ATTORNEYS' FEES AND FIDUCIARIES' COMMISSIONS IN ESTATE ADMINISTRATION IN CONNECTICUT

BY FRANK S. BERALL*

I. INTRODUCTION

This article initially analyzes Connecticut authorities dealing with fees and commissions in estate administration, followed by practical suggestions to persuade both beneficiaries and probate courts of the reasonableness of a fee.

II. LEGAL AUTHORITIES

Connecticut is one of the many states with no statute governing fiduciary compensation,[1] "The probate court has exclusive jurisdiction over the . . . determination of . . . fees . . . nor are there [any] official guidelines promulgated by the Probate Court Administrator. . . ." [2]

A. *Compensation Must Be Reasonable*

Except where an executor's compensation has been previously fixed,[3] Connecticut allows reasonable compensation for services rendered.[4]

"In some cases the compensation or the manner of computing compensation is fixed in advance, either by . . . will, by . . . agreement between the testator and the executor, or . . . between the fiduciary and all . . . beneficiaries. The right of a testator to fix by his will the compensation of his executor is generally recognized . . . [because of] testator intention, estoppel, election or implied contract."[5]

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* Of the Hartford Bar; Senior Topical Editor, Connecticut Bar Journal.

1 CONNECTICUT PROBATE PRACTICE BOOK (4th. Ed., Rev. 2000), Part I, Chapter IV, Page I-38, hereafter cited as PRAC. BK.

2 John Berman, *Compensation in Probate*, 1 CONN. PROB. L. J. 205 (No. 2, Spring 1986); hereafter cited as Berman. Judge Berman is a retired probate judge of the West Hartford Probate Court.

3 At least one case has ignored an agreement fixing compensation. Andrews v. Gorby, 237 Conn. 12, 675 A.2d 449, 13 Conn. L. R. 602 (1996) stated that where the attorney who drafted a will had named himself executor, the Probate Court could depart from the will's fee schedule and award him a lesser amount as reasonable compensation, with the burden of proof on the attorney to prove the reasonableness of the compensation by a preponderance of evidence. Subsequently, the Fairfield County Superior Court, acting on a remand, held an executor who incurs legal expenses to attempt to increase his fiduciary and thus his legal fees could not be reimbursed from the estate, because actions to obtain fiduciary or legal fees do not benefit the estate in any manner and thus must be a personal expense of the claimant. *Andrews v. Gorby,* 33 Conn. L.Rptr. 201, 2002 W.L. 31126312 (Conn. Super. Ct. 2002), *aff'd*. 78 Conn. App. 441, 826 A.2d 1267 (2003).

4 Berman, *supra*, note 2, p. 206.

5 Berman, *supra*, note 2, p. 211, citing Comment, *Executors and Administrators--Effect of Testamentary*

Connecticut courts are usually silent on the issue of whether a testamentary provision for compensation of the executor is binding on the probate court.[6]

"A Connecticut probate court would not be bound by a provision for compensation in a testator's will if there were facts or policies justifying departure from the provision such as objections by heirs or creditors."[7] The Department of Revenue Services "is not unaware of the more stringent position" of increased scrutiny of fees by the probate court.[8]

"The compensation of a fiduciary may be fixed by an agreement between him and other persons beneficially interested in the estate or between him and the testator.[9] In the case of an agreement between a testator and the executor named by him it is questionable whether the contract would be strictly enforced since one of the parties is dead.[10] This type of contract would also be subject to the same policy considerations as a will provision, such as the rights of creditors and satisfaction of heirs and beneficiaries.

"An agreement between those interested in the estate and the fiduciary may bind those parties but [not] the probate court . . . . [11] To the extent that it is relevant to the determination of reasonableness, the court takes into consideration whether those beneficially interested in the estate are satisfied with the manner in which the estate was handled and with the fees charged. An agreement between the parties might be evidence that the heirs and beneficiaries understood the fee arrangement.

"Most financial institutions which act as fiduciaries have formulated and published fee schedules. These published fee schedules are generally based on percentages of the value of the assets in the estate or of the income from a trust. Since the fees are published, it could be presumed that the testator, in naming the bank or trust company as executor or trustee of their estate or trust, was aware of its charges or was at least aware of the method of computing the fee."[12]

Provisions on Executor's Fees, 38 MICH. L. REV. 381, 385 (1940); hereafter cited as *Comment*.

6 *See* DiSesa v. Hickey, 160 Conn. 250, 278 A.2d 785 (1971) where the court did not reach the issue of whether it would be bound by a provision in the will fixing the fee of the executor at 15% of the estate's gross inventory, but held that this provision was not clear and, therefore, the executor was entitled to "reasonable" fees.

7 Berman*, supra,* note 2, at 212, citing *Comment*, *supra,* note 5 at 386.

8 GAYLE WILHELM, DEATH TAXES IN CONNECTICUT (3d Ed., 2005), § 2:34 , hereafter cited as DEATH TAXES.

9 37 C.J.S. *Executors and Administrators* § 870 (1942).

