

### **Explanation of SCPA § 2309: Trustee Compensation**

The Surrogate's Court Procedures Act ["SCPA"] is a collection of laws that govern procedures regarding wills, trusts, estate planning laws and Surrogate's Court proceedings in the state of 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 the default treatment for these areas of the law, meaning that in some instances, including compensation of fiduciaries, a person may deviate from these written guidelines.

**SCPA § 2309 outlines the statutory guidelines and default treatment of "Costs, Allowances and Commissions" specifically for Trustees. A brief explanation of this Section follows.**

It is important to remember that a Trustee is a "fiduciary", meaning that his interests are subordinate to the trust and the trust beneficiaries. **Though Trustees are NOT required to accept a commission, their services are very valuable.** Thus, a Trustee is entitled to receive payment for his services, but is liable for breaching his duties of care and loyalty to the trust and its beneficiaries. Either competent individuals or institutions may serve as Trustees.

Some trusts contain specific language as to how the Trustee will be compensated for his work, particularly if the Creator of the trust or the Trustee does not want to rely on the defaults described below. Because a person cannot be forced to be a Trustee, some leniency should be afforded to Trustee commissions: The advantage of specifically stating lower or default commission levels in a trust document is that the Trustee is forced to receive the stated commission rates if they decide to serve in that position. The downside is that if the initial Trustee refuses to serve in his position or can no longer attend to his duties a different Trustee may be hard to find if the commissions stated in the trust are untraditionally low.

The person who creates the trust can be known as the "Grantor", the "Settlor," or the "Creator." These terms had historical significance, but these differences are often ignored in trusts created today provided at least one term is used to designate who is establishing the trust. The Settlor of the trust ultimately decides how she wants her funds administered now and in the future, and it is the Trustee's job to follow those instructions.

One final note: Several Institutional Trustees require that a minimum fee be charged, no matter how small the investment in the trust. If a person plans on funding a long-term trust with minimal assets they should likely find a trusted friend or family member who will not charge a commission for his or her Trustee duties, as using an institution would greatly diminish the trust's assets.

**SCPA § 2309. Commissions of Trustees under wills of persons dying, or lifetime trusts established, after August 31, 1956**

**Subsection 1 – Reimbursement of Expenses and “Distribution Fees”:**

This Subsection explains that a Trustee is entitled to reimbursement for expenses he has paid for the benefit of the trust provided they are “reasonable and necessary,” such as court costs or legal requirements of the Trustee. Unreasonable expenses (such as reimbursement from trust funds to pay for lunch between the Trustee and a trust’s investment adviser) will not be reimbursed to the Trustee.

Also, this Subsection states that a Trustee is entitled to a commission of 1% of any trust principal distributed in the final year. So if a trust distributes \$50,000 to all beneficiaries in 2006 the Trustee is entitled to a \$500 commission for that year. I call these fees “**Distribution Fees.**” Keep in mind that these guidelines should be viewed as only a guideline of what a Trustee should charge: Parties can agree to different amounts.

**Subsection 2 – “Principal Fees”, Measuring Period of Principal and Commission Disputes by Beneficiaries:**

Section 2 notes annual commissions on principal that has not yet been distributed to the trust’s beneficiaries. I call these “**Principal Fees.**” Remember, this merely illustrates guidelines of what a Trustee can charge: Parties can agree to different rates.

- **(a) \$10.50 per \$1,000 on the first \$400,000 of principal**
- **(b) \$4.50 per \$1,000 on the next \$600,000 of principal**
- **(c) \$3.00 per \$1,000 on any principal over \$1,000,000**

So, for example, under these guidelines a Trustee administering a trust holding \$1,500,000 of principal could charge Principal Fees of \$8,400 for that year. A Trustee administering a trust with \$600,000 of principal could charge \$5,100.

The subsection then states that the amount of what constitutes “principal” can be determined at either the beginning or the end of the trust period. I call this the “**Measuring Period of Principal,**” since this period of time determines what Trustee fees the trust will distribute. If you are following these statutory guidelines and your trust will be distributing principal on a somewhat regular basis, it may be to the beneficiaries’ benefit to have the amount of principal to be determined at the end of the year.

Lastly, Subsection 2 states that any person with an “interest” in the trust (whether they are currently a beneficiary or may reasonably become a beneficiary in the future) may dispute the Trustee’s commission.

### **Subsection 3 – Source of Commission Payments:**

This provision states that commissions will be paid 1/3<sup>rd</sup> from trust income and 2/3<sup>rd</sup>s from trust principal UNLESS your trust provides otherwise. Some testators would rather have the full commission come from income in the hopes of decreasing income taxes, but this is often not beneficial if a corporate or institutional fiduciary is receiving Distribution Fees as outlined in Subsection 1. A Creator of a trust can discuss with his or her attorney how to minimize income taxes on the trust(s) while simultaneously attempting to maximize the funds remaining in the trust.

