulty of raising over \$16,000,000 to pay off debts, in an unusually difficult financial climate, involved a high degree of difficulty which should be considered in determining trustee compensation as assuming this responsibility involved risk for which the trustee should be rewarded.

Where a trustee did not keep detailed records of his services, his assertion that the trustee of a special needs trust automatically assumes a higher than average degree of difficulty was rejected by the court.⁹¹ The court explained that “Appellant had ‘offer[ed] no calculation or method of calculating any specific amount of compensation,’” and instead “‘calculated his proposed compensation by starting with his requested one percent and then reasoning backward by seeking grounds to justify it as reasonable, instead of starting with the factors specified by the Court to arrive at a reasonable amount which is then subject to a one percent limitation.’”⁹²

Just as increased risk can warrant a higher fee, a delegation of a substantial amount of a trustee’s duties can warrant a lower fee. *In re Beal* is an example of such a finding where the trustee’s delegation of investment authority was delegated to Bank of America, thereby substantially reducing the risk assumed by the trustee.⁹³

Promptitude, Results Achieved & Quality of the Performance

When the settlement of an estate is delayed by disagreement among beneficiaries, this factor will not be weighed in a manner that detracts from the fees due to the trustee.⁹⁴

The court in *Hartford Nat. Bank & Trust Co. v. Donahue*⁹⁵, also relied on the *Hayward* case discussed above, explaining that trustee fees should not be reduced based solely on the “results achieved” factor and that, in considering the results achieved factor of the reasonableness test, courts must consider the diligence of the trustee at the time it is making decisions, not the overall performance of the subject security. In *Donahue*, the court found that, where the trustee “show[ed] itself to have been conscientious, careful and qualified and to have used its best efforts in the overall management of the subject trust for the three

88 *McGrath v. Gallant*, 143 Conn. App. 129, 137, 69 A.3d 968, 974 (2013).

89 *Id.*

90 98 Conn. 374, 119 A. 341 (1923).

91 *In re D.M.B.*, 979 A.2d 15, 21 (D.C. 2009).

92 *Id.*

93 *In re Beal*, No. TR 2-99, 2005 WL 1118153, at *4 (D.C. Super. Ct. May 11, 2005).

94 *Id.*

95 35 Conn. Supp. 194, 198, 402 A.2d 1195, 1197 (Super. Ct. 1979).

year period under scrutiny,” the loss to the trust of \$9,127.50 is not sufficient evidence to support a reduction in the trustee’s fee of \$3,410.28 as such fee was deemed reasonable. The case was remanded to consider the other eight elements of the *Hayward* test.

A Pennsylvania case describes the vast efforts of trustee, McLaughlin, in developing a once failing piece of real estate owned by a trust.⁹⁶ An attorney, McLaughlin devoted significant time to developing sought after property and supervising the work of employees, contractors, and salesmen. He hired brokers for the sale of lots on the property, wrote approximately 500 deeds and contracts, handled resident complaints, served on committees and more. “Through his skill, foresight and initiative a club was formed, roads were built and numerous other improvements were constructed to make the enterprise productive” and many of his efforts were undertaken at his own expense. As such, McLaughlin’s fees should reflect these enhanced efforts.

Trustee’s fees of \$42,000, charged for management activities, were reasonable in light of the fact that the trustee expended efforts in “acquiring, constructing, developing and selling property to provide funds” to the trust and creating an increase in the shareholder’s equity.⁹⁷

Negative results achieved were not a persuasive factor and did not result in reduced fees when the trustee made reasonable and prudent investment decisions, as measured at the time the decisions were entered into.⁹⁸

Nature and Cost of the Services

Applying the *Hayward* test to an executor, an appellate Connecticut court found that the executor, an attorney, was entitled to substantially less than the fees he was claiming because such executor did not undertake any special responsibilities, nor did his activities require a law degree.⁹⁹ The routine administration was done in a matter of months and the estate was not particularly large or complex. Further, instead of administering the estate efficiently, the executor initiated a civil suit to pursue what the court characterized as a personal vendetta. As such, the executor’s legal fees in conjunction with such suit were denied, as were other legal fees and executor fees. For example, legal fees related to the sale of decedent’s home were excluded from the award since many fees were of a nature that would be required of an executor; not an attorney.