10 Berman*, supra*, note 2, at 211, citing *Comment*, *supra*, note 5, at 385.

11 Berman*, supra*, note 2, at 212, citing DiFrancesca v. Rousseau*,* 36 Conn. Supp. 33, 409 A.2d 1252 (1979); *In re Barnes Estate*, 20 Conn. Supp. 179, 129 A.2d 257 (1956). Appellant has no right to appeal as creditor of the estate from the settlement of the accounts where she entered into an agreement with the administrator and withdrew her objection to the will in return for a promise by the administrator that she would be taken care of for life.

12 Berman, *supra,* note 2, p. 212.

While these fee schedules are ordinarily accepted by most Connecticut probate courts (unless they are based on New York's statutory fees, which are usually considered excessive for Connecticut estates), at least one court stated that "use of a fee schedule by the fiduciary in and of itself is not approved by the court since it is constructed upon an assumption that the degree of services to an estate corresponds closely to the asset value of the estate, whereas each estate has its own peculiar problems, difficulties and requirements of skill and judgment."[13] Additional percentage charges in certain corporate fiduciary schedules, made for special services to the estate, such as managing and selling real estate, have been discounted, certainly in contested cases, whether by corporate or individual fiduciaries, relying on the reasonableness standard.[14]

The concept of reasonable compensation is discussed in *Hayward v. Plant,*[15] Connecticut's landmark case about executors' commissions and attorneys' fees. Reasonable executors' and administrators' commissions, as well as attorneys' fees in representing estate fiduciaries should be based on a combination of responsibilities assumed and services performed, both before and after being appointed or retained.

"[Thus, compensation is based on] what is fair in view of the size of the estate, the responsibilities involved [to all the beneficiaries], the character of the work required, the special problems and difficulties met in doing the work, the results achieved, the knowledge, skill and judgment required of and used by the executors, the manner and promptitude in which the estate has been settled, the time and service required, and any other circumstances which may appear relevant and material to the determination."[16]

"Special problems and difficulties . . . could justify higher fees. Examples . . . include difficulties in gathering the requisite heir information, marshalling estate assets, preparing real property for sale, handling disputed claims against the estate or on behalf of the estate, defending a will contest, and handling tax problems. [They] . . . often require more effort, expertise, administrative time and additional court hearings. . . . Results achieved are a factor but the fee should not be adjusted primarily on the basis of the results achieved without due consideration of other factors. . . ."[17]

Besides the above, dealing with closely held operating businesses, any difficulties obtaining their performance information, even before a fiduciary's appointment, his[18] expertise

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13 Wolfgang v. Cowell, 2 Conn. L. Rptr. 730, 1990 W.L. 283131 (Conn. Super. Ct. 1990).

14 DEATH TAXES, *supra*, note 8, § 2:34.

15 Hayward v. Plant, 98 Conn. 374, 119 A. 341 (1923).

16 *Id.* at 377, 119 A. at 345.

17 Berman, *supra,* note 2 at 206-207.

18 Author's note re use of gender terms: wherever the words "he," "his," "him." "man," "men" or comparable words or parts of words appear, they have been used solely for literary purposes in the interest of having a smooth reading text. No discrimination is intended nor should any be inferred.

in analyzing financial statements and handling assets requiring special attention, in the author's opinion should all be considered in determining reasonableness.

While the reasonableness standard is used as a benchmark when determining whether a claimed fiduciary fee is appropriate, the fee itself must be set "in good faith and . . . [justified] if its reasonableness is challenged by an interested party or the court . . . by complete and accurate records of all time spent and actions taken in carrying out his or her duties, so that charges can be directly related to the tasks performed."[19]

Hayward v. Plant's reasonableness standard also applies to attorneys' fees.[20] Although no Connecticut Supreme Court decisions address directly what hourly rates are reasonable for compensating fiduciaries and their counsel, the courts are willing to follow "established" practice.[21]

"Subsequent decisions of the Connecticut Supreme Court have left the rule of reasonable compensation for fiduciaries and *Hayward v. Plant*'s factor analysis firmly entrenched in Connecticut law. . . . [They have] been adopted by the courts in *The Rules of Professional Conduct* [*for Attorneys,* hereafter cited as *Rule*] and the Probate Practice Book."[22]

"A fiduciary may choose his own counsel . . . determine . . . [his] compensation, and the court will extend . . . [him] a certain amount of latitude in that regard." [23]

A rule of thumb used by many Connecticut probate judges is that a fiduciary's fee of less than 4% of the gross estate is presumed reasonable.[24] The 1995 Superior Court's decision in

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19 PRAC. BK., I-38, *supra,* note 1.

20 *In re Estate of Harry A. McQuillen, III,* 15 QUINN. PROB. L. J. 31 at 36 (Darien Probate Court 2000).

21 Rodenbach and Wilhelm (hereafter cited as Rodenbach), *Compensation of Fiduciaries and their Counsel in Connecticut*, 3 Conn. Prob. L.J. 295, 306 and 308 (1988).

