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The Computation of Trustee Compensation in Pennsylvania

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THE COMPUTATION OF TRUSTEE COMPENSATION IN PENNSYLVANIA

I. INTRODUCTION

In the area of trustee compensation a study of the pertinent legal history reveals a marked transition in the law. Early English law treated the position of trustee as one of high honor with the trustee performing his duties without expectation or right to remunerative rewards.[1] This view was adopted by some early American courts,[2] but the creation of corporate fiduciaries triggered the recognition of trustee compensation for individual as well as corporate trustees,[3] and today most states have statutes governing such compensation. These statutes are of three types: (1) those that provide for reasonable compensation as authorized by an appropriate court, (2) those that authorize compensation to the trustee without prior court approval, and (3) those that provide a fee schedule for determining the trustee's compensation.[4]

The Pennsylvania statute is of the first type. It provides:

> It shall be lawful for any court having jurisdiction . . . whenever compensation shall not have been otherwise provided, to allow such compensation to assignees, and other trustees, out of the effects in their hands, for their services, as shall be reasonable and just.[5]

The amount of compensation to be allowed, which may be apportioned between principal and income,[6] is within the discretion of the court.[7] To facilitate making this determination the courts have developed standards against which the particular facts of each case are measured. In *Williamson Estate,* Justice Bell[8] lists the following factors to be considered in determining the trustee's compensation: (1) the labor and services performed and the time expended by the trustee; (2) the responsibility incurred by the trustee; (3) the number of trustees; (4) the size of the estate; (5) the results of the trustee's services; and (6) the interests and rights of

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1. G. BOGERT, TRUSTS AND TRUSTEES § 975, at 278 (2d ed. 1962).
2. G. BOGERT, *supra* note 1, at 278 & n.74. Two of the primary reasons for not recognizing compensation for trustees appear to have been the possibility of the trustee's exaggerating his duties for the purpose of increased compensation, and the fact that trustees often passed their duties on to attorneys experienced in trust administration. *Id.* at 278–79.

Pennsylvania, however, early recognized by statute that a trustee was entitled to reasonable and just compensation for his services. Law of June 14, 1836, § 29, [1836] Pa. Laws 628 (now PA. STAT. ANN. tit. 20, § 3271 (1964)).
3. Ehret Estate, 41 Pa. D. & C.2d 51, 69 (Philadelphia Orphans' Ct. 1966) (dissenting opinion), *rev'd,* 427 Pa. 584, 235 A.2d 414 (1967).
4. G. BOGERT, *supra* note 1, at 285.
5. PA. STAT. ANN. tit. 20, § 3271 (1964).
6. PA. STAT. ANN. tit. 20, § 3470.11(2) (1964).
7. PA. STAT. ANN. tit. 20, § 3470.11(2) (1964); Williamson Estate, 368 Pa. 343, 349, 82 A.2d 49, 52 (1951).
8. 368 Pa. 343, 353, 82 A.2d 49, 54 (1951).

the beneficiaries.[9] Most decisions consider the factors outlined by Justice Bell in arriving at "reasonable and just" compensation, but since what is "reasonable and just" may vary with the times as well as the peculiar circumstances of the case, a brief sampling of the case law is helpful in giving content to these terms.

II. CASE STUDY OF TRUSTEE COMPENSATION

Although there is no fixed percentage used to compute "reasonable and just" trustee compensation, it appears that 5% is the usual rate for compensation from income and also represents the usual maximum rate allowable on the principal of the trust. Compensation from principal, however, is measured by the trustee's labor and the responsibility incurred, factors which necessarily vary according to the circumstances of the case.

If a trustee expends no labor in the administration of the trust, he may be entirely denied compensation from the corpus. In *McCauseland's Appeal*,[10] the testator bequeathed a $4,000 loan investment to be used as the principal of the trust. The trustee, who could do so only at his own risk, never changed the investment. Compensation on the income of the loan was approved, but commissions on the principal were denied on the basis that the trustee neither expended labor nor incurred responsibility in connection with the loan.[11]

But even where services have been rendered, compensation may be disallowed on the basis that commissions from the income of the trust alone are adequate compensation. In *Estate of Niccolls*,[12] a successor trustee after 13 years of administration sought to be relieved because of age and blindness. The trustee asked for compensation of 5% ($1,426) on a trust with a total corpus and income amounting to $28,852. Recognizing that ordinary commissions are awarded only at the termination of the trust or when the trustee's relationship with the trust ends through no fault of his own, the court allowed $550 compensation, which was approximately 5% of the income. In addition, $700 was allowed for legal services performed by the trustee, but the court denied any compensation on the principal of the trust.[13]

The type and amount of service which will warrant compensation from principal varies greatly. In *Lukens's Appeal*[14] the court distinguished the previously mentioned *McCauseland* case where compensation on principal had been denied. The corpus provided by the testatrix consisted primarily of a mortgage and bond which was to be administered by the trustee until the beneficiaries reached the age of 21. At the time of the

