

CHAPTER 22

GUIDELINES FOR FIDUCIARY COMPENSATION

22.1 INTRODUCTION

In 2005, the Judicial Council of Virginia approved “Guidelines for Fiduciary Compensation” which had been prepared by the Standing Committee. These Guidelines have been approved by most circuit courts and are in general use. The Guidelines answer many questions concerning fiduciary compensation, which had been a source of concern to Commissioners and which had not heretofore been uniformly interpreted.

The introduction to the Guidelines states, in part, “[t]he guidelines are not intended as a substitute for the analysis the Commissioner must do to determine the statutory ‘reasonable compensation’ in each case.” For this reason, the material formerly included in the numbered paragraphs below is continued. The Guidelines are not law. The *law* controlling fiduciary compensation is contained in the statutes (primarily § 26-30 of the Va. Code) and in court decisions; it remains the same and continues to guide the Commissioners and practitioners.

(1) Fiduciary compensation is governed by statute, specifically § 26-30, Code of Virginia, 1950, which states in part “The Commissioner, in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts or otherwise.” This part of the Virginia Code has been basically unchanged for over 150 years. However, during that time it has been interpreted by numerous cases from the Supreme Court of Virginia (“the Court”).

(2) Case Law: The Court has stated on several occasions that because of the many factors involved in determining “reasonable compensation,” no hard and fast rule could be laid down by the courts and that each case must be decided on its own facts. As the Court put it in *Virginia Trust Co. v. Evans*,¹ “The allowance or refusal of compensation rests in the sound discretion of the Court under the circumstances in each case.” In *Trotman v. Trotman*,² the Court said fiduciary commissions should be “measured by the conscience of the court,” a task which has been delegated by the courts to their Commissioners. (The Court went on to say “[c]ompensation to fiduciaries is a veritable well

¹ 193 Va. 425, 433, 69 S.E.2d 409 (1952).

² 148 Va. 860, 868, 139 S.E. 490, 492 (1927).

spring of litigation.”) Other important cases include the older cases of *Koteen v. Bickers*³ and *Grandy v. Grandy*,⁴ and the newer cases of *Perrow v. Payne*⁵ and *Clare v. Grasty*.⁶

(3) Court Guidelines: The *Trotman* case set out factors to be considered in making the determination, being (i) the value of the estate, (ii) the character of the work, (iii) the difficulties encountered, and (iv) the results obtained.

(4) Percentage Amounts: Many older cases, beginning in 1793 with *Granberry's Ex'r v. Granberry*,⁷ established a general rule that a commission of five percent of receipts was reasonable compensation for an executor. However, courts have increased or decreased this rate under various circumstances. For example, in cases where executors simply distribute property in kind, or perform no extraordinary services and assume no unusual responsibilities, courts have held that reasonable compensation is two and one-half percent of the distributed personal property. By contrast, commissions of seven and one-half percent or ten percent have been awarded under exceptional circumstances.⁸

(5) Published Fee Schedules: In 2005, the legislature amended § 26-30 of the Code. The amendment (enacted after the Guidelines were published) reads in part as follows:

[W]here the compensation of an institutional fiduciary is specified under the terms of the trust or will by reference to a standard published fee schedule, the commissioner shall not reduce the compensation below the amount specified, unless there is sufficient proof that i) the settler or testator was not competent when the trust instrument or will was executed or ii) such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations.

The Virginia Code, as amended, obviously overrules anything to the contrary in the Guidelines. Note that there must be a reference to a published fee schedule in the trust or will. Otherwise, the Guidelines *would* apply.

Query: Is anything more than a bank trust company, credit union, or other “bank like” institution included in the use of the word “institution” in the Code? What about a legal PLC?

³ 163 Va. 676, 177 S.E. 904 (1934).

⁴ 177 Va. 601, 15 S.E.2d 66 (1941).

⁵ 203 Va. 17, 121 S.E.2d 900 (1961).

