

FIDUCIARY FEES

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Fiduciary Compensation

The Fairfax Circuit Court has adopted the Uniform Fiduciary Fee Schedule which the Judicial Council has approved. The commissioner has a duty to review fiduciary compensation to determine compliance with those schedules. Copies of the current approved Fiduciary Fee Schedules are attached as an exhibit. Where a fiduciary believes the extraordinary nature of his task justifies greater compensation than the guidelines permit, it is always advisable to request approval of that compensation in advance of disbursement to avoid unnecessary embarrassment.

In many cases, this compensation is cumulative over the life of the estate. A statement showing the total compensation of the fiduciary over the various accounts and the calculation of the allowable fiduciary fee is very helpful to the commissioner’s office.

Note that under the fiduciary fee guidelines, attorney or accountant compensation for routine fiduciary duties is generally deducted from allowable fiduciary compensation. Professional fees for matters that a fiduciary cannot reasonably be expected to handle independently, such as court proceedings or tax preparation, will be allowed in addition to the fiduciary fee. If the total professional and fiduciary fees exceed the allowable fiduciary compensation, it is advisable to address these costs in advance with the commissioner to determine a fiduciary fee which the commissioner will approve.

The Adopted Fiduciary Compensation Schedules

A. Compensation for Administrators & Executors

1. Principal – A fee based upon the inventory value, including amended inventories, of the decedent’s probate assets in accordance with the following schedule:

First	\$400,000.00	5%
Next	\$300,000.00	4%
Next	\$300,000.00	3%
Balance over	\$1,000,000.00	2%
Balance over	\$10,000,000.00	By agreement with the Commissioner (prior consultation is required)

2. Income – 5% of income receipts (not including capital gains) realized during each accounting period.

B. Compensation for Conservators for Incapacitated Adults and for Guardians of Minors

1. Principal - Total Assets at Beginning of Accounting Period – A fiduciary may take compensation on an annual basis, based on the fair market value of the estate assets (i.e., principal and undistributed income) at the beginning of the accounting period. The percentages below should be applied annually to the beginning fair market value of the account; for the initial account, the beginning fair market value is the principal amount shown on the inventory:

First \$500,000.00	1%	(.01)
Next \$500,000.00	¾ of 1%	(.0075)
Balance over \$1,000,000.00	½ of 1%	(.005)
Balance over \$10,000,000.00	By agreement with the Commissioner (prior consultation is required)	

2. Income – An additional fee of 5% should be allowed on non-investment income received during the account period (for example, periodic retirement payments). No compensation is to be calculated on investment income received during the year.

C. Compensation for Trustees

1. Principal – same schedule as for conservators and guardians
2. Income – no separate fee for income

General Rules for All Fiduciaries

1. If the will or court order clearly sets out compensation in a specific dollar amount or a specific percentage that the fiduciary is to receive, the will or court order controls, and the fiduciary is entitled to the amount set out.

2. If the will or court order states that the fiduciary shall receive for services the compensation set out in a referenced published fee schedule in effect at the time such services are rendered, fees as set out in the fee schedule shall be presumed to be reasonable, as that term is used in § 26-30. An objecting party has the burden of persuading the Commissioner that fiduciary compensation taken according to such a fee schedule is not reasonable. The Commissioner has the ultimate responsibility to determine the reasonableness of fiduciary compensation.

3. If the will or court order is silent as to the fiduciary's compensation, the guidelines set out herein apply.
4. Where all parties affected by the amount of compensation are (i) competent to contract (ii) understand the issues involved (i.e., can give "informed consent") and (iii) agree in writing as to the amount of the compensation to be paid, then the Commissioner will honor the agreement.
5. If the fiduciary employs an attorney or accountant to perform duties that should be performed by the fiduciary, the fees of those persons should be deducted from the compensation due the fiduciary. Note that this does not apply to reasonable fees paid to attorneys or accountants for tax work or litigation or other legal services reasonably necessary for the orderly administration of the estate. The reasonable expense of such services will be allowed in addition to the fiduciary fee.
6. If the fiduciary employs an investment advisor, the advisor's fees, if reasonable, generally should not be deducted from the fiduciary's compensation.
7. If there are co-fiduciaries, generally, one fee will be divided equally among them. The co-fiduciaries may agree among themselves on a different division. If there is a dispute concerning the division of the fee, the Commissioner may hold a hearing to resolve the dispute.
8. If there are successor fiduciaries, the annual compensation shall be pro-rated. This guideline applies to fiduciaries for estates, trusts, conservatorships and guardianships.
9. The Commissioner may increase or decrease the otherwise allowable compensation in exceptional circumstances. Factors to be considered in determining the compensation include the nature of the assets, the character of the work, the difficulties encountered, the time and expertise required, the responsibilities assumed, the risks incurred and the results obtained.
10. If the fiduciary has any questions about the allowable compensation after examining these guidelines, the fiduciary should consult with the Commissioner before taking any fee.
11. Nothing in these guidelines is intended to alter any statute concerning fiduciary compensation.

