

# After ‘Reasonable Compensation’ Litigation, Who Pays Trustees’ Attorneys?; Legal Profession

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In 2006, Pennsylvania passed the Uniform Trust Act, *20 Pa. C.S.A. §7701, et seq.* With respect to trustees’ compensation, Pennsylvania’s statute restated a trustee’s right to reasonable compensation. Then, it took a giant step further than the Uniform Trust Code, on which the Uniform Trust Act was modeled — it created a presumption that “compensation at levels that arise in a competitive market shall be presumed to be reasonable in the absence of compelling evidence to the contrary.”

As one might expect, trustees are claiming increased fees under the new law; beneficiaries, perhaps understandably, prefer the status quo, and often oppose the increase. In that setting, the Orphans’ Court is being called upon to set reasonable compensation.

The Pennsylvania statute explicitly creates an entitlement for a trustee to be reimbursed for expenses “properly incurred in the administration of the trust.”

In proceedings to establish what constitutes “reasonable compensation,” beneficiaries often object to any claim made by the trustee for payment of legal fees from the trust for legal services rendered in support of the trustee’s claims for fee increases, claiming that those services only benefit the trustee.

However, this objection ignores the trustee’s statutory right to both reasonable compensation and reimbursement for “expenses that were properly incurred in the administration of the trust.”

The statute does not say “except for attorney fees related to setting reasonable compensation for a trustee.” And there is no basis for the court to graft such a limitation onto the provision. *The California Supreme Court, in Estate of Trynin, 782 P.2d 232 (Cal. 1989)*, described litigation over reasonable compensation to the trustee as a “necessary incident to the attorney’s work for the estate, and so compensable, when unjustified challenges are raised to a fee claim.”

Payment of reasonable compensation is an intrinsic element of the trust and is not merely for the corporate trustee’s own benefit.

Trusts benefit when trustees are fairly compensated. The whole purpose of the legislative actions over the last 170 years in Pennsylvania was not simply to enrich fiduciaries. It was to make sure that worthy institutions would be willing to serve as trustees over long periods of time, subject to serious responsibilities.

In many, if not most cases, trust beneficiaries, by filing objections, are the ones taking the actions that give rise to the attorney fees incurred. If a party files objections — and persists in asserting them in the face of statutory changes intended to ensure that trustees are appropriately compensated by making it easier for trustees to prove such compensation — the conduct of the trustee, through its counsel, in opposing those objections becomes just another part of the routine administration of the trust, and should be paid from the trust. (See *Riley v. Superior Court of Los Angeles County*, 316 P.2d 956 (1957) (appellant’s argument against fees being paid from the trust failed in view of the fact that it was she who caused the necessity for the additional fees).)

It is obvious that the legal services are, in part, “for the trustee’s own benefit.” After all, the trustee would receive the increased compensation. But legal services rendered in an effort to determine what would constitute a reasonable payment to the trustee, in a very fundamental way, benefit the trust itself.

It has been the law in Pennsylvania for almost 200 years that a trustee is entitled to reasonable compensation payable from the trust. It is inconsistent with the UTA to award the trustee reasonable compensation but then impose on it expenses reasonably incurred in the court process required to obtain that compensation.

Filing an account with the court is certainly part of the administration of a trust. So is responding to objections to an account. Preparation for a hearing, once the objections have been filed, becomes an unavoidable part of the administration of a trust. Those costs should be paid from the trust.

The Pennsylvania Supreme Court awarded such fees to a trustee 135 years ago in a case that has been overlooked by later lower court decisions.

#### Biddle’s Appeal

In 1877, the *Supreme Court of Pennsylvania, in Biddle’s Appeal*, 83 Pa. 340 (1877), held that attorney fees for services to a trustee, which included efforts on behalf of the trustee seeking enhanced compensation, were properly payable from the trust. There, the settler died and the trustees assumed her duties a few days later. The trust consisted chiefly of real estate. They collected rents and profits from her estate and paid the net income to her sisters for their lives.

In their account, the trustees sought a commission of 3 percent on the value of the estate that remained unsold at the time of the death of the second-to-die of the sisters. The residuary beneficiary objected to the commissions on the unsold real estate and to counsel fees. The auditing judge denied the 3 percent commission requested on the unsold real estate (the sum of \$6,120), but, instead, allowed \$2,000 as compensation for lengthy service; he also allowed the counsel fees requested.

Exceptions were filed that led to disallowance of the \$2,000 compensation and reduction of the attorney fees by 30 percent. The trustees appealed. The Supreme Court reversed the Orphans’ Court and reinstated the decision of the auditing judge.

With respect to attorney fees, the auditing judge had awarded \$250, as requested; the Orphans’ Court, en banc, reduced that amount to \$175. The Supreme Court noted that the “entire claim of the accountants for the care of the corpus” (including the trustee’s claim for compensation) had been resisted, which led to the award by the auditing judge of the additional commission of \$2,000. The Supreme Court reinstated the full award of attorney fees. In today’s dollars, that \$250 would translate into more than \$5,000.