When real estate is part of the trust assets and the trust document explicitly directs the trustee to sell the assets, it is implied that the trustee is empowered to hire a broker (to be paid by the trust) to carry out such sale(s).¹⁰⁰

96 *Appeal of Burke*, 378 Pa. 616, 628, 108 A.2d 58, 65 (1954)

97 *Schade v. Gethmann*, 710 N.W.2d 258 (Iowa Ct. App. 2005).

98 *Hartford National Bank and Trust Co. V. Donahue*, 5 Conn.Supp. 194 (1979).

99 *Rozbicki v. Gisselbrecht*, 155 Conn. App. 371, 381, 110 A.3d 458, 465 (2015).

100 *Appeal of Burke*, 378 Pa. 616, 628, 108 A.2d 58, 65 (1954).

4. STATUTES

Exhibit B provides a list of references to the state statutes governing trustee compensation. Exhibit C provides an overview of the statutory framework governing trustee compensation in the United States reflected in summaries of the state statutes.

As noted above, a majority of states have adopted the Uniform Trust Code (the “UTC”), or a version thereof, such that their trustee compensation statute is based upon Section 708, providing for Compensation of Trustees. Section 709 of the UTC provides for Reimbursement of Expenses. The text of both sections, as well as the comments provided by the Uniform Law Commission, which promulgated the UTC, is attached as Exhibit A.

5. CHECKLISTS

Exhibits D and E contain checklists intended to assist in determining (a) what amount of fees might be reasonable for a trustee to charge in the circumstances, and (b) whether an adjustment to the reasonable compensation might be warranted. These checklists are intended only as guidelines, and there is no assurance that the conclusion reached from these charts is the same conclusion that a court would reach.

UNIFORM TRUST CODE

SECTION 708. COMPENSATION OF TRUSTEE.

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or

(2) the compensation specified by the terms of the trust would be unreasonably low or high.

COMMENT

Subsection (a) establishes a standard of reasonable compensation. Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance. *See* Restatement (Third) of Trusts Section 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. b (1959).

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. *See* Section 807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts Section 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. d (1959).

Because "trustee" as defined in Section 103(20) includes not only an individual trustee but also co-trustees, each trustee, including a co-trustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one trustee mean that the trustees are

eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of co-trustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a co-trustee duties the settlor expected the trustees to perform jointly. See Restatement (Third) of Trusts Section 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, see *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

This Code does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991).

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular

compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. *See* Restatement (Third) of Trusts Section 38 cmt. e (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. *See* Section 111(d) (matters that may be resolved by nonjudicial settlement). *See also* Restatement (Third) of Trusts Section 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul. 66-167, 1966-1 C.B. 20. *See also* Restatement (Third) of Trusts Section 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. j (1959).

Section 816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

SECTION 709. REIMBURSEMENT OF EXPENSES.

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

- (1) expenses that were properly incurred in the administration of the trust; and*
- (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.*

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

COMMENT

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust).

Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

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As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust. The purpose of this provision, which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959).

Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 245 (4th ed. 1988).

STATE STATUTE REFERENCES

| STATE | STATUTORY REFERENCE | UTC RULE APPLICABLE? |
|-------------|----------------------------|------------------------------------|
| Alabama | Ala. Code §19-3B-708 | *Modified |
| Alaska | Alaska Stat. §13.36.055 | *No |
| Arizona | A.R.S §14-10708 | Yes |
| Arkansas | A.C.A. §28-73-708 | Yes |
| California | Ca. Trust Law §15680-15684 | *Modified |
| Colorado | C.R.S. §§15-10-602, 603 | No |
| Connecticut | No Statute | Common law basis for compensation. |
| Delaware | 12 Del. C. §3560, 3561 | *Modified |
| Florida | Fla. Stat. §736.0708 | *Modified |
| Georgia | OCGA. §53-12-210 | *No |
| Hawaii | HRS §607-18 | *No |
| Idaho | I.C. §68-103 | *No |
| Illinois | 760 ILCS 5/7 | *No |
| Indiana | I.C. §30-4-5-16 | *Modified |

