

Thoughts On Fiduciary Compensation

SERVING AS the Trustee of a Living Trust or the Executor of a Will is a job that involves a significant amount of work and responsibility. Fiduciary compensation questions usually involve Executors, Trustees or both.

What Does Your Executor Get Paid?

Let's review the role and compensation of your Executor to gain some perspective on the demands on that role and contrast how your living trust is a cost-saving plan when compared to a simple will.

Your Executor has to probate your Will, sell your assets (maybe, or some of them), open and maintain an estate bank account, pay any outstanding debts you left and the expenses of administering your estate, file the appropriate tax returns, account to the court and the beneficiaries, and make distributions to the beneficiaries. Your Trustee performs the same functions, just not under the supervision of the probate court and the probate procedures. Your Trustee also may take over and manage your estate, pay your bills, etc. during your lifetime when you are too incapacitated to do these jobs yourself.

Assuming all of these tasks go smoothly, the person serving as your Executor or Trustee still must take significant amounts of time out of her or his life to ensure that the tasks are accomplished properly and timely. And, of course, there's the overhanging possibility that a beneficiary might sue the Executor or Trustee for failing to perform any of

these duties in the best manner possible. Oh, the joys of being a fiduciary.

Given the amount of work and risk involved in being your fiduciary, it is no surprise that your Trustee and Executor are entitled to compensation.

The Executor's Commission.

Your Executor's compensation comes in the form of a "commission," and in California, a statute establishes the amount of the commission payable for ordinary services required as a sliding percentage scale applied to the value of the estate administered. For example, a California Executor handling an estate valued at \$1 million will receive the following commission:

4% of the first \$100,000	\$4,000
3% of the next \$100,000	\$3,000
2% of the next \$800,000	<u>\$16,000</u>
Total Commission	\$23,000

For estates exceeding \$1 million, the percentage fee goes down to 1% of amounts over \$9 million, 1/2% of then next \$15,000,000, and a reasonable amount above that value.

You can see that an Executor with a \$1 million estate that doesn't require more than the basic probate tasks that take about 25 hours will receive a commission that works out to an hourly rate of \$920.00. If your estate does not require a lot of extra work, the cost of your living trust is nothing in comparison to what your estate will pay your Executor.

Also consider that the commission is taxed to the Executor as earned income. If your Executor also is a beneficiary,

she would be better off waiving the commission and receiving it as part of her inheritance, none of which is subject to income tax.

Your Trustee's Compensation.

The Trustee is entitled to compensation as specified in the trust document. If it is not specified, then the Trustee is entitled to reasonable compensation under the circumstances for the work performed. (Probate Code §15681.) While the term "reasonable compensation" is a bit slippery, it rarely adds up to what the Executor receives for comparable work.

A judge awarding the Trustee reasonable compensation will look at several factors in determining that amount: How much work was done, how complicated or sophisticated were the tasks performed, how much time was used, and any other factors demonstrating the demands and risks of the Trustee's services. Other factors in this analysis include: what the Trustee brought to the job in terms of education, training, special licensing and experience. Finally, what is the prevailing rate in the community for performing similar work?¹

The Trustee should follow that same analysis when determining the amount or rate of his compensation. It will be important to be able to explain to the beneficiaries how compensation was calculated; they need to see that the amount is not arbitrary.

When I recommend a reasonable fee or fee range for this type of job, I want to gather information from the community so that my advice is relevant here where the trust work was performed. First, I want to know what the entities providing trust work (trust companies) charge their clients in the community. I want to be sure not to exceed that amount because it is very rare that an

individual has the same qualifications as the trust company (or "corporate fiduciary") in performing some of the more sophisticated tasks that might be presented in the administration of the decedent's trust.

The rate a private professional fiduciary, might charge (if available) may be a better guide to the upper limit to what a non-professional individual Trustee should be compensated.

The end result always is a range of fee rates into which I will factor the client's particular knowledge, education, training and experience in this type of work. That's the best anyone can do to derive what the Trustee's compensation in this area ought to be. There is no black-and-white answer to this question.

Note: Serving as the agent or attorney-in-fact under a power of attorney also is a fiduciary job. However, it is rare in my experience that such an agent will be called upon to provide the scope of work that a Trustee will perform. Most often, the agent will perform one or more transactions that, in themselves, require little in the way of time and expertise.

Advantages of a Living Trust

Although there is no clear answer to the question "What are Trustees paid?" it should be clear that the Trustee will be compensated for his actual work, whereas the Executor often receives payment on a grand scale under the compensation statute. In this respect, the cost savings of your trust far exceed the cost of the trust. Undoubtedly, this kind of forward thinking can make more of your estate available for your beneficiaries.

¹ A list of factors the court may consider in approving a trustee's compensation is found in CA Rules of Court, Rule 7.776.