
Bases for Awarding Compensation to Trustees

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The word "option" is often used for any continuing offer regardless of whether it is revocable for lack of consideration; but more commonly the word is used to denote an offer that is irrevocable and therefore a contract.³⁵

To make unqualified statements, such as were made in several of the above cases, that an, "option contract is unilateral," can be deceiving. Corbin, for instance, says:

An option contract can be either unilateral or bilateral. . . . If A pays B \$100 cash in return for B's promise to convey Blackacre to A for \$5,000 if paid within 30 days, they have made a unilateral option contract. A has an irrevocable option to buy, good for 30 days; he has made no promise of any kind, being equally privileged to buy or not to buy—his option or freedom of choice is wholly unlimited. Nevertheless, B's promise is binding because he has been paid \$100 for it.

On the other hand, suppose that instead of paying cash A had given to B his promissory note for \$100, or his oral promise to pay that sum, in return for B's promise to convey Blackacre to A for \$5,000, if paid within 30 days. The contract thus made is bilateral, each party having made a binding promise.³⁶

According to Corbin's analysis, an option contract may be bilateral as well as unilateral and the unqualified statement that an option contract is unilateral is incorrect. Since neither Williston or the *Restatement* use the words "unilateral contract," and because its use tends to be confusing, and since no purpose is served in calling an option a "unilateral contract," it would be helpful if the words were omitted completely.

CONCLUSION

Professor Page apparently did not think that the term "unilateral contract" was the best that could be used to describe "an offer for an act." Perhaps it is not, but as it now stands, the term is in existence and appears likely to remain firmly entrenched in the legal vocabulary. The problem lies in the fact that the words "unilateral contract" have been tossed about carelessly and confusion has been the result.

The Illinois courts have varied in their repeated use of the terms. If "unilateral" and "unilateral contract" were used uniformly, or better yet, used as defined by Williston, Corbin, and the *Restatement*, much of the confusion revolving around the law of unilateral contracts would be cleared up.

³⁵ § 24 Comment c.

³⁶ 1 Corbin, Contracts § 260 (1950).

BASES FOR AWARDING COMPENSATION TO TRUSTEES

Historically, the law as expressed in the early English cases and in some of the American jurisdictions was that a trustee was not entitled to compensation for his services and time in administering a trust. The trustee's efforts were merely gratuitous without regard to any advantage that

might result from his skill and diligence.¹ A court adopting this principle felt that to pay trustees:

[W]ould have the tendency to tempt the trustee to disregard the interest of the beneficiaries, and lead, in general, to the consequence of loading the estate for the benefit of the trustee, by pretenses of care, trouble, and loss of time; thus placing the trustee in a position, which equity forbids, where his personal interests would conflict with the performance of his duty.²

Presently, although this non compensatory theory is still prevalent in England, the law in this country is well established that a trustee shall be reasonably compensated for his services in caring for a trust.³ This rule is applied whether the trust be administered by an individual or a corporation; whether the trust be inter vivos or testamentary, private or charitable.⁴ The courts' reasoning in repudiating the earlier law is based on the concept that any "laborer is worthy of his hire," and since compensation is generally provided for administrators, executors, and guardians, then trustees should also be awarded compensation.⁵

Notwithstanding the general acceptance of this law of compensation, a myriad of controversies and complexities has arisen in an attempt by various jurisdictions to arrive at some reasonable basis in awarding fees to trustees. The aim of the ensuing comment is not to embrace the many ramifications with which this topic is laden, but rather to apprise the reader of the several considerations which the courts entertain in establishing criteria on which to predicate the amount of compensation.

AGREEMENT BETWEEN THE PARTIES

One of the most important considerations in establishing the trustee's fee is the provisions in trust instruments wherein the settlor and trustee agree as to the amount of compensation.⁶ The provision either awards a particular amount or percentage of the estate or, not infrequently, the terms of the trust instrument provide merely that the trustee shall be "reasonably" compensated for his efforts. In the latter cases, the courts generally allow compensation after determining what would be a just and proper fee considering the time, attention, and labor devoted to the affairs

¹ *Cook v. Gilmore*, 133 Ill. 139, 24 N.E. 524 (1890); *Huggins v. Rider*, 77 Ill. 360 (1875); *Gilbert v. Sutliff*, 3 Ohio St. 129 (1853); *Boyd v. Hawkins*, 17 N.C. (2 Dev. Eq.) 160 (1832); *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457 (1830).