| STATE | STATUTORY REFERENCE | UTC RULE APPLICABLE? |
|---------------|----------------------------|----------------------|
| Iowa | Iowa Code Ch. 633A.4109 | *Modified |
| Kansas | K.S.A. §58a-708 | *Modified |
| Kentucky | KRS §386B.7-080 | Yes |
| Louisiana | La. Civil Code §2181 | *No |
| Maine | 18-B M.R.S. §708 | *Modified |
| Maryland | Md. Code §14.5-708 | *No |
| Massachusetts | G.L.C. 203E §708 | Yes |
| Michigan | MCL §700.7708 | Yes |
| Minnesota | Minn. Stat. §501C.0708 | Yes |
| Mississippi | Miss. Code Ann. §91-8-708 | *Modified |
| Missouri | §456.7-708 R.S.Mo. | *Modified |
| Montana | Mont. Code Ann. §72-38-708 | Yes |
| Nebraska | Neb. Rev. Stat. §30-3864 | Yes |
| Nevada | Nev. Rev. Stat. §153.070 | *No |

| STATE | STATUTORY REFERENCE | UTC RULE APPLICABLE? |
|----------------|--------------------------------|----------------------|
| New Hampshire | R.S.A. §564-B:7-708 | Yes |
| New Jersey | N.J.S.A. 3B - 3B:18-2 et. seq. | *No |
| New Mexico | N.M. Stat. §46A-7-708 | Yes |
| New York | S.C.P.A. §2309 | *No |
| North Carolina | N.C. Gen. Stat. §36C-7-708 | *No |
| North Dakota | N.D. Code §59-15-08 | Yes |
| Ohio | R.C. §5807.08 | Yes |
| Oklahoma | 60 O.S.. §175.48 | *No |
| Oregon | O.R.S. 130.635(1) | *Modified |
| Pennsylvania | 20 Pa. C.S. §7768 | *Modified |
| Rhode Island | R.I. Gen. Laws §18-6-1 | *No |
| South Carolina | S.C. Code Ann. §62-7-708 | Yes |
| South Dakota | S.D. Code §55-3-14 | *No |
| Tennessee | T.C.A. §35-15-708 | *Modified |

| STATE | STATUTORY REFERENCE | UTC RULE APPLICABLE? |
|---------------|--------------------------------|----------------------|
| Texas | Tex. Code §114.061 | *No |
| Utah | Utah Code Ann. §75-7-708 | *No |
| Vermont | 14A V.S.A. §708 | *Modified |
| Virginia | Va. Code Ann. §64.2-761 | Yes |
| Washington | Wash. Rev. Code §11.98.070(26) | *No |
| West Virginia | W.Va. Code §44D-7-708 | *Modified |
| Wisconsin | Wis. Stat. §701.0708 | *Modified |
| Wyoming | Wyo. Stat. Ann. §4-10-708 | *Modified |

SUMMARIES OF STATE STATUTES

The following is intended as an overview of the various state statutes. It is not intended to be comprehensive or to provide legal advice. For additional information, please consult the state statute and/or local counsel.

| STATE | STATUTORY LANGUAGE |
|------------|---|
| Alabama | UTC Rule, plus compensation paid to a business entity associated with Trustee is presumed reasonable if consistent with published fee schedule maintained in the ordinary course of business. See statute for additional provisions. |
| Alaska | Trustee and employees of Trustee entitled to compensation that is reasonable under the circumstances. If trust specifies how compensation of Trustee or employee of Trustee is to be determined and such method is used, the compensation is presumed reasonable. If determined in such manner, any party seeking to question compensation has the burden of proving by a preponderance of evidence that such compensation was not reasonable. |
| California | UTC Rule, plus Court can also increase or decrease compensation if there are extraordinary circumstances that call for equitable relief, such order only applies to prospective actions taken in the administration of the trust after the order. The Court can determine periodic compensation for a period that the Court determines is proper. Compensation is to be apportioned between co-Trustees pursuant to services rendered. Trustee is entitled to repayment from trust property for expenses properly incurred in the administration of the trust and even expenditures not properly incurred to the extent that they benefitted the trust. |