## Allegheny County

In *In re Fishel Land*, 3 Pa. D. & C.3d 231, 232 (Orph. Ct. Allegh. Co. 1976) (J. Boyle), the court held that the trustee was entitled to attorney fees incurred in defending its right to compensation.

## Philadelphia County

There is some contrary authority in the Philadelphia Orphans' Court. (See, e.g., *In re Nicely Estate*, 18 Fiduc. Rep. 2d 397 (Orph. Ct. Phila. Co. 1998) (J. Pawelec).) In *Nicely*, the court created a judicial exception to the trustee's right to have all expenses properly incurred in the administration of the trust charged to the trust. *Nicely* is distinguishable from the routine matter in that, there, the corporate co-agent under a power of attorney sought a termination fee based on extraordinary services.

Generally, in these cases, there is no claim of extraordinary services. *Moss Trust*, 21 Fiduc. Rep. 2d 151 (Orph. Ct. Phila. Co. 2001) (Pawelec, J.), follows *Nicely*, as one would expect. But neither opinion cites to or discusses *Biddle's Appeal* or *In re Fishel Land*. Of course, all of these decisions pre-date enactment of the UTA.

## Remick's Pennsylvania Orphans' Court Practice

In the treatise *Remick's Pennsylvania Orphans' Court Practice*, 5A *Remick's Pa. Orph. Ct. Prac.* § 39.10 (1980), the differing results in the three cases are reported, but not explained.

Both lines of cases (*Fishel* and *Nicely/Moss*) cite to *In re Estate of Browarsky*, 437 Pa. 282, 263 A.2d 365 (1970), and other authority for the proposition that "fees of counsel in successfully representing a fiduciary in resisting a surcharge are properly payable from the estate." The court in *Fishel* saw no difference between that situation and where counsel successfully represents a fiduciary in resisting objections to its claim to compensation; nor did the Supreme Court in *Biddle's Appeal*.

## The foundation of the *Nicely* analysis

The source of the *Nicely* position begins with an opinion from the *Philadelphia Orphans' Court in Powers' Estate*, 58 Pa. D. & C. 379 (1947). In that case, a trustee was awarded additional commissions of approximately \$177,000, even though the trust was not terminating. On exceptions, the Orphans' Court reduced the payment to \$100,000. However, the court, en banc, sustained exceptions to the auditing judge having allowed a fee of \$7,000 to counsel for the trustee for services relating to the allowance of commissions.

The auditing judge, much like in *Fishel*, had found "upon the analogy that a fiduciary is entitled to fees for successfully defending him against a surcharge, that the trustee was entitled to the services of counsel made necessary in establishing the right to commissions." The court, en banc, ruled otherwise.

"In our opinion, the burden was on the trustee to establish the exceptional and unusual facts which justified the special allowance of compensation, and that no fee should be paid to counsel beyond the fee for general services, credit for which is taken in the account."

In *Powers*, the trustee was seeking principal commissions before termination of the trust, which at that time were generally denied, except "where there are circumstances of an unusual and extraordinary character, and the trustee has increased the estate by great care and skill." In the usual compensation cases litigated today, the trustee is seeking reasonable compensation for ordinary services pursuant to the UTA; often, no extraordinary services are claimed. The compensation requested is generally not a "special allowance of compensation" for which the trustee must

“establish exceptional and unusual facts.” More importantly, Powers is inconsistent with Biddle’s Appeal.

When the court first wrote on this issue in Nicely in 1998, it ruled that both the fiduciary and its counsel had to bear the expense involved in seeking those fees.

In Nicely, Judge Edmund S. Pawelec first articulated his reasoning for not allowing such fees to be charged to the trust, i.e., the fiduciary and its counsel, whether seeking a fiduciary’s commission or an attorney’s fee, are claimants against the estate, with the burden of proof in each instance to prove that the request is fair and reasonable. The opinion cites to no authority for why “counsel fees for services rendered in an attempt by the bank to secure a termination fee and counsel fees are another matter.” The Supreme Court, in Biddle’s Appeal, and the Orphans’ Court of Allegheny County, in Fishel, obviously did not think so. Moreover, Powers, Nicely and Moss were decided before the UTA and, in particular, Section 7769(a) (relating to expenses), were enacted. Now, the fiduciary does not have the burden of proof to show that its request is fair and reasonable. It only has a burden to show that its charges “arise in a competitive market”; if it does so, those charges are presumed reasonable, unless the opposing parties present “compelling evidence to the contrary.” The burden of proof reasoning in Nicely is not in line with current law.

## Conclusion

Trustees in Pennsylvania have been entitled to reasonable compensation payable from trust assets for almost 200 years. In 2006, the Pennsylvania legislature once again confirmed this entitlement and took steps to create a presumption — rebuttable only by compelling evidence to the contrary — that fees set in a competitive market are deemed reasonable. The payment of compensation that arose in a competitive market is, by statute, an expense properly incurred in the administration of the trust. Therefore, attorney fees incurred in defending the payment of such compensation should be payable as an administrative expense, just as are attorney fees incurred in defending against other unsuccessful objections. To hold otherwise creates a judicial carve-out for which there is no support in the statute.

In the second part of this series, we will show that this result is consistent with most trust-related authority outside of Pennsylvania and in other similar contexts. •