22 Rodenbach, *supra*, note 21 at 300 and 302 (1988).

23 GAYLE WILHELM, SETTLEMENT OF ESTATES IN CONNECTICUT (2d Ed. 2005), hereafter cited as Wilhelm, ¶ 9:115 summarizing Connecticut law on fees, cites Hayward v. Plant, *supra,* note 15.

24 In Estate of Stella Macgonical, 7 Conn. Prob. L. J. 37 and 8 Conn. Prob. L.J. 212 (Stratford Prb. Ct. April 1993), the late Judge F. Paul Kurmay (who was also the Probate Court Administrator) applied the Hayward v. Plant standard in fixing the executors' fees and allowed the two individual executors $125,000. This was 3.9063% of the $3,200,000 Macgonial estate. In addition, Judge Kurmay allowed $60,000 in attorneys fees. The combined fees, totaling $185,000, were 5.7813% of that estate. "The legal fees incurred in contesting allowability were allowed because the Executors acted reasonably and in good faith and had the right to engage counsel." DEATH TAXES, *supra,* note 8, § 2:34.

Andrews v. Gorby,[25] according to *Wilhelm,*[26] was cited for the rule that executor's fees must be just and reasonable and stated that a provision in the instrument stipulating the amount or method of calculation of the fee is binding on a fiduciary and beneficiaries, that fee schedules are neither reasonable nor unreasonable *per se*. Percentage fees are not necessarily objectionable in all cases. Fee schedules are commonly used, without an explicit direction in the will, as a basis for computing reasonable compensation for an executor. In exceptionable circumstances the probate court may depart from the compensation schedule and award reasonable compensation. The court pointed out that judicial notice of human nature may be taken; namely, that most people considering their will do not give nearly as much attention, if any, to fiduciary compensation as they do to the disposition of their estate or minimizing taxes.

An award of fees according to the New York fee statute may not necessarily be consistent with Connecticut policy and law as to reasonableness. Thus, New York law, although incorporated into the compensation portion of a will, may violate the positive policy of Connecticut law under the standards of *Hayward v. Plant.*[27] These are also specifically incorporated into Connecticut's Probate Practice Book. Finally, courts should give deference to the statutory construction by the probate court.

Various percentage tables of minimum fees used as a guide by certain corporate fiduciary's associations, as well as the published schedules of individual banks, are generally accepted by probate courts as representing "reasonable compensation" in the usual case,[28] but "fiduciary [compensation and presumably that of their attorneys] still must be evaluated according to the reasonableness standards established by Connecticut case law."[29] Additional services of a fiduciary, such as for managing and selling real estate, overseeing and performing manual labor as well as rental management services may be compensated if within the *Hayward v. Plant* criteria.[30]

B. *Fiduciary And Attorneys' Fees*

"Legal fees incurred by the fiduciary in connection with the performance of duties owed to the estate are a personal expense of the fiduciary, but are reimbursable out of the funds of the

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[25] Andrews v. Gorby*,* 33 Conn. L. Rptr. 201, 2002 W.L. 31120312 (Bridgeport Sup. Ct., 1995), *aff'd* 78 Conn. App. 441, 826 A.2d 1267 (2003).

[26] WILHELM*, supra*, note 23.

[27] *Supra,* note 15.

[28] WILHELM*, supra,* note 23, ¶ 9:117. Examples of percentage fee charges and the courts' reactions are at Wilhelm, ¶ 9:118, mentioning that corporate executors have commonly and customarily charged fees of two or three percent of the estate, *See* Wolfgang v. Cowell*,* 2 Conn. L.Rptr. 730 (Stamford/Norwalk Sup. Ct., 1990).

[29] Berman*, supra,* note 2, citing in its note 36, Spencer v. Hartford Nat'l Bank*,* Conn. L. Trib., Jan. 3, 1983, at 14, 15 (Conn. Super. Ct. Apr. 27, 1982).

[30] WILHELM*, supra,* note 23, ¶ 9:120 through 9:123.

estate if reasonable and necessary."[31] Section 45a-294(a) allows "the executor his just and reasonable expenses in defending the will in the probate court, whether or not the will is admitted to probate."

If the defense is successful, however, the expenses of defending a will in probate or on appeal shall be charged pro rata against the beneficiaries' shares so that the residuary beneficiaries will not bear the entire expense.[32]

"The statute is unclear as to who bears the costs of litigation when the will is denied admission to probate and the executor takes an appeal which is unsuccessful. The statute seems to provide that the successful appellant and the unsuccessful appellee will be allowed the costs of maintaining and defending the appeal. However, the unsuccessful appellant will bear the expense of taking an appeal. Therefore, there should be an understanding among those who will profit from the appeal that they will be responsible for the expenses of taking the appeal. Of course, in all of these cases the probate court shall allow only the expenses which are just and reasonable.[33] Thus, the probate judge has discretion as to who will finally bear the expense of a will contest.[34]

"The probate courts' ruling on the allowance of any item in an account is subject to appeal to the superior court by one with standing, such as a creditor, heir or beneficiary of the estate. However, when the fees of an attorney, accountant or other provider of services for the fiduciary are disallowed, that provider has no standing to appeal from the probate court decree disallowing those fees. The provider of services must bring a civil action in superior court against the executor or administrator for relief. The obligation is a personal one and not an estate obligation. However, if the action is brought while the executor or administrator still holds that office, the superior court may order the amount of the claim to be paid wholly out of the estate."[35]

Attorneys who act as fiduciaries may receive reasonable compensation, but should separate their two roles in their time records.[36] Hourly rates for legal services should be reasonable, charged only for legal work, in proportion to the work involved and its value to the estate. Community practices should be observed and an adequate description of services rendered should be submitted.[37]

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31 WILHELM, *supra,* note 23, ¶ 9:124.

