

# GUIDELINES FOR ASSESSING REASONABLENESS OF FIDUCIARY COMPENSATION

## Introduction & Scope

These guidelines are intended to assist the court, fiduciaries, and interested persons in evaluating whether a fiduciary's compensation is reasonable. Because the services fiduciaries provide must be tailored to the needs of the individuals they serve, a one-size-fits-all regulatory approach to fiduciary compensation is not practical. Requiring the use of predetermined times to perform specific tasks would result in overcharges in less complicated cases and, in more complicated cases, would place too large an economic burden on the fiduciary obligated to perform the task. Similarly, a predetermined rate schedule would not take into account the varying education, training, and skill of individual fiduciaries or the responsibility and risks fiduciaries assume in different cases. As a result, what constitutes reasonable fiduciary compensation must be evaluated on a case-by-case basis. *See In re Estate of Gordon*, 87 P.3d 89, 207 Ariz. 401 (App. 2004).

Because every case is different and because every fiduciary has unique qualifications, these guidelines set forth only general principles rather than rigid rules. All principles should be considered when assessing whether a fiduciary's compensation is reasonable in a particular case, and no factor should predominate or be given undue weight. *Cf. Schwartz v. Schwerin*, 85 Ariz. 242, 245-46, 336 P.2d 144, 146 (1959) (discussing factors to be considered when determining reasonableness of attorney fees). Thus, above all, the totality of the circumstances should be taken into consideration. However, the court, in its discretion, may assign more or less weight to any of the factors.

The guidelines are intended to apply only to compensation of court-appointed fiduciaries, specifically guardians, conservators, and personal representatives. Compensation paid to trustees, which is governed by Arizona Revised Statutes section 14-10708, and compensation paid to agents under powers of attorney are beyond the scope of these guidelines because the amount or rate of compensation paid to such fiduciaries may be set forth in the terms of the trust or power of attorney.

These guidelines are intended to apply regardless of whether the fiduciary is a professional fiduciary.<sup>a</sup> However, due to the unique role and nature of professional fiduciaries, certain portions of these guidelines necessarily will apply only to them and will not apply to non-professional fiduciaries.

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<sup>a</sup>For purposes of these guidelines, the phrase *professional fiduciary* means a fiduciary who is licensed pursuant to Arizona Revised Statutes section 14-5651 or who is a financial institution as defined in section 14-5651(K).

## Guidelines

### 1. Fiduciaries are entitled to reasonable compensation for their services.

Court-appointed fiduciaries are entitled to “reasonable compensation” for the services they render. Ariz. Rev. Stat. §§ 14-3719 (personal representatives), and -5314(A) (guardians), -5414(A) (conservators); *see also* Ariz. Rev. Stat. § 14-10708 (A) (stating that trustees are entitled to reasonable compensation). The determination of whether a fee is “reasonable” cannot be made simply by applying a mathematical formula in a vacuum. By definition, “reasonable” is a subjective and relative term. *See Black’s Law Dictionary* 1265 (6<sup>th</sup> ed. 1990) (defining the term *reasonable* as “fair, proper, just, moderate, suitable under the circumstances[,] [f]it and appropriate to the end in view”).

When assessing what constitutes “reasonable” compensation for a fiduciary, one must consider the responsibilities and risks assumed by the fiduciary, regardless of whether the fiduciary is a professional fiduciary. Guardians are charged with making life-and-death decisions for someone else. Legally, they are the equivalent of a parent. *See* Ariz. Rev. Stat. § 14-5312(A). Thus, guardians are required to perform functions unlike any other service provider, with the possible exception of medical and health care providers. Similarly, conservators and personal representatives are responsible for managing someone else’s financial affairs. In the case of a conservator, that someone else is a person who, as a result of some disability, is unable to manage the person’s own financial affairs. Thus, guardians and conservators often are exposed to liability from a variety of sources, including not just the ward/protected person, but also the ward/protected person’s family and third parties. Similarly, personal representatives are exposed to liability from all the beneficiaries of the estate, as well as third parties. Moreover, fiduciaries (especially guardians) are often “on-call” 24 hours each day, seven days each week, every week of every year.

### 2. Courts have described several factors that should be considered in assessing the reasonableness of a fiduciary’s compensation.