| STATE | STATUTORY LANGUAGE |
|------------------------|--|
| <p>Colorado</p> | <p>Applies to fiduciaries, not just Trustees. Fiduciary is entitled to reasonable compensation. Entitlement to compensation or costs shall not limit courts authority to determine reasonableness of costs and compensation. Compensation and costs may be paid directly without a court order. Appropriate refunds shall be ordered by the court if compensation is in excess. Fiduciary who defends or prosecutes in good faith, regardless of their success is entitled to reimbursement for necessary costs and disbursements including attorneys fees. There is no presumption that any method of fee charging is unreasonable. Factors that the court may consider include: The value of a benefit to the estate, respondent, ward, or protected person; The number of parties involved in addressing the issue; The efforts made by the lawyer or person not appointed by the court to reduce and minimize issues; and Any actions by the lawyer or person not appointed by the court that unnecessarily expanded issues or delayed or hindered the efficient administration of the estate.</p> |
| <p>Delaware</p> | <p>UTC Rule, plus the court can also alter compensation if extraordinary circumstances call for equitable relief, such increase or decrease in compensation shall apply to the administration of the trust as set forth in the order. For qualified Trustees, each qualified Trustee shall file with the Register in Chancery for every county in this State, a copy of a schedule or formula by which its allowance as compensation shall be computed. Such schedule or formula may be based upon or reflect the following factors: The time spent or likely to be spent in administering a trust of the type contemplated; The risks and responsibilities involved; The novelty and difficulty of the tasks required of the Trustee; The skill and experience of the Trustee; Comparable charges for similar services; The character of the trust assets; The time constraints imposed upon the Trustee in administering the trust. The Court of Chancery will fix the method by which compensation of other Trustees is determined from time to time.</p> |
| <p>Florida</p> | <p>UTC Rule, plus Trustee can receive reasonable compensation for any other services rendered in connection with the administration of the trust.</p> |

| STATE | STATUTORY LANGUAGE |
|-----------------------|---|
| <p>Georgia</p> | <p>For corporate Trustee, compensation pursuant to their published fee schedule, provided that such fees are reasonable. For an individual Trustee, one percent (1%) of cash and fair market value of any other principal asset received at the initial funding and at the time as other principal assets are received and an annual fee pursuant to the schedule set forth below as of the last day of the accounting year based on the cash and market value of other principal assets, prorated to the extent necessary based on the service time of the Trustee.</p> <p>Percentage Fee Market Value</p> <p>1.75 percent / year on the first.....\$ 500,000.00</p> <p>1.25 percent / year on the next.....\$ 500,000.00</p> <p>1.00 percent / year on the next.....\$ 1,000,000.00</p> <p>0.85 percent / year on the next.....\$ 3,000,000.00</p> <p>0.50 percent / year on values over.....\$ 5,000,000.00</p> |
| <p>Hawaii</p> | <p>Banks, trust companies and others serving as fiduciaries shall be entitled to reasonable compensation as set forth in their published fee schedules, provided that written notice of any amendment to the same is provided. Generally, individuals serving as Trustee are entitled to one percent (1%) of the gross fair market value of trust assets as of Trustee's acceptance. Five percent (5%) of the income received during the year shall be payable to the Trustee, and paid not more than once per quarter. The Trustee shall be compensated from principal no more than once per quarter, based on the following: One-half of one per cent of the first \$5,000,000; One-third of one per cent of the next \$3,000,000; One-fifth of one per cent of the next \$2,000,000; and One-tenth of one per cent of assets in excess of \$10,000,000, based upon the gross fair market value of the principal assets as of the first day of the trust's fiscal year; and A Trustee shall be entitled to a minimum total annual compensation of \$3,000. See statute for additional provisions.</p> |
| <p>Idaho</p> | <p>If not specified, a Trustee is entitled to the same compensation as an executor. If specified the Trustee is only entitled to what is set forth, no more.</p> |