32 CONN. GEN. STAT. § 45a-294(c). *See* Berman, *supra,* note 2, at 210.

33 CONN. GEN. STAT. § 45a-294(a).

34 *See* Berman, *supra*, note 2 at 210.

35 *Id.*

36 PRAC. BK., ch. IV, II, § B, p. I-40. *See also,* WILHELM, *supra*, note 23, ¶ 9:125 and DEATH TAXES, §2:34, p. 2-82.

37 WILHELM, *supra*, note 23, ¶ 9:126.

"When an attorney acts only in the fiduciary capacity he is entitle to receive compensation based on the "reasonable" standard applicable to non-attorneys as enunciated in *Hayward.* A different standard applies to the fee of an attorney who is acting as legal counsel for the estate. . .

"When accounting for time spent the fiduciary of an estate should describe the tasks performed, indicate whether or not he is an attorney,[38] and distinguish between the legal and nonlegal services performed. Paraprofessional and secretarial services, should be billed separately. The court of probate, when examining fees, allows the attorney's hourly rate only for legal services performed. Thus, a lawyer who is also acting as the fiduciary, or a lawyer who is performing all of the administrative tasks for the named executor, should handle an estate in a cost efficient manner using paralegal or other staff assistance for administrative duties not requiring legal expertise. These duties include balancing the checkbook, paying bills and marshalling the assets. If the attorney performs this myriad of tasks he should be prepared to allocate his time among the various types of duties recognizing that some tasks are compensated at a higher hourly rate than others."[39]

"Legal fees incurred by the fiduciary . . . [of an] estate are . . . reimbursable out of the ... estate if reasonable and necessary. . . . [Their] reasonableness . . . [is] addressed by the Probate Court in . . . [an] accounting . . . ." [40]

"In determining . . . whether attorneys' fees are reasonable and proper and therefore the fiduciary entitled to reimbursement, the usual rule is '*quantum meruit'*. The Probate Court's determination should be based upon consideration of a variety of factors, generally those set forth in *Hayward v Plant* [41] with respect to executors and Rule 1.5 of the Connecticut Rules of Professional Conduct." [42] The use and utility of 'time sheets' continues to be explored by the probate courts." [43]

Among Rule 1.5's pertinent factors justifying the reasonableness of attorneys' fees are essentially a broadened restatement of *Hayward v. Plant.* [44] They are "(1) The time and labor

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38 "The common law rule was that a fiduciary could not make payment to himself for legal services. Connecticut has abandoned that common law rule by practice, although there is no case or statute to support it. Forger, *Report of Committee on Fees and Commissions in Probate Proceedings*, 103 TRUST AND EST. 935, 936 (1964). Berman*, supra,* note 2 at 208, note 13.

39 Berman*, supra*, note 2 at 208-209.

40 WILHELM*, supra*, note 23, ¶ 9:124.

41 *Supra,* note 15.

42 Hereafter referred to as "Rule."

43 WILHELM*, supra*, note 23, ¶ 9:125, p. 9-58.

44 *Supra,* note 15.

required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charges in the locality for similar legal services; (4) The amount involved and the results obtained; . . . [and] (5) The time limitations imposed by the client or by the circumstances; (6) The nature and length of the professional relationship with the client; (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) Whether the fee is fixed or contingent."

However, fees for representing fiduciaries administering estates and trusts should rarely, if ever, be contingent, except for a wrongful death suit or a similar claim normally handled on a contingent fee basis. Then it should be only for that claim, not for any other estate administration work, and only those tax matters for which contingent fees are permissible under Circular 230.[45]

"If the fees are perceived as unreasonable the court frequently suggests a fee which would be acceptable without scrutiny, which also provides the opportunity for the larger fee to be accepted at the option of the attorney's fiduciary. The length of time spent in administering an estate or trust is an important factor in considering fees although not necessarily a controlling one. The judge may also require an affidavit of the tasks performed and the rationale for the apparently high fees. If the estate involved work which was not apparent from examining the file, the fees will be allowed if the fees then fall within the standards of reasonableness as perceived by the judge. Most judges consistently apply their own method of determining reasonableness. Many courts will alert attorneys and fiduciaries that the fees set forth in the Succession Tax Return appear high so the issue can be resolved prior to filing the final account."[46]

Where there are two or more fiduciaries, separate awards of reasonable compensation will be made to each one, based upon his services.[47] Courts then may give a disproportionate amount to an active as opposed to an inactive fiduciary, even if this increases the costs to the estate.[48]

C. *Determining An Attorney's Hourly Rate And The Reasonableness Of His Compensation*

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45 I.R.S. Circular 230, § 10.27(c)(3) permits "[a] contingent fee . . . for preparation of or advice in connection with an amended tax return or a claim for refund (other than a claim for refund made on an original tax return), but only if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended tax return or refund claim will receive a substantive review by the Internal Revenue Service."