Courts have established the following factors that should be considered in assessing the reasonableness of a fiduciary’s compensation:

- a. The fees customarily paid agents or employees for performing like work in the community;
- b. Any unusual skill or experience which the particular fiduciary may have brought to the fiduciary’s work;
- c. The custom in the community as to allowances to trustees by settlors (or agents under powers of attorney by principals) or courts and as to fees charged by trust companies and banks;
- d. The degree of risk and responsibility the fiduciary assumed;

- e. The nature of the services performed in the course of the fiduciary's administration, whether routine or involving skill and judgment;
- f. The time consumed in carrying out the fiduciary's duties;
- g. The success or failure of the fiduciary's administration;
- h. The fidelity or disloyalty displayed by the fiduciary;
- i. Any estimate that the fiduciary has given of the value of the fiduciary's own services;
- j. The amount of principal and income received and disbursed by the fiduciary; and
- k. Payments made by the beneficiaries to the fiduciary and intended to apply to the fiduciary's compensation.

*See* George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 977 (rev. 2 ed. 1983) (describing factors to be considered when determining whether a trustee's compensation is reasonable).

The factors used in determining whether an attorney's fees are reasonable may also be used to evaluate the reasonableness of a fiduciary's compensation. Those factors are:

- a. The qualities of the fiduciary, specifically, the fiduciary's ability, training, education, experience, professional standing, and skill;
- b. The character of the work to be done, specifically, its difficulty; its intricacy, its importance, time, and skill required; the responsibility imposed; and the prominence and character of the parties where they affect the importance of the case;
- c. The work actually performed by the fiduciary, specifically, the time, skill, and attention given to the work; and
- d. The result, specifically whether the fiduciary was successful and what benefits were derived from the fiduciary's efforts.

*See Schwartz v. Schwerin*, 85 Ariz. 242, 245-46, 336 P.2d 144, 146 (1959) (describing factors to be considered when determining whether an attorney's fee is reasonable).

3. In determining whether a fiduciary's rate is reasonable, a variety of additional factors should be considered.

A fiduciary's compensation is typically, but not always, based on the amount of time expended by the fiduciary and an hourly rate charged by the fiduciary. In assessing whether the fiduciary's hourly rate is reasonable, the following factors should be considered:

- a. The fiduciary's ability, training, education, experience, professional standing, and skill;
- b. Rates charged by other fiduciaries with similar ability, training, education, and experience in the community for providing similar services;
- c. Whether the fiduciary utilized special skills or licensing (e.g., medical, legal, accounting, etc.) in performing the task;
- d. The character of the work to be done, specifically, its difficulty; its intricacy, its importance, time, and skill required; the responsibility imposed; and the prominence and character of the parties where they affect the importance of the case;
- e. The degree of risk assumed by the fiduciary in the particular matter;
- f. Whether the service provided was the result of an emergency (requiring urgent attention), was potentially dangerous in nature (e.g., involving hazardous materials or contaminated real property), or was otherwise extraordinary in nature;
- g. Whether the service provided was provided, and was required to be provided, outside normal business hours;
- h. The novelty and difficulty of the tasks performed;
- i. Whether the fiduciary's acceptance of appointment in the particular matter precluded other employment by the fiduciary (e.g., as a result of conflicts of interest or the time required);
- j. Whether the court has previously approved the fiduciary's rate in another matter;
- k. Whether a different person, including (in the case of a professional fiduciary) an independent contractor or a non-licensed employee could have provided the same level of service at a lesser rate;

1. In the case of a licensed fiduciary, whether the Fiduciary Code of Conduct requires that task be provided by a licensed fiduciary (as opposed to an unlicensed employee or agent)
4. Other factors that should be considered in evaluating the reasonableness of a fiduciary's compensation.

Other factors that may be considered in assessing whether a fiduciary's compensation is reasonable include the following:

- a. Whether the service provided by the fiduciary was mandated by statute, court rule, court order, or federal or state regulation;
- b. The value, extent, and type of the assets managed by the fiduciary;
- c. The nature and extent of the ward's incapacity or of the protected person's disability;
- d. Any difficulties the fiduciary encountered in marshalling, inventorying, or managing the assets or in locating appropriate health care and treatment or a residence for the ward
- e. The results obtained by the fiduciary;
- f. The benefits derived by the ward, protected person, or estate as a result of the fiduciary's efforts;
- g. Any time limitations imposed upon the fiduciary by the circumstances, the court, statute, court rule, regulations, or the interested persons;
- h. Any limitations, including but not limited to financial limitations, imposed by the circumstances, the court, or any person that impeded the fiduciary in the performance of the fiduciary's duties;
- i. In the case of a guardian or conservator, whether the ward or protected person suffered any medical or psychological event that necessitated the fiduciary providing additional services;
- j. Whether the service provided by the fiduciary was available in the community or had to be performed by the fiduciary (e.g., transporting the ward to appointments in rural areas);
- k. Whether the fiduciary was involved in litigation in the matter and, if so, who initiated the litigation, the type of litigation, and the results of the litigation; and

1. Whether the fiduciary committed a breach of fiduciary duty and, if so, the resulting damages caused by such breach.

5. Additional factors that should be considered when assessing the reasonableness of a professional fiduciary's compensation.

