

Reasonable Compensation for the Individual Fiduciary

Searching for a Definition

By Ilene Sherwyn Cooper and Erin Moody

Introduction

The commissions of an individual serving as a fiduciary – be it an executor, trustee or even a guardian – are generally predicated on a statutory rate table based on the value of the estate subject to administration. For the executor and guardian, the rates are established pursuant to N.Y. Surrogate’s Court Procedure Act 2307 (SCPA); for the trustee, they are contained in SCPA 2308 and 2309. Indeed, these statutory provisions are default rules, applicable in the absence of a contrary provision in a will or trust instrument.¹ Given the freedom of testation (in the case of a will) and contract (in the case of an inter vivos trust), a testator or grantor has the right to deny, limit or even enhance the statutory commission base to which the individual fiduciary might otherwise be entitled.²

Unlike the individual fiduciary, the compensation of a corporate fiduciary is based upon the provisions of SCPA 2312. Enacted in 1984, that statute explicitly directs that the commissions of a corporate fiduciary be predicated on a determination of “reasonable compensation” for services rendered, if the will or lifetime trust instrument does not provide for specific rates or amounts of commissions.³ While the statute does not define reasonable

compensation, the legislative history of SCPA 2312, long-standing precedent in New York and elsewhere, and commentary have developed a standard reminiscent of the *quantum meruit* analysis established by the courts in *In re Potts*⁴ and *In re Freeman*⁵ for fixing reasonable legal fees. Yet, while this standard has been utilized in determining reasonable compensation due to the corporate fiduciary, is it also applicable to the individual fiduciary where the will or inter vivos instrument directs that the executor, trustee, or guardian receive reasonable compensation for work performed? After examination of the relevant statutes, treatises and case law, discussed below, the authors conclude that it is.

Quantum Meruit and Reasonable Compensation: The Potts/Freeman Criteria **Reasonable Compensation in the Non-Fiduciary Context**

The term *quantum meruit* has often been employed by courts when confronted with the task of determining reasonable compensation.⁶ When there is doubt as to the amount due for the work performed, a judge or jury will determine compensation based upon the customary



charge for services rendered.⁷ To that extent, it appears that principles of *quantum meruit* are not simply limited to ascertaining the time value of services rendered.⁸ Rather, as is typified in cases involving the fixing of legal fees, courts have routinely relied on the criteria enumerated by the courts in *Potts* and *Freeman*,⁹ which require consideration of the time and labor involved; the difficulty of the questions involved; the skill required to handle the problems presented; the lawyer's experience, ability, and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.¹⁰ Indeed, in the context of legal fees, invoking a *quantum meruit* analysis has, for decades, required consideration of the *Potts/Freeman* criteria in order to determine the "customary charge" for services rendered.¹¹

For example, in *Padilla v. Sansivieri*, the court stated that "[a]n award [of legal fees] in quantum meruit should in all cases reflect the court's assessment of the qualitative value of the services rendered, made after weighing all relevant factors considered in valuing legal services."¹² Notably, in reaching this result, the court explicitly stated that *quantum meruit* compensation awards are not limited to a calculation based on the number of hours worked multiplied by a reasonable hourly rate, impliedly indicating that other factors must be taken into account.¹³

Similarly, in *Biagioni v. Narrows MRI & Diagnostic Radiology, P.C.*, the court held that an award of attorney fees based on *quantum meruit* should not be limited to a calculation based on the number of hours worked multiplied by a reasonable hourly

rate, but can also be calculated as a portion of a contingent fee . . . [i]n either case, a court must weigh the relevant factors, which include evidence of the time and skill required in that case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit from the services, and the fee usually charged by other attorneys for similar services.¹⁴

Numerous cases in New York stand for the proposition that an award of compensation based on *quantum meruit* is made by consideration of relevant factors.¹⁵

Therefore, as the foregoing makes clear, an award of compensation based on *quantum meruit* is not distinct from an award of compensation based on the criteria set forth in *Potts* and *Freeman* for determination of a reasonable fee.¹⁶

Reasonable Compensation for the Corporate Fiduciary: SCPA 2312 and Its Legislative History

Reasonable compensation has been applied in New York in the corporate trustee context pursuant to SCPA 2312. Specifically, Subsection 2 provides that for trusts having a principal value of more than \$400,000, in the absence of a provision in the will or lifetime trust instrument setting a specific rate of compensation or amount of commissions,

ILENE S. COOPER is a partner with the firm of Farrell Fritz, P.C., located in Uniondale, New York, and concentrates her practice in trusts and estates litigation. **ERIN MOODY** is an associate with the firm's corporate department.



corporate trustees are entitled “to such commissions *as may be reasonable*, and the court . . . may review the reasonableness of the commission of such corporate trustee.”¹⁷

Although the statute provides that corporate trustees are entitled to reasonable compensation, it does not provide a definition or standard for determining an award of commissions on this basis. However, the statute’s legislative history elucidates the legislature’s intent regarding the meaning of the term. The statute was enacted by Senate Bill 9572, Chapter 936 of the Laws of 1984; it was approved by the Senate and the Assembly in June 1984 and signed by the governor in August of that year.

Unlike the individual fiduciary, the compensation of a corporate fiduciary is based upon the provisions of SCPA 2312.