46 Berman, *supra*, note 2 at 209.

47 *See* DEATH TAXES, *supra*, note 8, § 2:34, p. 2-82.

48 Stevenson v. Moeller, 112 Conn. 491, 496, 152 A. 889, 891 (1931); Hayward v. Plant, 98 Conn. 374, 385, 119 A. 341, 245 (1923).

The hourly rate of an attorney "is usually a function of professional credentials and experience. This method does a good job taking into account 'time and service' and even factors like 'knowledge, skill and judgment,' 'special problems and difficulties,' and 'character of work' to the extent these are reflected in the use of timekeepers with different training and experience and hourly rates for different types of work." [49]

Estate of Marie D. Fach[50] noted that it "is an accepted fact that attorneys' fees for services vary greatly from one area of this state to another [and the law firm that represented the estate in the *Fach* case] maintains the highest rating possible in the Martindale Hubbell Law Directory."[51] Both of these factors were noted in connection with the list of criteria described in the Connecticut Rules of Professional Conduct as determining the reasonableness of legal fees."

"An attorney's charges will be based upon time spent, the complexity of the work and other criteria . . . ." [52] Thus, pertinent factors in determining reasonableness of legal fees are "the time and labor required . . . and the skill requisite to perform the legal service properly . . . [as well as] the experience, reputation, and ability of the lawyer or lawyers performing the services. [Furthermore,] as counsel to an estate, he or she owes a duty not alone to the fiduciary but also to the court of probate, the beneficiaries, and other interested parties. . . . [H]is or her responsibilities are correspondingly extensive." [53]

"Many attorneys request additional fees for extraordinary results not fully covered by time compensation . . . where extraordinary service or results are rendered or obtained. Special compensation is well rooted in the compensation law of fiduciaries and their counsel." [54]

"The attorney for an estate often finds himself or herself spending substantial additional and arguably unnecessary time . . . arguing with a client [fiduciary] as to an undoubtedly proper

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[49] Rodenbach, *supra*, note 21, at 306.

[50] Estate of Marie D. Fach, 8 Conn. Prob. L .J. 10 (Prbt. Ct. District of Essex, Jan. 6, 1993).

[51] WILHELM, *supra,* note 23, in an example at § 9.125, quotes Probate Judge McManus' statement in the *Fach* case. *See also,* DEATH TAXES, *supra,* note 8, § 2:34, p. 2-84, where it is pointed out that "the court noted with some dismay that many of the entries in the computer records (such as 'estate administration') did nothing to help the court determine the nature of the services, and also criticized selection of a minimum time component of 15 minutes [, found the attorneys' fees reasonable but disallowed] . . . various disbursements which it considered part of law firm overhead (word processing, late night taxi, in-house messengers, night restaurant, photocopying, LEXIS, telephone). It also considered relevant that the proposed legal fees were not challenged by the D.R.S. or the I.R.S.… [T]he court determined that a substantial amount of these ordinary fiduciary services had in fact been provided by counsel and reduced the fees of the Bank of New York accordingly," pointing out that since the fiduciary's preparation of the federal and state death tax returns and the probate accounting had been delegated to counsel, these costs should not be included in the fiduciary's fee. However, in this author's opinion, photocopying, LEXIS, and telephone charges should have been allowed here, since ABA Formal Opinion 93-379, *infra*, note 65, next to last sentence, allows them.

[52] PRAC. BK., *supra,* note 1, Part I, Ch. I, p. I-4.

[53] PRAC. BK., *supra*, note 1, Ch. IV, II. B, pp. I-39 and 40.

[54] Rodenbach, *supra*, note 21, at 308-310. *See also,* Berman, *supra*, note 2 at 207.

legal course of action. When the bill is submitted, particularly if it includes time sheets and a description of services, it can at first blush appear unconsciously [sic] large for the result accomplished. At the time of the accounting the attorney would be well advised to submit to the court an Affidavit of Services explaining why the legal fees are larger than usual." [55]

Apostle v. Bumster[56] involved disputes between co-executors, one of whom was also the estate's attorney. The Superior Court pointed out that: "[s]ettling these disputes at times required the intervention of the Probate Court with resulting delays and incurring additional costs to the estate.

"Other delays and expenses resulted [because of a will contest, and various matters. The court held that] much of the delay in the probating process was directly attributable to the plaintiffs' determination to control the day-to-day procedures of the probating process, and failure to accept [the] attorneys' legal opinions regarding the probating and tax procedures." [56A]

Accordingly, the court found the attorneys' fees to be reasonable, "taking into consideration the size and complexity of the estate,[57] the obstacles raised by the [co-executor] that prolonged the probating process and the lack of complete cooperation on the part of the [co-executor] in the efficient and expeditious conduction of her executrix' duties." [57A]

Wilhelm[58] says, "[T]he time and effort an attorney is required to expend in providing legal services to a fiduciary who, for whatever reason, requires such attention, is a factor which needs to be taken into account under both the standards set in *Hayward v Plant*[59] and the principles of the Rules of Professional Conduct." *Wilhelm* summarized the law concerning fiduciary and attorney's fees as it existed in 1988 and then continued with "brief digests of a number of cases, generally those decided since that date . . . ." [60]

D. *The Model Rules of Professional Conduct and the ACTEC Commentaries on Them*

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55 WILHELM, *supra*, note 23 at § 9.124.