| STATE | STATUTORY LANGUAGE |
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| Illinois | Trustee is to be reimbursed for proper expenses incurred in management and protection of the trust, being entitled to reasonable compensation for services provided. |
| Indiana | UTC Rule, plus Trustee is entitled to be reimbursed with interest from trust property for expenses properly incurred in administration or trust, expenses not properly incurred to the extent necessary to prevent unjust enrichment. Any advance by Trustee for protection of trust gives rise to a lien against trust property to secure reimbursement with reasonable interest |
| Iowa | UTC Rule, plus the court can also alter compensation if extraordinary circumstances call for equitable relief. |
| Kansas | UTC Rule, plus compensation can be increased or decreased upon approval by Trustee with unanimous consent by the qualified beneficiaries who do not have a conflict of interest. |
| Louisiana | Reasonable compensation unless trust instrument provides otherwise or the Trustee waives compensation. |
| Maine | UTC Rule, plus a percentage fee is allowable if the fee is reasonable. A qualified beneficiary can petition for review of the reasonableness of compensation and refunds can be ordered if appropriate. In determining reasonableness, the Court can consider factors including: The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the service properly; The likelihood, if apparent to the Trustee, that the acceptance of the particular employment will preclude the person employed from other employment; The fee customarily charged in the locality for similar services; The amounts involved and the results obtained; The time limitations imposed by the Trustee or by the circumstances; and The experience, reputation and ability of the person performing the services. |

| STATE | STATUTORY LANGUAGE |
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| Maryland | Income commissions are: 6% on all income from real estate, ground rents, and mortgages collected in each year; and 6.5% on the first \$10,000 of all other income collected in each year; 5% on the next \$10,000; 4% on the next \$10,000; and 3% on any remainder. Commissions are payable at the end of each year on the fair value of the corpus or principal held in trust at the end of each year as follows: 0.4% on the first \$250,000; 0.25% on the next \$250,000; 0.15% on the next \$500,000; and 0.1% on any excess. See statute for additional provisions. |
| Mississippi | UTC Rule, plus specifically references that it is applicable to trust protectors and trust advisers as well. Factors to consider in determining reasonableness include: the size of the trust, the nature and number of the assets, the income produced, the time and responsibility required, the expertise required, any management or sale of real property or closely held business interests, any involvement in litigation to protect trust property, and other relevant factors. A published Trustee fee schedule of an entity that is regulated by the Mississippi Department of Banking and Consumer Finance, the OCC, Office of Thrift Supervision or another similar regulatory agency is presumed reasonable. |
| Missouri | UTC Rule, plus reasonable compensation can include fees that take into account the administration of income and principal regardless of whether the instrument contains provisions relating to the same. |
| Nevada | On the settlement of a Trustee's account, the Court shall allow the Trustee's expenses and compensation that is deemed just and reasonable. In the case of multiple Trustees, the costs shall be pursuant to the services performed. The Court may fix a yearly compensation in a specific amount or pursuant to a fee schedule. |
| New Jersey | Expansive provisions - see statute. |