9. *Id.* at 357, 82 A.2d at 56.
10. 38 Pa. 466 (1861).
11. *Id.* at 470.
12. 6 Fayette Legal J. 1 (Fayette County, Pa. Orphans' Ct. 1942).
13. *Id.* at 10–11.
14. 47 Pa. 356 (1863).

accounting, after 21 years of administration, the principal consisted primarily of one-half of the mortgage. It was held that the trustee had performed a service in collecting and paying the other one-half of the mortgage to one of the beneficiaries, and since the bequest was not specific, the trustee could be compelled by the existing beneficiary to collect the present amount due under the mortgage. By contrast, the bequest in *McCauseland* was specific, thereby allowing the trustee to fulfill his duties by turning over the corpus of the trust unliquidated to the beneficiary. On this rationale a principal commission of 1½% was awarded.[15] A similar insignificant service warranted compensation on principal in *Freed's Estate,*[16] where the trust was fully invested upon receipt by the trustee and had lasted only 6 months when the beneficiary died. Stating that compensation cannot be based on a fixed percentage, since the true test for measuring compensation is the trustee's labor and responsibility incurred, the court reduced compensation on principal from the 5% requested to 2.5%.

The quantity and sophistication of the investing that the trustee must undertake pursuant to his duties is also taken into consideration. The trust before the court in *In re: Trustee of Rohrkaste Estate*[17] had a corpus of $21,000, representing the proceeds of real estate sold and given to the trustee in 1924. The trustee invested the capital, paid over the interest to the life tenant, and accounted for the principal of the fund upon termination of the trust on the death of the life tenant 9 years after his appointment as trustee. The trustee sought an award of $625, which represented 5% on income collected and paid to the life tenant plus 5% on principal of $1,050.[18] The court allowed the 5% income commissions on the theory that a trustee who collects and pays out income and invests the corpus is entitled to compensation out of income as well as the corpus. However, after taking into consideration the fact that the trustee's principal duties were to make proper investments and to collect and pay out interest to the life tenant, and in view of the type of investments (which the court did not specify), the court held that 5% of the principal was excessive and reduced the compensation to 3%, thereby decreasing the award from $1,050 to $630.[19]

But the investments need not be entirely successful to warrant full compensation. For example, in *Jagode's Estate,*[20] one of the numerous investments made during the trustee's 25 years of administration resulted in a $1,300 loss due to a mortgage foreclosure. Exceptions were taken to the award but the court allowed a 5% principal commission plus a commission on income.

15. *Id.* at 357–58.
16. 4 Pa. Dist. 98 (Philadelphia Orphans' Ct. 1895).
17. 3 Beaver Co. Legal J. 151 (Beaver County, Pa. Orphans' Ct. 1936).
18. *Id.* at 153.
19. *Id.* at 154.
20. 7 Pa. D. & C. 405 (Philadelphia Orphans' Ct. 1926).

The length of the trustee's administration as well as the decrease in the value of the trust corpus were factors considered by the court in *Risley's Estate*[21] in determining reasonable and just compensation. Noting that the terminal value of the corpus had decreased from $25,244 to $14,627, and that the trustee had served for only 8 years, 5% was held to be excessive and the award limited to $500.[22]

The trustee in *Biddle's Appeal*[23] was to collect and pay income to the life beneficiaries and then convey the estate to their descendants. The issue presented on appeal to the Pennsylvania supreme court was whether the trustees, who had cared for the real estate for nearly 19 years and who had received a commission upon the income, were entitled to be compensated from the principal upon the termination of the trust even though the real estate remained unsold. The court, reasoning that had the trustees sold the property they would have been entitled to compensation from the proceeds of sale, reinstated the $2,000 allowance from the principal. In so doing, the court considered the length of time that the trustees had cared for the property, and the special vigilance that they had to maintain over the property because of a nearby city building project.[24]

As can be seen from the above cases, an income commission of 5% is the usual rate.[25] Commissions on principal, however, depend on the particular fact situation, ranging from disallowance entirely to an allowance of 5%.[26]

III. USE OF A GRADUATED PERCENTAGE AND APPRECIATION OF THE VALUE OF THE TRUST PRINCIPAL

It has been noted[27] that the use of a percentage to fix compensation is a method of convenience, and whether compensation be large or small in comparison with the estate is irrelevant so long as it is fair.[28] Compensation should be based on the trustee's services, a consideration that may be overlooked when a percentage rate is adopted.[29] When a percentage rate is used to determine the amount of compensation, questions arise as to