56 Apostle v. Bumster, 2000 W.L. 961368 (Conn. Super. Ct. 2000).

56A *Id,* note 56.

57 Citing the Connecticut Supreme Court's opinion in Andrews v. Gorby, 237 Conn. 12, at 23 (1996), *supra*, note 3.

57A *Supra*, note 56.

58 WILHELM, *supra*, note 23, at the end of § 9:125.

59 Hayward v. Plant, *supra,* note 15.

60 DEATH TAXES, *supra*, note 8, § 2:34, pp. 2-77 through 2-85. The most important cases have already been covered in this article.

Connecticut adopted the ABA's Model Rules of Professional Conduct (hereafter MRPC) October 1, 1986. MRPC 1.5 dealing with fees says nothing about fees for fiduciary representation. However, the ACTEC[61] Commentaries on MRPC 1.5 have several points of note. They provide that these fees "may be established in a variety of ways provided that the fee ultimately charged is a reasonable one taking into account the factors described in MRPC 1.5(a)."[62] These are quite similar to those set forth in *Hayward v. Plant*[63] and the language of the Probate Practice Book.[64]

The ACTEC Commentaries go on to point out that fees in trust and estate "matters frequently are primarily based on the hourly rates charged by the attorneys and legal assistants rendering the legal services or upon a mutually agreed upon fee determined in advance. Based on the revisions to MRPC 1.5 (Fees) in 2002, unless the lawyer has regularly represented the client on the same basis or rate, the lawyer must advise the client of the basis upon which the legal fees will be charged and obtain the client's consent to the fee arrangement. As revised in 2002, the rule also requires a lawyer to inform the client, preferably in writing, before or within a reasonable time after commencing the representation, of the extent to which the client will be charged for other items, including duplicating expenses and the time of secretarial or clerical personnel. Any changes in the basis or rate of the fee or expenses shall be communicated to the client.[65] Basing a fee for legal services solely on any single factor set forth in MRPC 1.5 (Fees) is generally inappropriate unless required or allowed by the law of the applicable jurisdiction. In recent years courts in several states [but not Connecticut] have, in effect, prohibited or seriously limited the use of fees based upon a percentage of the value of the estate."

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61 ACTEC is an acronym for American College of Trust and Estate Counsel, publisher of the *ACTEC Commentaries on the Model Rules of Professional Conduct,* 4th ed. 2006.

62 These factors are: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." ACTEC Commentaries on the Model Rules of Professional Conduct, 4th ed. 2006, p. 62 and 63, hereafter *ACTEC Commentaries*.

63 Hayward v. Plant*, supra*, note 15.

64 *Supra,* note 1.

65 ABA Formal Op. 93-379 (1993) "articulates more particularly the duties of a lawyer to disclose the basis of fees and charges as provided in MRPC 1.5. In addition, in matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time that she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour). A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping and office; however, the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services provided in house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonable reflects the lawyer's actual cost for the services rendered. A lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cots of the third-party services."

However, an attorney who had previously represented a corporate fiduciary on unrelated estate matters was not required to have a written fee agreement for representation of same corporate executor of a new estate.[66]

"Most states allow a lawyer who serves as a fiduciary and as the lawyer for the fiduciary to be compensated for work done in both capacities. However, it is inappropriate for the lawyer to receive double compensation for the same work."[67]

"Under the majority view, a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship only with the fiduciary and not with the fiduciary estate or the beneficiaries. In this connection note that a distinction should be drawn between the duties of a lawyer who represents a fiduciary in the fiduciary's representative capacity (a 'general' representation) and the duties of a lawyer who represents the fiduciary individually (i.e., not in a representative capacity)." [68]

III. PRACTICAL SUGGESTIONS TO PERSUADE BENEFICIARIES AND COURTS OF THE REASONABLENESS OF A FEE

A. *Submit Engagement Letter to Probate Court for Advance Approval. if in Litigation*

When an attorney is retained in a probate matter being litigated, it might be advisable to submit his engagement letter to the probate court for advance approval. But bear in mind that opposing counsel (who must be given a copy of anything filed in the court in a contested matter) may then object to some of its terms.[69]

B. *Fees Affidavit*

Before submitting an estate's interim or final account to a probate court, the attorney should consider sending a copy to each beneficiary. If the estate was unduly complex and either required more time than usual or a greater degree of skill in dealing with tax or other legal problems, it would be wise to send a fees affidavit, too. This could summarize the attorney's time sheets, showing his hourly rate and those of other lawyers and legal assistants who worked on the estate. The information may keep beneficiaries from being unduly upset if the fees seem excessive.