| STATE | STATUTORY LANGUAGE |
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| New York | For individual Trustees, an annual one percent (1%) commission, plus \$10.50 per \$1,000 or major fraction thereof on the first \$400,000 of principal. \$4.50 per \$1,000 or major fraction thereof on the next \$600,000 of principal. \$3.00 per \$1,000 or major fraction thereof on all additional principal. Corporate Trustees are entitled to reasonable compensation. |
| North Carolina | Reasonable compensation is determined in accordance with N.C. Gen. Stat. §32-54 of the General Statutes. Factors to consider include: The degree of difficulty and novelty of the tasks required of the Trustee. The responsibilities and risks involved. The amount and character of the trust assets. The skill, experience, expertise, and facilities of the Trustee. The quality of the Trustee's performance. Comparable charges for similar services. Time devoted to administering the trust. Time constraints imposed upon the Trustee in administering the trust. Nature and costs of services delegated to others by the Trustee. Where more than one Trustee is serving, the reasonableness of the total fees paid to all Trustees. Other factors which the Trustee or the clerk of superior court deems to be relevant. |
| Oklahoma | Reasonable compensation for services rendered and responsibilities assumed. |
| Oregon | UTC Rule, plus fees to third parties who perform Trustee functions are to be considered in determining the reasonable compensation of the Trustee. |
| Pennsylvania | UTC Rule, plus additional or decreased compensation allowed for extraordinary services performed. In determining reasonableness, the Court can look to the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value. |
| Rhode Island | Reasonable expenses and costs in the execution of the trust and reasonable compensation for services as Trustee. |
| South Dakota | Reasonable compensation. If the declaration sets forth the amount of compensation, Trustee is only entitled to the amount set forth and nothing more. |

| STATE | STATUTORY LANGUAGE |
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| Tennessee | UTC Rule, plus applies to trust advisors and trust protectors. Factors to consider include: the size of the trust, the nature and number of the assets, the income produced, the time and responsibility required, the expertise required, any management or sale of real property or closely held business interests, any involvement in litigation to protect trust property, and other relevant factors. Fee schedule of a Trustee, trust protector or trust advisor, provided they are regulated by the OCC, Office of Thrift Supervision, Department of Financial Institutions, or other similar regulatory agency is presumed reasonable. |
| Texas | Reasonable compensation; Trustee can be denied all or part of its compensation if it commits a breach of trust. |
| Utah | Reasonable compensation. |
| Vermont | Reasonable compensation with consideration of the following factors: the size of the trust; the nature and number of the assets; the results obtained; the time and responsibility required; the expertise required; any management or sale of real property or closely held business interests; any involvement in litigation to protect the trust property; the fee customarily charged in the locality for similar services; the experience, reputation, and ability of the person performing the services; the effect that the particular employment may have on the ability of the person employed to engage in other employment; the time limitations imposed by the Trustee or by the circumstances; and other relevant factors. |
| Washington | Reasonable compensation considering circumstances including the time, effort, skill, and responsibility involved in the performance of services by the Trustee. The Trustee is to be reimbursed, with interest as appropriate, for expenses that were properly incurred in the administration of the trust. |
| West Virginia | UTC Rule, plus upon petition by grantor, qualified beneficiary, Trustee or co-Trustee, the court can review and adjust compensation. |

| STATE | STATUTORY LANGUAGE |
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| Wisconsin | UTC Rule, plus the Trustee can receive reasonable compensation for other services rendered in connection with the administration of the trust. |
| Wyoming | UTC Rule, plus additional compensation upon agreement of all qualified beneficiaries. Trustee must provide notice to all qualified beneficiaries when the method of determining compensation or the rate of compensation changes. Such notice must be provided at least 60 days prior, unless waived by written consent and is to include: The current Trustee’s compensation; the proposed change to the Trustee’s compensation; an explanation of the reasons for the change in compensation; the date upon which the change in compensation is to take effect; and the date, not less than sixty (60) days after giving notice, by which a qualified beneficiary is required to notify the Trustee in writing of an objection to the change in compensation. |

CHECKLIST FOR DETERMINING REASONABLE TRUSTEE COMPENSATION

| QUESTION | YES | NO |
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| Is there a mandatory fee schedule in place under applicable law? | Yes - if the applicable law provides for a fee schedule that cannot be changed by the parties, the fee schedule applies. | No - if the applicable law either does not provide for a fee schedule or allows the parties to alter the fee schedule by agreement, continue with the checklist. |
| Does the governing instrument provide for trustee compensation? | Yes - if no party objects to the fees provided for in the agreement, then that fee agreement applies. | No - if the trust instrument does not provide for trustee compensation or simply says that the fees should be reasonable, continue with the checklist. |
| Did the trustee enter into an agreement with the grantor? | Yes - if the agreement indicates that it should apply at the present time (and/or after the grantor's death), then that fee agreement applies. | No - if the trustee did not enter into an agreement with the grantor or the agreement does not indicate that it should be applicable at the current time, continue with the checklist. |
| Did the trustee enter into an agreement with the beneficiary(ies)? | Yes - that fee agreement applies. | No - continue with the checklist. |
| Does the governing statute provide for a statutory fee schedule? | Yes - if applicable law provides for a fee schedule that can be used, that fee schedule applies. | No - if there is no statutory fee schedule that can be applied, continue with the checklist. |