21. 9 Pa. D. & C. 125 (Philadelphia Orphans' Ct. 1927).
22. *Id.* at 130.
23. 83 Pa. 340 (1877).
24. *Id.* at 345–46.
25. McCaskey's Estate, 307 Pa. 172, 177, 160 A. 707, 709 (1932). The court, in upholding an award of 5% on income, stated that such rate is usual. For additional cases allowing commissions of 5% on income see 1 D. HUNTER, PENNSYLVANIA ORPHANS' COURT COMMONPLACE BOOK 270 (2d ed. 1959).
26. In a concurring opinion in Williamson Estate, 368 Pa. 343, 357, 82 A.2d 49, 56 (1951), Justice Bell suggested that, because of the increase in trust administration costs, the 3% commission limitation on principal of trusts in excess of $500,000 which was established by Gardner's Estate, 323 Pa. 229, 185 A. 804 (1936) and Quigley's Estate, 329 Pa. 281, 198 A. 85 (1938), be removed. However, the commissions in *Gardner's Estate* as well as in *Quigley's Estate,* were to an executor-trustee at the termination of his duties as an executor.
27. Williamson Estate, 368 Pa. 343, 349, 82 A.2d 49, 52 (1951).
28. Rothschild's Assigned Estate (No. 1), 47 Pa. Super. 234, 237 (1911).
29. Harrison's Estate, 217 Pa. 207, 208–09, 66 A. 354, 354–55 (1907).

the point in time when the corpus is to be evaluated for use as the base, and whether compensation should be computed on a graduated percentage — a computation whereby the percentage decreases as the size of the estate increases.

Whether the basis used in computing the trustee's compensation is the value of the corpus on receipt or on termination of the trust may depend on whether or not the trustee served as executor of the estate. In *Gardner's Estate*,[30] the Pennsylvania supreme court held that an executor's commissions should be based on the amount of the corpus at the time of receipt by the executor, and disapproved of the lower court's use of a graduated percentage in computing commissions on principal. The court found that 3% on income and principal was ample and observed that:

> [W]here an estate of this size is administered, with assets approaching a million dollars, and particularly where the executor in practical effect exercises the functions of the trustee which it will ultimately become, and where the services and responsibility involved are not of an unusual character, compensation in excess of 3 per cent on *both* income *and* corpus received has rarely been allowed, although compensation of more than 3 per cent has sometimes been allowed on income alone. . . . Each case is sui generis.[31]

In the more recent case of *Lovering Estate*,[32] a lower court distinguished *Gardner* on the basis that *Gardner* was concerned with an executor's commission as opposed to compensation to a trustee. The court then held that a trustee's commission should be computed on the terminal principal. The distinction is bottomed on the rationale that the principal at the time of receipt is appropriate for determining commission payable to an executor, since his duties consist of liquidating the assets and making distribution; the duties of a trustee, however, are to invest and administer the estate until the termination of the trust. Accordingly, if compensation is computed on the termination value, the trustee's skill in administering the estate will be recognized.[33] Referring to the issue of graduated percentage, the court stated that although it was bound by the Pennsylvania supreme court decisions in *Gardner's Estate*[34] and *Williamson Estate*[35] disallowing the use of such a computation formula, daily experience was in opposition to such disallowance. The federal income tax and the minimum fee bill of the Philadelphia Bar Association for services to decedent's estates were cited as examples of the daily use of graduated fees.

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30. 323 Pa. 229, 185 A. 804 (1936).
31. *Id.* at 240, 185 A. at 809. In *Williamson Estate*, the court reiterated the rule against disallowance of graduated commissions. 368 Pa. 343, 350, 82 A.2d 49, 53 (1951).
32. 27 Pa. D. & C. 2d 501 (Philadelphia Orphans' Ct. 1962).
33. *Id.* at 503–04. In Cray Trust, 4 Fiduciary Rep. 194 (Allegheny County, Pa. Orphans' Ct. 1954), shares with a stated value of $6,860 were later liquidated for $27,440; the court held that compensation should be computed on the proceeds received from liquidation.
34. 323 Pa. 229, 185 A. 804 (1936).
35. 368 Pa. 343, 82 A.2d 49 (1951).

Also, it was pointed out that many judges intuitively use a graduated percentage in computing commissions.[36] The court further stated:

> Such percentage in the ordinary case measures the amount and character of the trust corpus, the risk and responsibility undertaken by the trustee, the character of the service rendered, the difficulties encountered in administration of the trust, and the skill and success of the trustee in administering the trust, the factors which the Supreme Court requires us to consider in fixing compensation for a fiduciary. It is common experience that normally the amount, character and complexity of the services of the fiduciary vary directly with the size of the estate; although the rate of increase in work diminishes somewhat as the estate becomes quite large. This rule bends where the services performed by the fiduciary are unusual or extraordinary. In such cases, additional compensation is awarded.[37]

In 1963, shortly after *Lovering* was decided, the legislature incorporated by statute the reasoning of that decision. The pertinent statutory language provides:

> The court shall allow such compensation to the trustee as shall in the circumstances be reasonable and just, and *may* take into account the market value of the trust at the time of the allowance, and calculate such compensation on a graduated percentage.[38]

The statute has not yet been judicially construed; however, there is some evidence of its effect on the computation of trustee compensation. In *Harrison Trust,*[39] decided subsequent to the 1963 amendment, the market value of the trust assets had increased by $300,000 in the 3 years between accountings.[40] Although it did not mention the statute, the court awarded compensation based on 5% of the market value of the distributed principal.