Special Rules for Executors and Administrators

1. The value of real estate will be included as property in the decedent's probate estate for compensation purposes only if the Executor is given the power to sell real estate and (i) is instructed to sell real estate in the will, or (ii) is requested to sell real estate by all affected beneficiaries or devisees, or (iii) is required to sell real estate to pay taxes and other charges

against the estate, or (iv) the Commissioner determines that such sale is clearly in the best interest of the devisees or beneficiaries as a whole.

2. As a general rule, an Executor or Administrator is not allowed compensation based on the value of non-probate assets. The Commissioner may allow such compensation in circumstances where it is necessary for the Executor or Administrator to assume some responsibility for the asset. The Executor or Administrator is advised to make separate compensation arrangements with the beneficial owners of non-probate assets.

3. The Executor or Administrator does not have to wait to take compensation until the estate is closed; however, the time of taking should bear some relationship to the expected life of the estate, the work already done, and the work remaining to be done.

4. If there are successor fiduciaries, the compensation shall be pro-rated between them, provided that the Commissioner may determine the amount to be allowed based on all factors concerning the estate. More than one full compensation fee may be allowed, if the Commissioner determines this to be appropriate.

Foreclosure Trustees

The Commissioner's Office is currently developing a fiduciary compensation schedule for foreclosure trustees.

Ethical Concerns

An attorney who also serves as the fiduciary has an additional set of ethical issues. If the attorney engages his own firm to represent the estate (and, as discussed previously, himself) his personal interest as fiduciary creates a conflict of interest which must be cured by consent after disclosure.

LEO No. 1515, which is attached in the outline materials, addresses a number of issues which arise when lawyers serve as fiduciaries in Virginia. LEO No. 1515 has been approved by the Virginia Supreme Court and thus is binding authority on Virginia lawyers.

One of the specific areas of risk to all fiduciaries are claims which arise out of conflicts of interest. In LEO No. 1515 the Committee considered the question of whether the attorney/executor could retain its own law firm to perform legal services for the trust or estate. The conclusion of the Committee was that there was a potential conflict between the lawyer's personal interests (i.e. the compensation that the lawyer would receive) and the interests of the client. This conflict can be cured by disclosure.

If the lawyer drafted the will or trust for the client and was named as the fiduciary in the document, then full disclosure of the lawyer's potential fees as fiduciary, or as legal counsel for

the estate, should be made to the client prior to the client's execution of the document. If such consent was not obtained at the time the document was drafted, or if the lawyer / fiduciary did not draft the document but otherwise serves as the fiduciary, then the better practice is to obtain the consent of all residuary beneficiaries for the estate or the income and remainder beneficiaries of the trust. Clearly, if a lawyer is serving as a co-fiduciary, he or she will need to obtain the consent of all co-fiduciaries prior to providing legal services for the estate.

When a client asks you to serve as the fiduciary for his will or trust, the American College of Trust and Estate Counsel (ACTEC) has a checklist and a list of forms worthy of your consideration. The checklist and forms are available on the ACTEC website and are attached hereto. Proper use of these materials can cure the conflict of interest issues when you draft a document for your client in which you are to be named as fiduciary.

The account auditors in our office prepare a summary audit sheet for each accounting which records all fiduciary and professional fees. If the fiduciary is charging the estate for legal or accounting work, those fees should be listed separately and supported by time sheets to allow our office to consider the reasonableness of the charges. When the accounting is filed, it always is helpful if the fiduciary provides a letter of explanation to explain the purpose of the additional fees being charged by the fiduciary. To the extent we feel the charges are not reasonable, we ask the fiduciary to obtain the consent of the beneficiaries or refund the excessive fees to the estate.

Rule 1.5(a) states that a lawyer's fee must be reasonable and provides a number of factors which can be used to evaluate the reasonableness of a fee. The difficulty of the work and the fees customarily charged for similar services are the primary factors enumerated under Rule 1.5 which our office would consider in our review of compensation paid for professional services charged to an estate.

On a fairly routine basis, an individual, oftentimes a lawyer, is appointed as the guardian and conservator for an incapacitated adult. We have fiduciary compensation guidelines for conservators but not for guardians. However, the Code does provide that the guardian is entitled to reasonable compensation for his or her services. To the extent the conservator pays himself for services rendered as guardian, there is an inherent conflict of interest. Our office does allow for compensation to the guardian in accordance with the statute but requires separate time records to support fees for guardian services. However, we do not allow the lawyer to charge at his or her hourly rate. It is our position that any such compensation paid to the lawyer serving as guardian should be commensurate with the fees charge by lay firms or individuals who routinely provide such services.

It is my personal opinion that it is the better practice for all fiduciaries to contract with third parties to perform legal, accounting or guardian on behalf of the estate. Such practice will avoid the conflict of interest issue. As a general rule, when the fiduciary is not "wearing more

than one hat," he or she likely will be in a better position to fulfill his responsibilities to the estate.