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| <p>Does the fiduciary have a standard fee schedule?</p> | <p>Yes - if nothing else applies and the fiduciary has a standard fee schedule, then that fee schedule may be applied.</p> | <p>No - if the fiduciary does not have a standard fee schedule that would apply in the situation, continue with the checklist.</p> |
| <p>Can local custom and practice be determined to indicate a typical fee schedule?</p> | <p>Yes - the fiduciary should consider what other local fiduciaries would charge in a similar situation and charge a similar rate.</p> | <p>No - if no guidance can be found in local custom and practice (whether because fees of others are not available or no similar situations exist in the area), the trustee should start with the most analogous fee schedule and use the Fee Adjustment Checklist.</p> |

CHECKLIST FOR FEE ADJUSTMENTS

| FACTOR | FEES POTENTIALLY INCREASED IF TRUSTEE CAN SHOW: | FEES POTENTIALLY DECREASED IF BENEFICIARY CAN SHOW: |
|--|--|--|
| Trustee's skill and expertise | <ul style="list-style-type: none"> Trustee's special skills and expertise exceeded the expectations of the grantor and benefited the trust | <ul style="list-style-type: none"> Trustee was appointed because of, but failed to use special skills and expertise Trustee's special skills and expertise were not the basis for selection as trustee and such skills or expertise were not used in administration of the trust |
| Time devoted to the trustee's duties | <ul style="list-style-type: none"> That the trust took more time than a typical trust and more time than was anticipated by the grantor or trustee when trusteeship was accepted by the trustee | <ul style="list-style-type: none"> Trustee failed to expend the time necessary to adequately administer the trust Trustee's acts resulted in the need for excess time (i.e. frivolous lawsuits, incompetence) |
| Amount and character of trust property | <ul style="list-style-type: none"> A larger trust may warrant additional fees, and harder-to-administer assets will warrant higher fees. | <ul style="list-style-type: none"> The trustee fee must be reasonable relative to the size of the trust; a very small trust will warrant only a relatively small fee |
| Degree of difficulty | <ul style="list-style-type: none"> More difficult issues that are not typical of the trust administration and that were not anticipated may warrant higher fees for the trustee. | <ul style="list-style-type: none"> Trustee was a professional (attorney, CPA) and was compensated separately for its professional services |

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| <p>Level and type of responsibility</p> | <ul style="list-style-type: none"> • A level of responsibility above the anticipated level may justify a higher trustee's fee. | <ul style="list-style-type: none"> • Failing to undertake all responsibilities of a trusteeship might warrant a reduction in fees. |
| <p>Risk assumed</p> | <ul style="list-style-type: none"> • If the risk assumed is greater than anticipated at the time the trustee accepted the position, it might warrant a higher trustee fee. | <ul style="list-style-type: none"> • That the riskiness or responsibility was apparent when the trustee accepted the role might provide support for not increasing the fee. |
| <p>Nature and cost of the services</p> | <ul style="list-style-type: none"> • If the cost of providing the services to the trust exceed the anticipated cost, the extra cost might support a higher trustee fee. | <ul style="list-style-type: none"> • If the costs were clearly described in the trust document, the trustee might be deemed to have knowingly accepted such compensation structure. |
| <p>Quality of such party's performance</p> | <ul style="list-style-type: none"> • A particularly good result in a trust administration may warrant additional compensation. | <ul style="list-style-type: none"> • The trustee engaging in unnecessary litigation or failing to efficiently carry out duties or settled conflicts will support a reduction in fees. |

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