If it appears necessary, a complete printout of the firm's time records, showing the details of all services performed and time spent in administering the estate, should be sent. Many judges

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66 Connecticut Ethics Op. 00-22 (2000).

67 *ACTEC Commentaries*, p. 63, *supra,* note 62.

68 Reporter's Note to the First Edition of *ACTEC Commentaries*, p. 2.

69 These points were suggested to this author by Attorney Douglas R. Brown of Brody, Wilkinson and Ober, P.C., Southport, CT.

are interested in reviewing the attorneys' time and service records, especially if they are higher than the particular judge's guidelines or where a beneficiary objects to fiduciary or attorney fees. Even if no objection is made, the probate judge may ask for a fairly detailed explanation of what benefit the attorney's and/or fiduciary's services were to the estate.

C. *Affidavit of Extraordinary Services*

If the attorney's fees have exceeded a 5% guideline, the fees affidavit enables the probate judge to understand why this occurred. However, to help justify a fee in excess of the guidelines, it would also be wise either to file an affidavit of extraordinary services with the court or describe these services in the fees affidavit. This or these affidavits should accompany a copy of the account, which should probably be sent to each residuary beneficiary, explaining any difficult collection and legal matters, problems in dealing with one or more beneficiaries, other controversies and tax problems that led to any time consuming audits with the Internal Revenue Service or the Department of Revenue Services, particularly if tax litigation ensued and there was a substantial tax saving.

D. *Bonanza Fees*

Ordinarily, limiting fees to 4% to 6% of the estate may be not entirely fair to the attorney who did extensive work. In such cases a fee higher than his usual hourly rate should be considered, at least on these matters. But this should be agreed to in advance by the beneficiaries, probably in another engagement letter. If the attorney's efforts save the estate substantial taxes or enable it to recover or save other large sums or valuable property, even a percentage fee should be considered. Again, this should first be discussed both with the fiduciary and the residuary beneficiaries, allowed in the tax audits and approved by the court. If it was not mentioned in the original engagement letter, a supplemental one should be sent to the fiduciary.[70]

E. *Beneficiaries' Consents And Requests That The Court Not Require Their Appearance*

If a beneficiary has no objection to the fees and approves the account, he should sign a request that the court approve it. This should be sent to the court by the attorney, accompanying the account. If all beneficiaries consent to the fees and approve the account, in the interest of saving time and costs the attorney should consider requesting the court not to require anyone to appear at the hearing on the account.[71]

F. *The Legal Fee Should Be Reduced If An Outside Accountant Is Used*

Professional fees paid for services normally performed by an attorney should reduce his legal fee. Similarly, when a percentage fee is being charged or a corporate fee schedule used, the

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[70] The beneficiaries are not the attorney's clients. *Supra*, text preceding notes 53 and 68.

[71] Samples of a beneficiary's and an attorney's requests are attached to this article as appendices. The former is Probate Form PC-245 (BBS), New 10/98.

fee should include all probate work, as well as preparation of all federal and state income and estate tax returns. Thus, the cost of any outsourced work should be subtracted from the corporate fiduciary or the attorney's fee. The former may resist the reduction, even though tax returns, inventories or accounts are prepared (not just audited) by the fiduciary's attorney.

Thus, if an attorney uses an outside accountant (not an employee of his firm) to prepare any income or estate tax returns or the probate account, the attorney's fee should be reduced by the accountant's, so their combined fees do not exceed the amount of an attorney's fee for doing all work.

G. *Occasional Problem In Using The Decedent's Family Accountant*

Occasionally, the fiduciary or the decedent's family insists that the family's personal or business accountant be used to do the tax returns (even the decedent's final one); this collaboration frequently takes more of the attorney's time (in addition to the time of the accountant) than if his paralegal did everything under his supervision. The problem is that many otherwise excellent accountants have little knowledge or experience with estate or fiduciary income taxes. Even the attorney's coordination of his work with that of the accountant takes extra time and increases the possibility that something may be overlooked by both professionals, because each expected the other to handle it.

H. *Investment Counsel*

The use of investment counsel is entirely different. No attorney should give investment advice unless specially qualified. While he should ascertain the estate's cash needs, advising which estate securities to sell to raise cash and handling any reinvestment during estate or trust administration is not legal work. It should be done by the corporate fiduciary or else independent investment counsel, where there are only one or more individual fiduciaries, none of whom are qualified as such.

Thus, investment counsel work should be separately compensated for, without reducing the legal fee. Where the executor is a corporate fiduciary, barring a contrary will provision, the latter will normally handle liquidation of the decedent's assets and any reinvestments. If there is to be reinvestment during estate administration, this should have either been explicitly authorized by the will, appropriate provisions of the Fiduciary Powers Act[72] should have been incorporated therein or else probate court approval should be obtained.