### **Subsection 4 – Trustee “Accountings”:**

A Trustee is only permitted to keep his commissions if he creates a statement of the financial activity of a trust. An Accounting is a document which shows all trust income, principal, dividends, distributions, unrealized gains, commissions and fees for that year.

Some simple Accountings may only require copies of bank statements provided to interested parties every few years. Other more lengthy (and expensive) ways of tracking financial changes in trust funds is by using a formalized “**Judicial Accounting.**” Judicial Accountings must conform to the requirements of the county’s Supreme Court or Surrogate’s Court in which the trust is administered. “Inter Vivos Trusts” (those created during life) often have minimal Accounting requirements with very little, if any, court oversight, especially if the trust is both created and overseen by the same person (typically the “Grantor”). Trusts created after death, also known as “Testamentary Trusts,” such as those created by a Last Will and Testament, are almost always required to follow the rules of Judicial Accountings. Additionally, the beneficiary of a trust may request that the Trustee “account” for current activity in the trust.

Creating formal Accountings can be a very time consuming process. Though some Trustees recommend performing Accountings annually, even when NOT required to do so by law, my experience has been that some institutions do this merely to enable them to charge additional Trustee fees. Therefore, a Trustee, with the direct assistance from their retained law firm, should only compile one accounting per year at most, and in many circumstances much less frequently, unless (1) compelled to do otherwise, (2) there is a reason to believe there has been financial misconduct, or (3) there is a death of one of the beneficiaries.

### **Subsection 5 – Charitable Trusts and Unitrusts:**

This Subsection covers charitable trusts and Unitrusts. Trustees are permitted a 6% annual commission from any income generated from such trusts, but no commissions on trust principal. Because of the complex nature of many charitable trusts, if you are creating a charitable trust we will hold a more in-depth explanation verbally.

## **Subsection 6 – Multiple Trustees / Co-Trustees:**

This Subsection describes commissions where there are multiple Trustees for a trust (“Co-Trustees”). There are many factors involved in determining compensation for multiple Trustees, many of which are based on which Trustee provides what administrative duties for the trust. Remember that no Trustee is required to accept a commission, even if the other Trustee(s) accept commissions. Please keep in mind that this is a brief explanation of this Subsection, and many caveats exist (which we can review further if you are interested).

### **Where there are two Trustees:**

- If the trust principal is less than \$100,000: Both Trustees must split one Trustee’s commissions as outlined in Subsections 1 and 2.
- If the trust principal is \$100,001 and above: Both Trustees are entitled to the commissions of a sole Trustee under Subsections 1 and 2, meaning that the trust may essentially be paying two full commissions instead of one.

### **Where there are more than two Trustees:**

- If the trust principal is less than \$100,000: All Trustees must split one Trustee’s commissions as outlined in Subsections 1 and 2.
- If the trust principal is between \$100,001 and \$400,000: The three Trustees share the commissions of two Trustees, apportioned based on each Trustee’s work (though no Trustee may make more than the equivalent of a sole Trustee’s commission). This means that the trust may pay as much as two full commissions instead of one.
- If the trust principal is over \$400,000: Each Trustee is entitled to a full commission, apportioned based on each Trustee’s work (though no Trustee may make more than the equivalent of a sole Trustee’s commission). This means that the trust may pay as much as three full commissions.

## **Subsection 7 – Commissions on Collecting Rental Income**

Where a Trustee is required to collect rental income on rental properties owned by a trust, the Trustee is entitled to 6% of the gross rents collected.

## **Subsection 8 – Commissions Based on Accumulating Trust Income**

If a trust is set up with the intention of accumulating income (in order for a later beneficiary of the trust to receive a larger distribution) there are additional commissions charged since, essentially, the Trustee is not being compensated for Subsection 1 “Distribution Fees.” These “**Accumulated Income Fees**” are included because by law they cannot be considered principal (thus avoiding “Principal Fees” as outlined in Subsection 2). These fees equal 2% on the first \$2,500 of accumulated income, and 1% thereafter.

### **Subsection 9 – Valuation of Property Not Specifically Held in Cash Form**

Any property owned by the trust which does not have a value that can be readily described in cash amounts (such as real estate owned by a trust) will be valued by the court in a cash amount for the sake of computing Subsection 2 “Principal Commissions.” For example, if you own a rental property, its fair market value will be considered in calculating trust principal.

### **Subsection 10 – Specific Compensation for Trustees Described in Testator’s Will**

Simply stated, if your Last Will and Testament describes how a “Testamentary Trust” Trustee will be compensated, then all of the previous sections are moot. The plus side of establishing commissions in your Will is that you can avoid all of the prior complexities of these Subsections in this statute. The negative side is that if your Trustee decides they no longer want to service the trust it may be hard to find a replacement if the compensation is too low.

### **Subsection 11 – Corporate Trustees**

This somewhat misleading Subsection states that Corporate Trustees may not be considered Trustees under the terms related herein unless they are one of the “Co-Trustees” listed under Subsection 6.

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

Stay well,

Daniel A. Timins  
Partner, Attorney of Law