IV. INTERIM AND DOUBLE COMMISSIONS

Prior to 1945 a non-executor trustee could receive a commission on principal, in the absence of extraordinary circumstances,[41] only at the termination of the trust or the termination of his connection with it.[42] By statute,[43] an individual who was both the executor and trustee of an

36. Lovering Estate, 27 Pa. D. & C. 2d 501, 504 (Philadelphia Orphans' Ct. 1962).
37. *Id.* at 504–05. For additional support, the court observed that President Judge Klein, in an adjudication in Stoddart Estate, 27 Pa. D. & C.2d 251 (Philadelphia Orphans' Ct. 1962) urged that the use of a graduated percentage be approved by legislation or the appellate courts. Lovering Estate, 27 Pa. D. & C.2d 501, 505–06 (Philadelphia Orphans' Ct. 1962).
38. PA. STAT. ANN. tit. 20, § 320.985 (Supp. 1967) (emphasis added).
39. 15 Fiduciary Rep. 385 (Montgomery County, Pa. Orphans' Ct. 1965).
40. *Id.* at 387.
41. Kennedy Trust, 364 Pa. 310, 72 A.2d 124 (1950); Snyder's Estate, 346 Pa. 615, 31 A.2d 132 (1943); Thouron's Estate, 182 Pa. 126, 37 A. 861 (1897); Bosler's Estate, 161 Pa. 457, 29 A. 57 (1894).
42. Penn Gaskell's Estate (No. 1), 208 Pa. 342, 57 A. 714 (1904); Thouron's Estate, 182 Pa. 126, 37 A. 861 (1897).
43. Law of June 7, 1917, § 45, [1917] Pa. Laws 447 (repealed 1945).

estate was allowed but one commission on principal, and this was to be computed at the time the executor completed his duties. In either capacity, the trustee was limited during the period of his administration to an annual commission on income.[44] Because of these limitations on compensation, the non-corporate trustee found himself in an unfortunate situation; if the trust endured beyond the life of the trustee, he would never enjoy the primary rewards for his services,[45] even though he had been required to finance the administration of the trust out of present income.[46]

In 1945 the legislature repealed the statutory prohibition against double commissions to an executor-trustee.[47] However, the problem could be completely solved only if the repeal legislation could be retroactively applied, that is, made applicable to estates created before the repeal legislation was enacted. To try this issue a test case — *Williamson Estate*[48] — was brought. A trustee who had received compensation as an executor prior to the 1945 Act sought an interim commission for services rendered and also annual commissions on a pay-as-you-go basis for future services to be charged to principal or income.[49] The supreme court denied the compensation request, upholding the established Pennsylvania rule prohibiting the allowance of principal commissions in the absence of extraordinary circumstances or the termination of the trustee's interest in the trust,[50] and holding that the application of the Act of 1945,[51] to a trust created before that Act would be violative of the beneficiary's rights in the corpus under the fourteenth amendment of the United States Constitution.[52]

After *Williamson,* the legislature passed the following statute:

> Neither the fact that a fiduciary's service has not ended nor the fact that the trust has not ended shall be a bar to the fiduciary's receiving compensation for his services out of the principal of the trust.[53]
>
> Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court . . . shall allow him such original or additional compensation out of the trust income or the

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44. The usual commission on income is 5%. *See* note 25 *supra.*

45. Williamson Estate, 70 Pa. D. & C. 230, 232–33 (Philadelphia Orphans' Ct. 1950), *aff'd,* 368 Pa. 343, 82 A.2d 49 (1951) (quoting the auditing judge, Judge Klein).

46. Ehret Estate, 41 Pa. D. & C.2d 51, 66–68 (Philadelphia Orphans' Ct. 1966) (dissenting opinion), *rev'd,* 427 Pa. 584, 235 A.2d 414 (1967). It was noted that although there is evidence that the average Philadelphia trust lasts 25 years, many last much longer. *Id.*

47. Law of April 10, 1945, § 1, [1945] Pa. Laws 189.

48. 368 Pa. 343, 82 A.2d 49 (1951).

49. *Id.* at 347, 82 A.2d at 51.

50. Williamson Estate, 70 Pa. D. & C. 230, 232–33 (Philadelphia Orphans' Ct. 1950).

51. Law of April 10, 1945, § 1, [1945] Pa. Laws 189.

52. The rationale of the decision was that when the trustee accepted the trust under the old law, and was paid in full at the termination of his duties as executor, the rights of the life tenant and remainderman at that time became vested and could not later be revoked. Williamson Estate, 368 Pa. 343, 352–53, 82 A.2d 49, 54 (1951).

