

Explanation of SCPA § 2307: Executor Compensation

The Surrogate's Court Procedures Act ["SCPA"] is a collection of laws that govern procedures regarding wills, trusts and estate planning in New York. This includes rules for dispositions of real property, trials and hearings, orders and decrees, court fees, fiduciary compensation, and payments of debts owed after a person passes away. SCPA sections provide guidelines for these areas of the law, meaning that in some instances a person or his attorney may moderately deviate from these written guidelines. However, in some instances both client and practitioner must conform to the stated law at a minimum.

SCPA § 2307 outlines the statutory guidelines of "Costs, Allowances and Commissions" of fiduciaries other than Trustees. This includes your Executor, your chosen Representative who shall oversee the Probate process over your Last Will and Testament. A brief explanation of this Section follows. However, if you are having the attorney who drafted your Will serve as your Executor you should review SCPA § 2307-a.

When you pass away with a properly executed Last Will and Testament (which makes you the "**Testator**" of the will) you have named a specific person to serve as your Executor during the Probate process. The Executor (or if you choose more than one person to serve in this position, "Executors") often works with an attorney to pay off your debts, collect and distribute your property, and represent your estate against any parties who contest your Will. Unless you utilize trusts, or you do not have a Will (and your Probate estate passes through the process of "Intestacy"), your Executor may be required to perform extensive tasks to deal with your estate. Your Executor is entitled to compensation for these tasks, the guidelines for which are below.

Executors are only paid commissions based on "Testamentary Assets." Typically, this excludes assets that pass by (1) joint accounts and joint property, (2) retirement plan benefits, (3) life insurance proceeds, (4) "Transfer On Death" and "In Trust For" accounts, and (5) assets transferred by Living Trusts. You may appoint almost anyone to serve as your Executor, though some people (such as convicted felons) may not be permitted to serve in this capacity. The Surrogate's Court will either approve or disapprove your choice of Executor named in your will.

Lastly, the term "Executrix" has come to be thought of as the female equivalent of an "Executor." This is an unnecessary distinction: The term "Executor" is gender-neutral, therefore a Last Name and Testament naming a women as an "Executor" is equally as effective as naming her an "Executrix."

SCPA § 2307. Commissions of Fiduciaries Other Than Trustees

Subsection 1 – Reimbursement of Expenses and “Asset Management Fees”

This Subsection is the heart of the statute, and explains that an Executor is entitled to reimbursement for expenses he has paid to administer the Will prior to and during Probate provided these expenses are “reasonable and necessary,” such as court costs or legal requirements of the Executor – unreasonable expenses (such as requesting reimbursement from the gross estate to pay for an expensive lunch with beneficiaries of the Will) shall probably NOT be reimbursed to the Executor.

Also, this Subsection lays out the statutory guidelines for what commissions the Executor is entitled to for his work. The statutory guidelines are based on percentages of the total assets they must administer over. For this reason, I call these commissions “**Asset Management Fees.**” These fees are based on a sliding-scale, meaning that the larger the amount of assets going through Probate, the lesser the percentage the Executor receives. The guidelines are as follows:

- 5% for the **first \$100,000** probated (**\$0 to \$100,000**)
- 4% for the **next \$200,000** probated (**\$100,001 to \$300,000**)
- 3% for the **next \$700,000** probated (**\$300,001 to \$1,000,000**)
- 2 ½% for the **next \$4,000,000** probated (**\$1,000,001 to \$5,000,000**)
- 2% for **all additional assets** probated (**\$5,000,001 and Above**)

➔ The Executor receives ½ of this commission rate for assets collected, and ½ for assets distributed. Therefore, assets with large debts will lead to a lesser commission than a similar size estate with no debts.

- **EXAMPLE 1 – “No Debt Small Estate”**: An Executor probating an estate with \$200,000 of liquid assets passing by Will and no estate debts is an easy calculation: 5% for the first \$100,000 (\$5,000) plus 4% for the next \$100,000 (\$4,000). Half of this is received upon collection, half upon distribution. **TOTAL COMMISSION: \$9,000**
- **EXAMPLE 2 – “No Debt, Larger Estate”**: The amount being Probated equals \$6,000,000 and there are no estate taxes due to charities receiving much of the estate: 5% on the first \$100,000 (\$5,000) plus 4% on the next \$200,000 (\$8,000) plus 3% on the next \$700,000 (\$21,000) plus 2.5% for the next \$4,000,000 (\$100,000) plus 2% on the last \$1,000,000 (\$20,000). Again, half of this is received upon collection, half upon distribution. **TOTAL COMMISSION: \$154,000**
- **EXAMPLE 3 – “Large Debt, Small Estate”**: An Executor probating an estate with \$200,000 of liquid assets passing by Will receives \$4,500 for the amount collected: One Half of 5% for the first \$100,000 (\$2,500) and 4% for the next \$100,000 (\$2,000). He must then pay \$100,000 of credit card and medical expenses on the Decedent’s debts, leaving \$100,000 to distribute to beneficiaries; this would be One Half of 5% of the remaining \$100,000 (\$2,500). **TOTAL COMMISSION: \$7,000.**