² *Cook v. Gilmore*, 133 Ill. 139, 143, 24 N.E. 524, 525 (1890).

³ 4 *Bogert, Trusts & Trustees*, § 974 (1948) containing a complete list of cases.

⁴ *Hart v. Taylor*, 301 Ill. 344, 133 N.E. 857 (1921); *In re Rothenberg*, 136 N.J. 530, 42 A. 2d 767 (1945); *In Matter of Hayden*, 175 Misc. 506, 24 N.Y.S. 2d 15 (1940).

⁵ *Schraver v. Frommel*, 183 Ky. 597, 210 S.W. 165 (1919).

⁶ *James v. Echols*, 183 Ark. 826, 39 S.W. 2d 290 (1931); *Croker v. Palm Beach Estates*, 94 Fla. 171, 114 So. 225 (1927).

of the estate.⁷ Where, however, a fixed amount or percentage is provided for, the courts encounter some difficulty in an endeavor to modify the amount agreed upon, such modification being necessary because of fortuitous circumstances which arise. For instance, upon the occurrence of facts which make the trustee's performance more cumbersome than it was at the time of the agreement, courts often award a greater amount than that agreed upon.⁸ In justifying such an increase in fee, the court in *Smith v. Stover* reasoned:

[T]he courts cannot put themselves in the place of the testator, and have no right to change the compensation fixed by the testator, except in case of an exigency, or an emergency. Such exigency or emergency must be of such a nature and character which threatens a proper administration of the trust, or endangers a full and complete carrying out of the testator's intention. If such an exigency or emergency is shown to exist, then the law is otherwise, and the court has authority to see that the will of the testator is properly carried out.⁹

The trustee, however, is entitled to this increment only if he has procured the agreement with the settlor without abuse of his fiduciary and confidential relationship.¹⁰ Thus, in *Lederman v. Lisinsky*¹¹ where a lawyer acting as trustee failed to make full disclosure and explanations regarding the trust, and because he had gained a personal advantage by such failure, the court compelled him to forego such advantage enabling the settlor to strike the alleged provision relating to the amount of compensation.

In some instances, the trust agreement provides that the trustee is to receive some particular benefit as a recompense for his services.¹² As a result, the query is posed as to whether the trustee is to receive such benefit in addition to, or in place of the benefit. Generally, in such cases, the benefit is inferred to be a gift in addition to the regular compensation unless there is evidence showing the contrary.¹³ A few jurisdictions, however, have construed such benefit as a gift in lieu of the trustee's compensation.¹⁴

The compensatory agreement in a trust instrument need not always

⁷ *Compher v. Browning*, 219 Ill. 429, 76 N.E. 678 (1906).

⁸ *Kaiser v. Second National Bank*, 123 Conn. 248, 193 Atl. 761 (1937); *Bankers' Trust Co. v. Forsyth*, 266 Mich. 517, 254 N.W. 190 (1934).

⁹ 262 Ill. App. 440, 443 (1931).

¹⁰ *City Bank Farmers Trust Co.*, 287 N.Y.S. 784 (1936).

¹¹ 112 N.Y.S. 2d 203 (1952).

¹² *Matter of Mason*, 98 N.Y. 527 (1885).

¹³ *National Bank of Commerce of Seattle v. Reinhardt*, 34 Wash. 2d 319, 208 P. 2d 857 (1949).

¹⁴ *Matter of Lewis*, 115 N.Y.S. 2d 791 (1952); *Matter of Cohen*, 128 Misc. 906, 220 N.Y.S. 509 (1927).

have its origin between the trustee and settlor. Hence, contracts between the trustee and the beneficiary fixing the amount of the compensation for trustees' services are permissible when entered into honestly and in good faith.¹⁵ If the amount fixed by the parties is *less* than that to which the trustee would have otherwise been entitled, considering the size of the estate, he is entitled to *no more* than that expressly provided for,¹⁶ and if the amount agreed upon is *more* than that which he would have otherwise received, he then also is entitled to only the amount stipulated in the agreement.¹⁷

STATUTORY PROVISIONS

Where no agreement is provided for as to what the compensation of the trustee shall be, statutory enactments are often applied in an attempt to realize some standardization in settling trustees' fees.¹⁸ Ordinarily, the statute provides for compensation at a certain percentage of the amount of income received and paid out by the trustee. This percentage is usually based on a sliding scale whereby a larger estate commands a smaller per cent and vice versa.¹⁹ In some states, although there are no statutes fixing fees for trustees, there are often provisions for compensation to executors and administrators. The courts in those jurisdictions have held that trustees are entitled to the same remuneration as the executor or administrator receives.²⁰