⁶ 213 Va. 165, 191 S.E.2d 184 (1972).

⁷ 1 Va. (1 Wash.) 246, 250 (1793).

⁸ See *Koteen v. Bickers*, *supra*.

(6) Miscellaneous Matters: It is now generally accepted that commissions, or at least a portion, may be taken from time to time after services have been rendered but before the estate is completed.

The fiduciary's commission is for services rendered the estate and not for merely filling the office.

If the fiduciary has the written informed consent of all persons whose interests are affected by the commission, and all such persons are competent adults, the Commissioner should approve the fee, even though it might exceed the Guidelines.

(7) Real Estate: When the testator directs the fiduciary to sell real estate in the estate or where the devisees request that the real estate be sold, the fiduciary should be allowed a commission on the value of the property (usually the inventory value). Where the fiduciary has the power to sell real estate but there is no necessity to do so, a fee should not be allowed for its sale. However, if services are rendered with respect to the property, Va. Code § 26-30 is pertinent. Va. Code § 26-30 was amended in 1985 and the following sentence added: "If a committee or other fiduciary renders services with regard to real estate owned by the ward or beneficiary, compensation may also be allowed for the services rendered with regard to the real estate and the income therefrom or the value thereof." This allows the Commissioner flexibility in such a situation.

The Clerk's printed instructions regarding inventories state that if the fiduciary has *power* of sale of real estate, either specifically set out in the will or by reference in the will to § 64.1-57 of the Code, the inventory should list the real estate in Part 3 of the inventory ("the decedent's real estate in Virginia over which you have a power of sale"). Fiduciaries argue that the fiduciary fee should be allowed on the value of any such real estate so listed. This is not correct. The test is the fiduciary's *necessity* for selling the real estate, not his naked *power* to do so. See paragraph A.6 of the Guidelines.

(8) Attorney Fees: "An executor may, in good faith, seek the aid of counsel in the 'execution of his duties.' However, in addition to good faith there must be some reasonable ground that renders the employment of counsel reasonably necessary to aid the executor in the performance of his duties. If counsel is employed under these circumstances, then reasonable expenses incurred by such employment are assessable against the estate."⁹ The attorney must be employed in good faith, and there must be *reasonable* grounds that make the employment of counsel *reasonably necessary*. Note also that the fees charged must be reasonable. If the fiduciary employs an attorney (or another) to

⁹ *Clare v. Grasty*, *supra* (quoting *Stull v. Harvey*, 112 Va. 816, 822, 72 S.E. 701, 703 (1911)).

perform services that are normally expected to be performed by the fiduciary, the fiduciary must pay for these services himself. If they are paid from the estate, the fiduciary's normal commission must be reduced by the amount paid from the estate. Examples of services the fiduciary is expected to perform would include, among other matters, the preparation of inventories and accountings. The Court has also held that the fiduciary may act as attorney for the estate, and he is entitled to reasonable compensation in both capacities. It is recommended that the attorney seeking compensation from an estate be required to furnish the Commissioner detailed time records.

(9) Accountants: A lay fiduciary cannot fairly be expected to be able to prepare the many tax returns which might be required of an estate, trust, etc. Reasonable fees of accountants should be paid by the estate where their employment is reasonably necessary. However, this is not true where the accountant is performing services which the fiduciary is expected to perform. See (8) above.

(10) Some wills direct that the named executor serve without compensation or for some figure less than reasonable. Compensation should be limited to that provided in the will unless the taker or takers of the residue, which would be reduced by the amount of the compensation, consent in writing to the allowance of the excess compensation. The written consent should be exhibited to the Commissioner who should either make a notation on the account regarding the consent or attach a copy to the account for recordation.