- **EXAMPLE 4 – “Large Debt, Larger Estate”**: The amount being Probated equals \$6,000,000 and there are estate taxes, large accountant and attorney fees, broker fees on sale of real estate, payment of a lawsuit, and the amount being distributed is only \$4,000,000: One Half of 5% on the first \$100,000 (\$2,500) and 4% on the next \$200,000 (\$4,000) and 3% on the next \$700,000 (\$10,500) and 2.5% for the next \$4,000,000 (\$50,000) and 2% on the last \$1,000,000 (\$10,000), equaling \$77,000 for received property. Upon distribution of \$4,000,000 to beneficiaries the commission is One Half of 5% on the first \$100,000 (\$2,500) and 4% on the next \$200,000 (\$4,000) and 3% on the next \$700,000 (\$10,500) and 2.5% for the next \$3,000,000 (\$37,500), equaling \$54,500. **TOTAL COMMISSION: \$131,500**

Next, this Subsection goes on to explain what will happen if the Testator has decided not to work with a friend or family member to act as Executor. This happens with some regularity, since the Executor has a great deal of power over the residuary estate and may make decisions that lead to disagreements between him and the beneficiaries. If the Testator chooses to work with a Corporate Executor the Testator may (1) state in her Will what commissions the Corporate Executor shall receive to Probate the estate (and hope that some company will agree to those rates after the Testator dies), or (2) agree during the Testator's life to a Corporate Executor's commission rates. Corporate Executor Asset Management Fees are typically somewhat higher than the statutory guidelines outlined above.

One quick note: By default, an Executor who is required to distribute Real Property (I.e. Real Estate) does NOT receive a commission unless that property is actually sold. This default can be addressed by explicitly declaring in your Will that you would like your Executor to receive compensation for handling real property, even if it is not being sold.

Lastly, this Subsection explains that the Executor is permitted to half of their commissions for collecting the Probatable assets, and the other half of commissions for distributing the assets.

Keep in mind that any assets which pass through a living trust, a joint account, or assets passing by “operation of law” (such as life insurance policies) will NOT be considered probatable property, and will NOT be included for the sake of Executor “Asset Management Fees.” Also, if you have a relatively small estate that will not have to pay estate taxes and your Executor is your only beneficiary (perhaps he or she is your only child) your Executor may not want to be paid Asset Management Fees because these commissions are considered income (and are thus taxable) to the Executor.

Subsection 2 – Hard to Value Assets; Income and Dividends Collected by the Executor

This Subsection explains that assets passing through Probate that do not have obvious dollar values (such as jewelry or real estate) shall have their dollar amount approved by the Surrogates' Court for the sake of Asset Management Fees to the Executor. If the Executor has to collect rental income from real estate or dividends passing through Probate those funds will be added to the Probatable estate for the sake of computing commissions.

Subsection 2 also states that any “*specific legacy*” (Ex: “I give my gold earrings to my daughter Jane”) or “*devise*” (such as the transfer of real estate) are NOT commissionable. Thus, by default, an Executor will NOT receive a commission on real estate that is transferred to beneficiaries without being sold. Therefore, if a Testator wants his or her Executor to receive a commission regarding real estate in their estate his or her Will should (1) explicitly state that the Executor will receive a commission based on the real estate’s value, or (2) compel that the real estate should be sold upon his or her death.

Subsections 3 & 4 – “Guardians of the Person” (N/A re. Executors)

The Subsection concerns guardians, a fiduciary position not relevant to commissions an Executor typically receives. Guardians are appointed by the Surrogate’s Court for named beneficiaries or people who may have a right to the estate, but who cannot adequately represent their own interests, such as minors, disabled adults, or people who cannot be found during the Probate Process (in which case a “Guardian Ad Litem” will be appointed by the Surrogate’s Court).

Subsection 5 – Commissions for Multiple Executors

This Subsection covers multiple commissions for Executors of Wills or Trustees of Living Trusts. Remember that these are guidelines; if the Testator wants a different commission arrangement for multiple Executors she should spell out her desires in her Will.

If the value of assets passing through Probate is worth less than \$100,000 and there is more than one Executor:

- The Executors have to split the commission of one Executor based on the amount of services each Executor has provided for the estate.

If the value of assets passing through Probate is worth between \$100,000 and \$299,999:

- If there are 2 Executors, the Executors have to split the commissions of one Executor in half.
- If there are more than 2 Executors, the Executors may split commissions of 2 Executors (i.e. twice the statutory guidelines) based on the amount of services each Executor has provided for the estate UNLESS the Executors have a written agreement to split the commissions in a different percentage (but total commissions per Executor cannot exceed the amount due to one Executor).

If the value of assets passing through Probate is worth \$300,000 or more:

- If there are 1, 2, or 3 Executors, the Executors each get the statutory commission (i.e. three times the statutory guidelines, divided equally)
- If there are more than 3 Executors, the Executors have to split the commissions of three Executors based on the amount of services each Executor has done for the estate UNLESS the Executors have a written agreement to split the commissions in a different percentage (but total commissions cannot exceed the amount due to three Executors).

Subsection 6 – Executors Collecting Rent Due to the Testator

An Executor who is required or entitled to collect rent from properties owned by the Testator's estate is permitted to keep 5% of the rent actually collected. If there are multiple Executors they must split this 5% between them based on the services they provide to collect that rent.

I hope this has been helpful to you, and look forward to any questions or comments you have regarding improving your understanding of Executor fees as outlined in the SCPA.

Stay well,

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