Still other jurisdictions have enacted provisions which do not establish a particular amount or percentage for compensation, but only provide generally that the trustee is entitled to a *reasonable* compensation.²¹ More particularly, In Illinois, the related statute stipulates:

That where a trustee or trustees shall hereafter act under any power or appointment given or created by any will, testament or codicil, and in such will, testament or codicil, except in case of trusts for charitable, religious or educational purposes, shall be contained no provision respecting the compensation to be allowed or paid such trustee or trustees, a reasonable compensation may be charged and allowed, demanded and collected therefor. . . .²²

In such statutes, where the particular amount of compensation is not set forth, the court will take various factors into consideration to deter-

¹⁵ In re Munsey's Estate, 163 Misc. 904, 298 N.Y.S. 140 (1937); Marshall v. St. Louis Union Trust Co., 209 Mo. App. 13, 236 S.W. 692 (1922).

¹⁶ In re Stenson's Estate, 143 Pa. 512, 18 A. 2d 678 (1941).

¹⁷ In re Buder, 358 Mo. 796, 217 S.W. 2d 563 (1949).

¹⁸ Consult Scott, Trusts, § 242, at 1,927 n. 4 (1956) for a listing of statutory provisions.

¹⁹ In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444 (1935).

²⁰ 3 Scott, Trusts, p. 1928, § 242.

²¹ Ibid.

²² Ill. Rev. Stat. (1957) c. 148, § 31.

mine the reasonableness of the fee; viz., the difficulty of the service rendered, the risks engendered by the administration of the trust, and the responsibilities imposed upon the trustee.²³

In conjunction with statutory provisions, banks and trust associations in some of the larger cities have compiled standard charges for administering trusts.²⁴ These charges are frequently computed on a graduated scale.²⁵

DISCRETION OF A COURT

In the absence of an agreement in the trust instrument or of any statutory provision definitely establishing the compensation of a trustee, the entire matter of such compensation is within the sound discretion of the courts.²⁶ Although the element of reasonableness is the underlying criterion in the courts' consideration of this problem, there are various components upon which different jurisdictions premise their conclusions in arriving at an equitable fee for the trustee.

One of the determining considerations employed by the courts is the success or failure of the trustee in caring for the trust. The court deciding *In re Vastine's Estate*²⁷ found that where in all substantial matters the management of the estate had been conducted skillfully and carefully, producing an excess of annual income over the usual earnings, the trustee should receive a greater allowance in return. In *Humphrey v. McLain*²⁸ the court declared that where the administration of a trust had resulted in an increase in value of the estate, this was to be considered in setting the fee for the trustee. Conversely, where in the services performed, the state sustained a loss, the Court asserted:

Losses in the business were perhaps inevitable during the period of the great depression, and it should be added that there was no evidence of willful violation . . . of his duty as trustee, but the fact remains that under his sole management the entire capital investment was wiped out. In determining whether the compensation which he claimed was excessive, we must consider the nature and results of his labor, the benefits, if any, which accrued to his beneficiary and all of the pertinent circumstances.²⁹

²³ *Rogers v. Belt*, 317 Ill. App. 81, 45 N.E. 2d 511 (1942).

²⁴ 4 Bogert, *Trusts & Trustees*, § 974, at 365 n. 22 (1948).

²⁵ *Ibid.* Several of the larger Chicago banks have set forth the following:

Income	Charge on Stocks and Bonds Per Cent	Charge on Mortgages Per Cent
First \$2,500	6	9
Next \$97,500	3	9
Next \$100,000	2¾	9
Next \$100,000	2½	9
Next \$100,000	2¼	9
Over \$400,000	2	9

²⁶ *In the Estate of Hanna*, 383 Pa. 196, 117 A. 2d 730 (1955).

²⁷ 190 Pa. 443, 42 Atl. 1038 (1899).

²⁸ 219 Ky. 180, 292 S.W. 794 (1927).

²⁹ *In re Patton's Estate*, 170 Ore. 186, 193, 132 P. 2d 402, 407 (1942).

Some jurisdictions look to the characteristics of the trustee regardless of the success or failure of the estate's administration. In *Weiderhold v. Mathis*³⁰ it was maintained that the negligence and irregularity of the trustee in discharging the trust were properly considered notwithstanding that the estate suffered no loss or diminution on that account. The character and powers of a trustee, the relation of such position to all the duties imposed, and the accompanying responsibilities are often recognized as the premise from which obligations to the trust arise and upon which the right to compensation is based.³¹ In *Follansbee v. Outbet*,³² where the trustee was an attorney, his ability, intelligence, and skill in the exercise of his duties were determining.