APPENDIX

GUIDELINES FOR FIDUCIARY COMPENSATION

INTRODUCTION

The Judicial Council of Virginia, in establishing the Standing Committee on Commissioners of Accounts in 1993, charged the Standing Committee with promoting uniformity of practice among commissioners of accounts. Mindful of the Supreme Court's consistent holdings that the circumstances in each case determine the allowance of fiduciary compensation, the Standing Committee recommended to the Council for approval the following Guidelines for Fiduciary Compensation in order to promote a degree of uniformity among the Commissioners of Accounts in Virginia in their task of determining compensation to be allowed fiduciaries. The Guidelines are not intended as a substitute for the analysis the Commissioner must do to determine the statutory "reasonable compensation" in each case. The Judicial Council approved the Guidelines in December 2004.

A. DECEDENTS' ESTATES

1. Where the will clearly sets out compensation in a specific dollar amount or a specific percentage that the Executor is to receive, the will controls, and the Executor is entitled to the amount set out.

2. Where the will states that the Executor shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in § 26-30. The burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable would be on an objecting party. The ultimate responsibility of determining the reasonableness of the compensation rests with the Commissioner.

3. Paragraph 2. above does not apply in the case where the will is silent as to the Executor's compensation. In such a case, if the Executor (corporate or otherwise) uses a published fee schedule to determine compensation, the other guidelines set out herein apply. There is, however, no presumption that such a published fee schedule is not reasonable.

4. Where all parties affected by the amount of the compensation are (i) competent to contract (ii) understand the issues involved (i.e., can give "informed consent") and (iii) agree in writing as to the amount of the compensation to be paid, then the agreement should be honored by the Commissioner.

5. Unless determined as set out in paragraphs 1., 2. or 4. above, the fee to be allowed the Executor on all property in the decedent's probate estate (calculated on the inventory value, including amended inventories) is as follows:

- (a) 5% of first \$400,000.
 4% of next \$300,000.
 3% of next \$300,000.
 2% over \$1,000,000.
 Over \$10,000,000 – by agreement with the Commissioner
 (prior consultation is required).

AND

- (b) 5% of income receipts (not including capital gains).

6. The value of real estate will be included as property in the decedent's probate estate for fee purposes only if the Executor is given the power to sell real estate and (i) is instructed to sell real estate in the will, or (ii) is requested to sell real estate by all affected beneficiaries or devisees, or (iii) is required to sell real estate to pay taxes or other charges against the estate, or (iv) the Commissioner determines that such sale is clearly in the best interest of the estate and the devisees or beneficiaries as a whole.

7. If the Executor employs an attorney or accountant to perform duties that should be performed by the Executor, the fees of those persons should be deducted from the compensation due the Executor. Note that this does not apply to reasonable fees paid to attorneys or accountants for tax work or litigation or other legal services reasonably necessary for the orderly administration of the estate.

8. If the Executor employs an investment advisor, the advisor's fees, if reasonable, should generally not be deducted from the Executor's compensation.

9. The Commissioner may also increase or decrease the otherwise allowable compensation in exceptional circumstances. Factors to be considered in determining the compensation include the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, the responsibilities assumed, the risks incurred and the results obtained. A consideration of these factors could result in a decrease or an increase of the compensation that would otherwise be determined using the standards set out elsewhere in these guidelines.

10. As a general rule, an Executor is not allowed compensation based on the value of assets not includable in the probate estate. The Commissioner may allow such compensation in circumstances where it is necessary for the Executor to assume some responsibility for the asset. The Executor is advised to make separate fee arrangements with the beneficial owners of non-probate assets.

11. If, after examining these "Guidelines," the Executor has any questions about the fee to be taken in a specific estate he or she should be encouraged to consult with the Commissioner in advance of taking any fee.

NOTE: The use of the word Executor above includes all fiduciaries charged with administering decedent's estates. The words "fee" and "compensation" are used interchangeably.