53. PA. STAT. ANN. tit. 20, § 3274 (1964).

trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him.[54] . . . This act shall apply:

(1) To all services heretofore rendered by any fiduciary;

(2) To all services hereafter rendered by any fiduciary heretofore appointed. . . .[55]

In 1965, a second test case — *Scott Estate*[56] — was presented to the Pennsylvania supreme court. On the final accounting the corporate trustee, who was also one of the executors, sought additional compensation for ordinary services performed during the administration of the trust. The supreme court held that the 1953 Act stood on the same footing as the 1945 Act (double commissions) and, therefore, on the basis of *Williamson,* such an award would be unconstitutional.[57] Noting that the theory advanced in justification of additional compensation is that trust administration costs have increased, the court reasoned that the executor-trustee had accepted the trust under the single commission statute. Consequently, if an increase should be allowed because of a "longer than usual trust" or because of increased costs, it would seem that a reduction in compensation would likewise be in order where, for example, the life tenant's life is unexpectedly shortened and the trust terminated much earlier than expected.[58]

In 1966, a third test case — *Ehret Estate*[59] — presented the issue of whether or not the Act of 1953, which permits interim commissions on principal, may be applied to a trust estate created prior to its enactment so as to allow interim compensation to trustees who had not been executors of the estate.

The supreme court awarded compensation.[60] *Williamson Estate*[61] was distinguished as applicable only to an executor-trustee seeking to retroactively apply the Act of 1945 in order to obtain compensation in addition to that awarded at the termination of his duties as an executor; whereas the issue before the court in *Ehret* was not one of additional compensation, but rather one of the time of payment.[62] Turning to *Scott Estate,*[63] the court stated that the only issue there presented concerned double compensation, since the executor-trustee therein sought additional compensation at the termination of the trust. The *Ehret* court then characterized the holding of the court in *Scott* as deciding that neither the Act

54. PA. STAT. ANN. tit. 20, § 3275 (1964).
55. PA. STAT. ANN. tit. 20, § 3278(1), (2) (1964).
56. 418 Pa. 332, 211 A.2d 429 (1965).
57. *Id.* at 339, 211 A.2d at 432. The Act of 1953 included a provision to the effect that if application of the Act to any of the enumerated services was unconstitutional, application of the Act to other services was not to be affected. PA. STAT. ANN. tit. 20, § 3279 (1964).
58. 418 Pa. 332, 339, 211 A.2d 429, 433 (1965).
59. 427 Pa. 584, 235 A.2d 414 (1967).
60. Ehret Estate, 427 Pa. 584, 235 A.2d 414 (1967).
61. 368 Pa. 343, 82 A.2d 49 (1951).
62. 427 Pa. 584, 594-95, 235 A.2d 414, 420 (1967).
63. 418 Pa. 332, 211 A.2d 429 (1965).

of 1945 nor the Act of 1953 could be retroactively applied so as to award double commissions on principal under the circumstances there existing.[64]

The issue in the instant case was whether a trustee who was never the executor and had never received any compensation on principal could receive an interim commission on principal for ordinary services. The court recognized that, in order to avoid depleting principal there had been a rule of law not to allow interim commissions on principal for ordinary services by a trustee, even where he had not received a prior principal commission. But, noting that *"there is no vested right* in a beneficiary in the *time* of payment of a commission,"[65] the court found that conditions had changed so greatly that there should be allowed, when earned, "a fair and reasonable *interim* commission on principal to a (non-executor) trustee of a long-term trust."[66]

Thus the Pennsylvania supreme court has ruled that a trustee who was not also the executor of the trust may receive, for his ordinary services as trustee, interim commissions on principal regardless of when the trust was created. In so ruling, however, the court did not disturb its prior decisions denying additional compensation to an executor-trustee who has previously been compensated from the principal of a trust created before the repeal of the statute limiting an executor-trustee to a single commission from the trust principal.

V. TRUSTEE COMPENSATION BY STATUTORY SCHEDULE

A. New Jersey

The opinion in the recent case of *In re Estate of Moore*[67] presents an excellent summary of the history of trustee compensation in New Jersey, and also analyzes how the pertinent New Jersey statutes[68] have been construed by the courts. The New Jersey statutory law[69] guarantees the trustee a 6% income commission,[70] 1% higher than the usual Pennsylvania court award to the trustee,[71] and a mandatory 5% commission on the first

64. 427 Pa. 584, 595, 235 A.2d 414, 420 (1967).
65. *Id.* at 596–97, 235 A.2d at 420–21.
66. *Id.* at 597, 235 A.2d at 421. Justice Roberts, in a concurring opinion, cautioned that "interim commissions should be allowed only on the basis of the worth of the services rendered and should not exceed the total value of the services rendered from the inception to the conclusion of the period of trusteeship." On that basis, he noted, citing Comment, *The Constitutionality of Retroactive Trustee Compensation Statutes in Pennsylvania,* 114 U. PA. L. REV. 530, 537 (1966), that interim commissions would not alter the final award and therefore not deprive the remainderman of any property; further, the slight reduction in income payments to the life beneficiary caused by the earlier payment of commissions is inconsequential since trustee compensation is at the discretion of the court. 427 Pa. at 598, 235 A.2d at 422.
67. 50 N.J. 131, 232 A.2d 641 (1967).
68. N.J. REV. STAT. §§ 3A:10–1, 3A:10–2 (Supp. 1967). These statutes specifically include compensation to testamentary trustees, however, in the absence of any express compensation agreement, the cited statutes will also govern the compensation of non-testamentary trustees. N.J. REV. STAT. § 3A:10–4 (1953).
69. N.J. REV. STAT. § 3A:10–2 (Supp. 1967).
70. N.J. REV. STAT. § 3A:10–2 (Supp. 1967).
71. *See* note 25 *supra.*