I. *Lay And Inexperienced Fiduciaries*

Where a lay fiduciary, such as a surviving spouse, does little but sign papers, dispose of tangibles and clean the decedent's house, he should receive only a relatively small fee. This could be based on his time spent at a rate comparable to what would be charged by an outsider for the various tasks performed and the responsibilities assumed. The attorney no doubt will have to put in far more time administering such an estate than if the fiduciary was sophisticated. Thus, the attorney should be compensated accordingly.

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[72] CONN. GEN. STATS. §45a 234(3).

Many attorneys or their legal assistants spend considerable additional time straightening out bank accounts and preparing an inventory. Among other occasions when this may have to be done are when an inexperienced fiduciary insists on keeping the estate's checkbook, or may have made deposits into a joint account or paid debts or the funeral bill either from it or used his own funds, perhaps before the attorney was retained. Uncashed checks belonging to the decedent or his estate may have been deposited without being properly recorded, instead of being held to be turned over to the attorney to identify their source, nature and whether they are pre-death or post mortem items. Reimbursements may be due the surviving joint tenant or some other payer of funeral expenses or debts.

To avoid these problems, lay fiduciaries should be encouraged to turn over all receipts to the attorney's legal assistant. All bills should be paid from the estate's account, even if this causes a delay in their payment. The legal assistant should keep the estate's checkbook, reassuring the fiduciary that the latter's sole signature authority gives him complete control over all funds. All checks are to be signed by him and should be accompanied by a written explanation (usually the bill itself is enough) from the legal assistant. Thus, the decision to sign it remains the fiduciary's. This procedure will avoid much otherwise wasted time in subsequently reconstructing deposits and withdrawals and balancing the account.

J. *Geographical Differences In Attorneys' Fees*

Attorneys' fees for the same work, degree of difficulty and time involved are the highest in Greenwich and most other towns in western Fairfield County, are somewhat less in eastern and northern Fairfield County, a bit lower in Litchfield and New Haven Counties, perhaps drop further in Hartford County and are at their lowest in eastern Connecticut. Thus, one of the keys as to how much can be charged depends upon where in Connecticut the estate is being probated. Furthermore, depending on the personality and reputation of the probate judge (who ultimately will be passing on the fee) it might be wise to discuss the matter informally with him or even his probate clerk.

While many probate judges use the 5% rule as a starting guideline, they may also look at the hours spent. In eastern Connecticut, where hourly rates are less than in Fairfield and other counties, they may look at the particular attorney's hourly rate. Some of these eastern Connecticut probate judges believe that there should not be rate differentials between the attorney's representation of a Fairfield County estate and one in New London County. Thus, they may allow a western Fairfield County attorney to use his regular hourly rate in representing an eastern Connecticut estate. [73]

K. *Where The Fiduciary Is Also The Estate's Attorney*

A number of probate courts look at a fiduciary who is also acting as his own attorney (a perfectly proper thing to do) as being only entitled to a lower fee for work as a fiduciary than as an attorney. While dealing with tax problems should be billed at the attorney's normal hourly

[73] Observation by New London Probate Judge, Matthew H. Greene.

rate, any paralegal, secretarial and similar work done by an attorney should be billed at lower than his normal billing rate. Separate records should be kept of the time spent in each capacity.

But to the extent that an attorney, possibly acting as a fiduciary, deals with complex nonlegal issues, such as learning the best ways to sell collections, dispose of artwork and prepare for auctions, such tasks might be worth charging at his hourly rate for legal work or close to it.

IV. CONCLUSION

In the absence of statutory fees or any other uniform method for determining the fee for serving as attorney for a fiduciary or for the latter's commission, the above general guidelines can be supplemented by whatever value the attorney believes his services added to the estate in saving taxes or obtaining higher prices at auctions or otherwise disposing of property. Both attorneys' fees and fiduciary commissions must be based on the reasonable value of the services performed. Different hourly rates should be used for work of varying degrees of difficulty.

Keeping the client informed throughout estate administration is quite important. Then, prior to filing any account in court, a copy of it should be sent to all the residuary beneficiaries to try to obtain their approval and if they approve, the judge should be requested that no one be required to appear at the hearing. In the end, fees must be approved by the probate judge.

While inter vivos trusts are not normally under probate court supervision nor do they require a court accounting, the trustee and his attorney should nonetheless observe the above mentioned practices followed by probate estates in determining the trustee's and legal fees.

APPENDIX A

APPENDIX B

REQUEST THAT NO APPEARANCE BE REQUESTED AT PROBATE HEARING ON AN ACCOUNT[74]

[date]

The Honorable Judge
_____Probate Court

Re: Estate of

Dear Judge :

Enclosed are:

1. The Return and List of Claims;

2. The Final Account for the above estate;

3. An affidavit explaining the services justifying the attorneys' fees claimed and our complete time and service records kept during this estate administration; [such an affidavit and records are ordinarily not needed] and

4. Requests from [insert number of] beneficiaries indicating that they have looked over the account, have no objections to it and do not plan to appear either in person or by attorney at the hearing.

As you can see by these requests, the beneficiaries do not object to our fees.

Under the circumstances, I respectfully request that our firm not be required to appear, so as to save time and costs.

Very truly yours,

Frank S. Berall

FSB/jnd
Enclosures

[74] This is the author's own form.