B. TRUSTS

With respect to Trusts, the specific guidelines for compensation are:

1. Compensation should be taken on an annual basis, based on the fair market value of the trust assets (i.e, principal and undistributed income) at the beginning of the accounting period. Previously distributed income, of course, is not to be counted in determining compensation. Where the required accounting is for a period of less than one full year (see, for example, § 26-17.6.A.), the compensation should be pro-rated.

2. Paragraphs A. 1. through A. 4. apply as well to trusts.

3. Undistributed income and principal should be treated alike in determining the fair market value of the trust assets at the beginning of the accounting period. The fee schedule set out below applies to undistributed income and principal combined, with no compensation to be calculated on income received and distributed during the year.

4. The schedule of fees is as follows:

1% of the first \$500,000. (.01)
 3/4 of 1% of the next \$500,000. (.0075)
 1/2 of 1% over \$1,000,000. (.005)
 \$10,000,000 or more – by agreement with the Commissioner
 (prior consultation is required).

5. The guidelines set out in A. 7., 8., 9. and 11. above also apply to Trustees. In addition, the Commissioner may reduce the allowable compensation in certain circumstances, such as where the Trustee has delegated total investment responsibility to professionals or is not making any discretionary distributions.

C. CONSERVATORS AND GUARDIANS

1. The same schedule of fees as set out for Trustees in B. 4. above should apply to both Conservators, Guardians of infants and Trustees of veterans under § 37.1-134.20 [now § 37.2-1016]. The percentages should be applied annually to the principal amount as shown on the inventory (initial account) and on the beginning balance of accountings (subsequent accounts). However, an additional fee of 5% should be allowed on non-investment income received during the account period (for example, periodic payments such as retirement payments). Compensation should be pro-rated when the required accounting is for a period of less than one full year (see § 26-17.4.A.). In situations where the ward or incapacitated person dies within a short time after the qualification, the Commissioner could consider additional compensation, understanding that much of the fiduciary's work occurs at the beginning of the estate.

2. The guidelines set out in paragraphs A. 7., 8., 9. and 11., and B. 1. above shall apply where appropriate.

D. SUCCESSOR FIDUCIARIES

Where a fiduciary is succeeded by another, the annual fees (Trustees, Conservators and Guardians) shall be pro-rated. In the case of Executors, the fees shall be based on the guidelines, but the Commissioner should determine the amount to be allowed, based on the factors set out in A. 9. above. More than one full fee may be allowed, if the Commissioner determines this to be appropriate.

E. CO-FIDUCIARIES

1. Generally, one fee will be divided equally among the co-fiduciaries. The co-fiduciaries may agree among themselves on a different division.

2. The Commissioner can agree to an increased fee under all the circumstances of the matter, and considering the factors set out in A. 9. above. See also paragraph A. 11. above.

3. In case of a dispute concerning the division of the fee, the Commissioner may hold a hearing to resolve the dispute, but all of the fiduciaries should first agree to the use of this hearing procedure.

ENDNOTES:

(1) The time to take compensation: Executors no longer must wait to take their fees until the estate is closed; however, the time of taking should bear some relationship to the expected life of the estate, the work already done, and the work remaining to be done.

(2) Statutes: Nothing in these Guidelines is intended to alter any statute concerning fiduciary compensation. See especially § 26-19, headed "(w)hen fiduciaries to forfeit their commissions, etc."

(3) Monthly Fees: If the fiduciary's account is set up so that the assets are valued and the fee calculated on a monthly basis, the Commissioner, if requested, may approve the taking of fees on a monthly basis.

(4) Other matters: Reference to the "Manual for Commissioners of Accounts" is recommended where other questions occur. See in particular § 22.1 of the Manual, "Fiduciary Compensation and Attorney's Fees" [now "Introduction"].

(5) Suggestions: Suggestions or questions about "Guidelines for Fiduciary Compensation" should be mailed to:

Chair, Standing Committee on Commissioner of Accounts
c/o Office of Executive Secretary
Supreme Court of Virginia
100 North 9th Street
Richmond, VA 23219