$100,000 of corpus. The commissions allowed from the corpus are not dependent on the length of the trust (for administrations less than 25 years), the amount of the corpus, or the risks or skills involved on the part of the trustee.[72] Only when the corpus exceeds $100,000 is the court to take into consideration, as the Pennsylvania courts do, the services rendered by the trustee. However, under no circumstances may the compensation exceed 5% of the base,[73] unlike the Pennsylvania statute which, at least theoretically, has no limitation on commissions except that compensation be reasonable and just.

In Pennsylvania, although the courts are not precluded from taking into consideration the number of trustees who administer the trust in determining the compensation to be awarded,[74] there is no prescribed manner for dealing with multiple trustee compensation. New Jersey, however, has specifically provided that in such a situation the court, in addition to the commissions normally awarded, may award additional commissions for each additional fiduciary at a rate not to exceed 1% of the corpus.[75] In determining to what extent, if any, such additional commissions will be allowed, the court is to take into consideration only the first 25 years of the trust.[76] When the trust extends beyond 25 years, additional compensation is allowed, but not in excess of 1/5 of 1% per annum.[77] The number of trustees and the size and nature of the estate are irrelevant in computing this particular additional award.

The statute[78] provides for interim compensation but does not specifically prescribe how such compensation is to be computed. In *Estate of Moore* the Supreme Court of New Jersey instructed that although the base to be used is essentially the maximum amount of the corpus during the particular accounting period, the current market value should be considered with caution since the trustee may select the accounting period, and there might be a subsequent decrease in the value of the corpus. Further, it must be kept in mind that a substituted trustee might be needed, and, if so, compensated for his services. The court should also be cognizant that future services might be greater than those already rendered and maximum commissions may eventually be awarded. Although the award of prior commissions must be taken into consideration, it is not proper to

72. *In re* Estate of Moore, 50 N.J. 131, 232 A.2d 641 (1967).

73. *Id.* at 141, 232 A.2d at 646.

74. *See* note 9 *supra.*

75. N.J. REV. STAT. § 3A:10–2 (Supp. 1967).

76. *In re* Estate of Moore, 50 N.J. 131, 142, 232 A.2d 641, 646–47 (1967).

77. *Id.* at 141, 232 A.2d at 648. In computing the compensation where the trust has extended over a period in excess of 25 years, the additional percentage allowed is to be considered as increasing the over-all rate permitted at termination, rather than requiring computation of the commission on the first 25 years and the balance separately. *Id.* at 144, 232 A.2d at 648.

78. N.J. REV. STAT. § 3A:10-2 (Supp. 1967).

compute the compensation on the entire period and then subtract prior commissions, as is done upon a final accounting.[79]

In determining the commissions on the final accounting where the exact rate is permissive within a specified maximum,[80] the statutory rate existing at the time of the accounting is "controlling," but any lesser rate that existed during a portion of the trust administration should be reflected in the over-all rate that is selected.[81]

Unlike the Pennsylvania statute, the New Jersey statute does not state that the market value of the corpus at the time of the allowance may be used in computing the commissions. Nevertheless, the market value is commonly recognized by the New Jersey courts as the proper base on which to compute compensation, "[a]t least as to final accounts."[82] The court in *Moore* made clear, however, that where the rate of compensation is permissive, the rate should be lowered commensurate with the length of time that the increase in corpus was held by the trustee; the increased corpus should not be related back to the inception of the trust. The court questioned the propriety of using recently increased market values, even where the rates to be applied are mandatory, and, significantly, suggested that the same principles should apply in both situations.[83]

B. New York

New York has two statutes providing fee schedules for trustees. One statute[84] (section 2308) governs compensation for trustees under wills of persons dying before August 31, 1956, while the other[85] (section 2309) governs trustees under wills of persons dying after August 31, 1956. The statutes also cover trustees of express trusts where compensation is not provided for in the trust instrument or otherwise.[86]

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79. 50 N.J. 131, 148, 232 A.2d 641, 650 (1967). When final corpus commissions are awarded for the trust administration, previously allowed interim commissions are, of course, deducted. Blauvelt v. Citizens Trust Co., 3 N.J. 545, 71 A.2d 184 (1950).