Some courts give approbation to an amount for compensation based on the time and work that the trustee expends in caring for the trust. In *Dunne v. Cooke*³³ the court declared that the amount or value of the estate would not be used to determine fees where the trustee took no active part in the business or in shaping its policy, nor in the management of the estate. On the other hand, where the trustee's duties were made more onerous due to inimical relationships between the parties, it was asserted:

From the record it clearly appears that certain of the beneficiaries of the trust estate are hostile to each other, are extremely litigious and faultfinding, and instead of cooperating with the trustees are antagonistic to them . . . their attitude and conduct toward the present trustees have greatly increased the latter's work and have made more difficult the handling of an estate already complicated by many problems. For such increased work the trustees are entitled to be reasonably compensated.³⁴

The nature and character of the trustee's duties are also considered whereby tasks involving judgment and discretion command a higher award than those which are merely ministerial.³⁵ In *Re Estate of Dorrance*³⁶ held that what the customary compensation was for "like work in a like area" would be a criterion in fixing an amount of compensation.

Another yardstick used in arriving at an equitable conclusion on the question of compensation is the relation of the fee to the value and income of the estate. In advocating such basis, the court asserted in *Phoenix v. Livingston*:

³⁰ 204 Ill. App. 3 (1917).

³¹ *Dunne v. Cooke*, 197 Ill. App. 422 (1916).

³² 182 Ill. App. 213 (1913).

³³ Authority cited note 31 supra.

³⁴ *In re Quinn's Estate*, 64 R.I. 322, 324, 12 A. 2d 275, 276 (1940).

³⁵ *Purdy v. Johnson*, 18 Cal. 310, 248 Pac. 764 (1926); *In re Taylor's Estate*, 281 Pa. 440, 126 Atl. 809 (1924).

³⁶ 186 Pa. St. 64, 40 Atl. 149 (1898).

The office of a trustee was at first deemed honorary and without compensation, but our statute changed the rule, and allowed compensation to executors, administrators, and guardians at a fixed percentage, to be computed upon all sums received and paid out. . . . To that we must therefore refer, and by that be governed in determining what allowance, if any, is to be made. Sums received and paid out are made the basis of computation.³⁷

Perhaps the last important consideration employed by courts in establishing trustee's compensation is the responsibility incurred by the trustee. In *In re Harrison's Estate*³⁸ it was decided that to fix compensation on a percentage basis was not adequate because a very small percentage which would seem reasonable might result in a large sum in gross suggesting a fee beyond what was adequate and fair to the trustee. On the other hand, a large percentage which apparently would be an excessive compensation might result in a small sum in gross which would disclose an unfair amount. Thus, the court concluded, the only safe rule to adopt and follow is to pay a trustee for the services performed and the liability incurred. In another case it was declared:

In states where there is no fixed statutory rate of compensation for trustees, it is usual to allow commissions for the ordinary service of trustees . . . and where exceptional circumstances show that the compensation reckoned in this way is too large or too small, the rate will be varied or another method of reckoning may be employed. The elements which determine proper compensation are the amount of risk and responsibility and the time and labor required of the trustee. . . .³⁹

CONCLUSION

The compensation of a trustee is not determined by any established practice of law, and unless provided for by agreement or statute, remuneration is peculiarly within the discretion of the courts. The compensation allowed, in light of the aforementioned criteria, is for the trier of the facts to decide, and his action will not be set aside unless arbitrary or capricious or, unless, unsupported by substantial evidence.⁴⁰ Since the judgment of the courts in such cases cannot be disturbed, parties contemplating a particular fee for the trustee's service should provide for a particular amount in the trust agreement.

³⁷ 101 N.Y. 451, 456, 5 N.E. 70, 71 (1886).

³⁸ 217 Pa. 207, 66 Atl. 354 (1907).

³⁹ Authority cited note 19 supra at 546, 447.

⁴⁰ Authority cited note 26 supra.

UNFAIR COMPETITION AND COMMON LAW TRADE-MARKS: STATE OR FEDERAL JURISDICTION?

Prior to the passage of the Trade-Mark Act of 1946,¹ protection afforded a person's unregistered brands was limited to an action for un-

¹ 15 U.S.C., §§ 1051-1127 (1948), referred to also as the Lanham Act.