Professional fiduciaries typically are appointed when no one else is willing or able to serve. Sometimes, the ward or protected person simply has no family or friends and, thus, the services of a professional fiduciary are necessary to maintain the highest possible standard of living and independence for the ward or protected person. In other cases, the ward or protected person may have family or friends but such persons either unwilling to serve or are disqualified from serving. Thus, a professional fiduciary often is appointed when a case is simply nasty, difficult, intense, or downright unpleasant. As a result of the frequent already-existing (before the professional fiduciary's appointment) hostility in such cases, the professional fiduciary typically ends up with a bulls-eye on the fiduciary's back, similar to the way a United Nations peacekeeper often ends up in the crosshairs of the warring parties.

As already noted, fiduciaries in general are often "on-call" 24 hours per day, seven days per week, 52 weeks per year. This is particularly true in guardianship cases as the ward's health and general welfare are unaffected by business hours. As a result, employees and agents of professional fiduciaries often work shifts (e.g., nights, weekends, holidays, etc.). To ensure continuity of care and decision-making, one shift must communicate with the other shifts as to the ward's status.

A professional fiduciary should, when possible, delegate tasks to the person with the lowest hourly rate who is able to perform the task. As a result, a supervisor periodically must communicate with those whom the supervisor oversees. Such communications may include not only changes in the ward's status but also changes in the workplan or strategy. In addition, from time to time, changes may require the input of other staff members who bring with them expertise in a different capacity or area of function.

Just as every business has general "overhead" expenses that are considered the "cost of doing business," so too do professional fiduciaries have general overhead expenses that should not be charged to the ward, protected person, or estate. Such expenses include staff time for clerical for tasks such as making routine photocopies, routine electronic scanning of documents, and routine filing. Instead, the cost of such overhead expenses should be covered by the professional fiduciary's general hourly rate.

A professional fiduciary may not charge the ward, protected person, or estate for the fiduciary's time (or the time spent by the fiduciary's staff) to respond to or otherwise defend against a regulatory complaint filed against the fiduciary (e.g., a complaint filed with the Administrative Office of the Courts, with the State Bar of Arizona, or with the Department of Banking). This prohibition does *not* apply to complaints or objections file against the fiduciary in court (e.g., a complaint or petition alleging breach of fiduciary duty). In such cases, the court consider the same factors in reviewing the reasonableness of the fiduciary's defense fees and

costs as the court would consider when reviewing the reasonableness of the fiduciary's compensation and expenses for other services provided by the fiduciary. Nothing herein shall be construed so as to preclude a professional fiduciary from offering in evidence in a dispute regarding the fiduciary's compensation the facts pertaining to such a regulatory complaint.

6. A fiduciary is entitled to be reimbursed for reasonable expenses that were necessarily incurred.

A fiduciary is entitled to be reimbursed from the estate for the fiduciary's out-of-pocket expenses so no long as the expenses were necessary and reasonable. Such expenses include, but not are not limited to, postage, photocopies, mileage, court and other governmental fees (e.g., filing fees, fees for certified copies of documents, recording fees, etc.), and bonds. For postage, bonds, court and other governmental fees, copying charges from vendors, and other "hard" costs, the fiduciary is entitled to be reimbursed for the actual cost incurred by the fiduciary, and the fiduciary shall not "mark-up" such costs. For "soft" costs, such as mileage and in-house photocopies, the fiduciary shall be entitled to be reimbursed at a rate commensurate with rates charged or approved by governmental entities (e.g., mileage rate equal to that approved by the Internal Revenue Service and photocopies as the same rate charged by the clerk of court).

7. A fiduciary generally may not charge interest on the fiduciary's unpaid bills.

A fiduciary may not charge interest on the fiduciary's unpaid bills unless the fiduciary obtains prior approval from the court. Similarly, the fiduciary may not, without obtaining prior court approval, charge interest on costs advanced to the ward, protected person, or the estate.