80. Rates are permissive within a specified maximum in the following situation: when the corpus receipts exceed $100,000; when there is more than one fiduciary; when the trust administration extends beyond 25 years. N.J. REV. STAT. §§ 3A:10–1, 3A:10–2 (Supp. 1967).

81. 50 N.J. 131, 145, 232 A.2d 641, 648–49 (1967), *citing* National State Bank v. Nadeau, 57 N.J. Super. 53, 153 A.2d 854 (1959).

82. 50 N.J. 131, 146, 232 A.2d 641, 649 (1967).

83. *Id.* at 147 n.4, 232 A.2d at 649 n.4. Where inflation rather than the trustee's administration is responsible for the increase in corpus, "the rate of commission should . . . be lower than if calculated upon inventory values." Appleby v. Appleby, 140 N.J. Eq. 8, 12, 52 A.2d 829, 832 (1947).

84. N.Y. SURR. CT. PROC. § 2308 (McKinney 1967).

85. N.Y. SURR. CT. PROC. § 2309 (McKinney 1967). The compensation scheme used by section 2308 is similar to prior New York compensation statutes, but with the use of increased percentages. It was thought unwise to make the new and different method provided for in section 2309 applicable to trusts created before its enactment. Note, *Compensation of Trustees in New York*, 33 N.Y.U.L. REV. 51, 57–58 & n.48 (1958).

86. N.Y. CIV. PRAC. § 8005 (McKinney Supp. 1967).

Section 2309, unlike section 2308, does not allow commissions on receipt of the principal, but provides for a 1% commission on all principal paid out on the termination of the trust. It differs again from section 2308, which allows annual commissions from principal as well as on a percentage of income, by computing the entire annual commission on principal — $5.00 per $1,000 on the first $50,000 of principal; $2.50 per $1,000 on the next $450,000 of principal; and $2.00 per $1,000 on all additional principal.[87] Payment is made, however, one-half from principal and one-half from income.[88] By computing the income entirely on principal the trustee is compensated for unproductive and low interest yielding assets, and will not be affected by a recession year, which would greatly diminish his annual compensation if it were based one-half on income.[89]

The base to be used for the annual commissions is presumptively the value of the asset at the time of receipt by the trustee. The actual value of the corpus at the time of accounting may, as in Pennsylvania and New Jersey, be used, but the trustee has the burden of proving such value.[90]

The trustee may retain the annual commissions without a court allowance, but is required to issue a statement to the beneficiaries listing the trust assets, receipts of principal and income during the year, and the amount of his commissions and the method of their computation.[91]

Both sections 2308 and 2309 specifically provide for additional compensation for multiple trustees. The additional compensation, unlike the New Jersey statute, does not take effect unless the principal is greater than $100,000; if it is, the additional trustees, not to exceed a total of three, will each receive the same compensation as one trustee would receive. When there are more than three trustees, the trustees will receive the compensation that three trustees would receive, and it will be apportioned according to the services rendered by each. When the trust is less than $100,000 and there is more than one trustee, the compensation that one trustee would receive will be apportioned according to the services rendered.[92]

C. Comparative Computations

Using a 25 year trust with a constant corpus of $400,000, an annual income of $16,000 (assuming a 4% return), and three trustees, the following comparison is provided between the New Jersey and New York (section 2309) statutes:

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87. N.Y. SURR. CT. PROC. § 2309.2 (McKinney 1967).
88. Note, *supra* note 85, at 58.
89. *Id.* at 58–59, 62–63.
90. N.Y. SURR. CT. PROC. §§ 2308.3, 2309.2 (McKinney 1967).
91. N.Y. SURR. CT. PROC. §§ 2308.4, 2309.4 (McKinney 1967).
92. N.Y. SURR. CT. PROC. §§ 2308.6, 2309.6 (McKinney 1967). Both section 2308 and section 2309 allow the trustee 6% commissions on gross rents in addition to his other compensation. But there can only be one such additional commission regardless of the number of trustees; where there is more than one trustee the additional compensation is apportioned according to the services rendered. N.Y. SURR. CT. PROC. §§ 2308.7, 2309.7 (McKinney 1967).

New Jersey			
Income Commission			
Rate	*Annual*		*Total*
6% on $16,000	$ 960		
6% on $400,000 (16,000 x 25 yrs.)			$24,000
Principal Commissions			
Rate			
5% on first $100,000		5,000	
5% (max.) on remaining $300,000		15,000	
2% (max.) (1%/each additional trustee) on $400,000		8,000	52,000
New York (section 2309)			
Annual Principal Commissions (charged to principal and income)			
Rate			
$5.00/$1,000 on $ 50,000	250		
2.50/ 1,000 on 350,000	875		
	$1,125		28,125
For Paying Principal			
(charged entirely to principal)			4,000
Each trustee			$32,125
Total (three trustees)			$96,375

Each trustee under New York law is entitled to $4,000 on paying out the principal,[93] and each trustee is allowed annual commissions of $1,125, or a total of $28,125 each over 25 years.[94] Although each individual trustee in New York would receive $19,875 less than the total award for the trustees in New Jersey, the total amount of trustee compensation under the New York statute is $96,375, which is $44,375 more than the New Jersey allowance. As can be seen, the allowance of multiple commissions by the New York statute, under the given circumstances, cuts much deeper into the corpus of the trust than the method employed by New Jersey. A fairer method would seem to be an allowance to each trustee proportionate to the services rendered rather than burdening the estate with three equal awards regardless of the services rendered.[95]

Pennsylvania has no prescribed manner for dealing with multiple trustees. However, in the above hypothetical, a single trustee would

93. N.Y. SURR. CT. PROC. § 2309.6(a) (McKinney 1967).
94. N.Y. SURR. CT. PROC. § 2309.6(b) (McKinney 1967).
95. *See*, 3 A. SCOTT, THE LAW OF TRUSTS § 242.10, at 1950 (2d ed. 1956); Note, *supra* note 85, at 64-66 n.76; Comment, *Institutionalized Trusteeship: Avenues of Compensation Reform*, 58 YALE L.J. 924, 944-46 (1949). New Jersey provides for court apportionment of commissions between trustees according to their respective services. N.J. REV. STAT. § 3A:10-6 (1953). In Pennsylvania, the Orphans' Court has jurisdiction over the apportionment of compensation among fiduciaries. PA. STAT. ANN. tit. 20, § 2080.301(6) (1964).

receive $20,000 (based on a 5% usual award on income of $400,000) plus $20,000 (based on a usual maximum principal commission of 5% on $400,000) for a total compensation of $40,000. This total is $4,000 less than the $44,000 received by a single trustee under the New Jersey statute, but it exceeds by $7,875 the $32,125 received by a single trustee under the New York statute.

VI. CONCLUSION

A most important concern of a trustee upon his undertaking the duties of that position is whether the compensation that he will receive will cover his costs plus a reasonable recompense for the services performed. Theoretically, a statute which provides for reasonable and just trustee's compensation appears to be better equipped to deal with a specific trust administration than does a statute which prescribes a fixed schedule of fees for all trusts. A fixed schedule may in the course of the trust administration become outdated and bear no relation to the actual costs and services of the trustee.[96] Against the flexibility provided by a reasonable and just standard must be balanced the advantages of a set schedule of fees. When such a schedule exists, the settlor seems better able to determine the amount of prospective trustee fees and plan his trust accordingly,[97] and the trustee can determine beforehand the amount of compensation that he will be entitled to receive for his services. Of course, a standard schedule of fees will not be able to provide for any extraordinary services that might be performed by the trustee. This shortcoming, however, could be corrected by statutory provision for additional compensation, at the discretion of an appropriate court, for services performed and proved by the trustee to be of an extraordinary nature.[98]

Whether or not Pennsylvania's "reasonable and just" standard is better suited for governing trustee compensation than is a state statutory fee schedule, the allowance by the legislature or courts of annual commissions computed on the principal of the trust would appear to be a logical extension of the Pennsylvania statutory allowances of interim commissions, graduated percentage, and consideration of the fair market value of the corpus at the time of the accounting.

As mentioned, section 2309 of the New York statute allows annual commissions computed on the principal, charged one-half to principal and one-half to income. The reasonable and just standard of the Pennsylvania statute would not appear to be a stumbling block for judicial allowance of similar pay-as-you-go commissions.[99] Such an annual allowance would

96. *See* Bardt, *Flexible Compensation — Fair Wage for Trusteeship*, 88 TRUSTS & ESTATES 80, 81–82 (1949).

97. *See* Note, *supra* note 85, at 59.

98. *See* Comment, *supra* note 96, at 943 & n.112. If the trustee's cost plus services rendered were the only criteria used to set his compensation, a certain amount of the trustee's initiative for efficient administration, which is present when the market value of the corpus is a factor in determining compensation, might be removed. *Id.* at 954.

99. Comment, *supra* note 96, at 953 n.167.

enable the trustee to meet his current expenses and at the same time be rewarded for services as they are performed.[100] The trustee would also reap tax savings as a result of having his earnings spread over the entire trust; and, because of similar tax advantages to the beneficiaries, it has been stated that the public would welcome the allowance of annual commissions.[101] In addition, annual commissions based on corpus would tend to take account of the different business cycles since the corpus should fluctuate accordingly.[102] However, corporate fiduciaries have been unsuccessful in obtaining court approval of "pay-as-you-go" annual commissions, and in *Ehret Estate*, the court noted that its decision to retroactively apply the interim commission statute to a trustee who had not been the executor of the estate in no way represented approval of annual commissions. It appears, therefore, that only if the legislature is so moved will annual principal commissions be introduced into Pennsylvania trustee compensation law.

Harry C. J. Himes

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100. Note, *supra* note 85, at 53.
101. 32 TRUST BULL. Jan. 1953, at 36 (1953).
102. Comment, *supra* note 96, at 954.