In a Memorandum in Support of the bill, New York State Senator Jay P. Rolison, Jr. stated that the purpose of the bill was to change the method of compensating trustees from a statutory schedule of rates to reasonable compensation¹⁸ (the “Rolison Memo”). Most importantly, the Rolison Memo defined reasonable compensation:

Generally, reasonable compensation can be characterized as a method of compensating trustees based upon what is fair and equitable in view of the size of the trust, the responsibilities of the trustee, the character of the work required to be performed by the trustee, the special problems and difficulties met in doing the work, the conduct of the trustee and the knowledge, skill and judgment required of and used by the trustees and the manner and efficiency which the trust has been administered and the time and service required, together with any other circumstances which may be relevant.¹⁹

The Rolison Memo stated that one purpose for considering the foregoing factors was to increase competition among corporate trustees which, in turn, is thought to result in higher quality of trust administration services.²⁰ The Rolison Memo acknowledged that the statutory rate schedules for personal trustees are often deficient, particularly because trustees’ duties have become increasingly more complex throughout the years and because the process to change the statutory rate schedule is time-consuming and difficult.²¹ As such, the Rolison Memo emphasized the need for flexibility in determining a trustee’s compensation and advocated for adoption of the reasonable compensation standard for corporate trustees. In doing so, the Rolison Memo noted that “[r]easonable compensation ha[d] been adopted in forty jurisdictions, including Arizona, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Pennsylvania and Texas” and that “reasonable compensation [could] be characterized as a method of compensating a trustee based upon what is fair and equitable.”²²

Compensation Under SCPA 2312: *In re McDonald and Its Progeny*

Although few New York cases have interpreted the meaning of “reasonable compensation” within the context of SCPA 2312, four opinions emanating from the Surrogate’s Court, Westchester County, have served to establish the requisite guidelines.

In re McDonald was the first decision that delineated the factors for the court to consider in determining reasonable compensation for a corporate trustee under SCPA 2312.²³ *McDonald* involved a proceeding for the judicial settlement of final accounts of a trust company as a corporate trustee of testamentary trusts.²⁴ The court observed that while the *Potts/Freeman* standard had been established to determine the reasonableness of attorney fees, there were no New York cases at the time that established guidelines or factors for determining reasonable compensation for trustees under SCPA 2312.²⁵

As such, the court considered the legislative history of SCPA 2312, specifically, the factors as set forth in the Rolison Memo, as well as case law in other states, in order to determine the factors that were relevant in assessing reasonable compensation in this context.²⁶ As a result of this analysis, the court developed the following criteria:

1. the size of the trust;
2. the responsibility involved;
3. the character of the work involved;
4. the results achieved;
5. the knowledge, skill and judgment required and used;
6. the time and services required;
7. the manner and promptness in performing duties and responsibilities;
8. any unusual skill or experience of the trustee;
9. the fidelity or disloyalty of the trustee;
10. the amount of risk;
11. the custom in the community for allowances to trustees; and
12. any estimate of the trustee of the value of his or her services.

The court explained that “[t]he weight to be given to any one factor and what is reasonable compensation rests in the discretion of the [trial] court . . . [t]he test of what is reasonable compensation requires a determination of the circumstances of the case and services actually rendered,” and further, that “[t]he reasonableness of commissions is dependant [sic] upon the singular facts of each trust.”²⁷

The *McDonald* standard was subsequently followed by the same court in *In re Estate of Prankard*.²⁸ In *Prankard*, the primary issue was whether the corporate trustee was entitled to compensation based upon its commission rates published within the competitive marketplace, or whether its reasonable compensation should be determined only upon consideration of the factors set forth in *McDonald*.²⁹

Interestingly, at a trial of the matter, the court called former Senator Rolison, Jr. – the sponsor of the bill enacting SCPA 2312 and author of the Rolison Memo – as its own witness. Senator Rolison testified that the reasonableness of compensation sought was to be left to the absolute discretion of the court to resolve based on whatever factors it deemed relevant, including, but not limited to, those enumerated in *McDonald*.³⁰ Ultimately, after engaging in a lengthy discussion of the history of SCPA 2312,³¹ the court held that in *all* contested proceedings it would apply the *McDonald* factors, together with the corporate fiduciary’s published fee schedule, when assessing reasonable compensation under SCPA 2312.³² Notably, in rendering its opinion, the court recognized the well-settled rule in attorney fee cases, that time spent is the least important factor in determining reasonable compensation, and held that the trustee’s failure to keep contemporaneous time records of its activities was of little consequence.³³

Prankard was followed by *In re Manny*, which involved an intermediate accounting proceeding instituted by a corporate trustee in which the objectants alleged that the corporate trustee should be surcharged for, among other things, collecting commissions in excess of the minimum compensation awardable as reasonable compensation under SCPA 2312.³⁴ Although the court denied both the trustee’s and the objectants’ motions for summary judgment and scheduled a hearing to determine the reasonableness of the commissions retained by the trustee, it stated that it would consider “all applicable criteria in making its determination.”³⁵

Similarly, in a later, related action arising out of the same trust and trustees (*Manny II*), the court explicitly considered the 12 factors from *Prankard* (as originally set forth in *McDonald*) in *In re Manny*.³⁶ In *Manny II*, the evidence demonstrated that the corporate trustee was responsible for administrative matters, knowing and carrying out the terms of the trust, collecting and managing assets, retaining records, corresponding with counsel in terms of legal issues, corresponding with beneficiaries, identifying appropriate assets in the trust for sales, raising cash, ensuring that the trust generated sufficient income, and ensuring the preparation of annual fiduciary tax returns and tax letters.³⁷

In applying the factors set forth in *McDonald* and *Prankard* to the evidence, the court held that the corporate trustee “offered sufficient evidence to establish that it [was] entitled to ‘reasonable compensation’ under SCPA 2312,” because: (1) the value of the trust grew from \$1 million to more than \$7 million during the accounting period, (2) the trustee’s responsibilities, the character of its work, the results achieved, its knowledge, skills and judgment, and the manner and promptness of performing its duties were all amply demonstrated by the record, (3) the language of the trust instrument permitted compensation in accordance with law (i.e., reasonable

compensation), and (4) because the trustee served as a co-trustee from the trust’s inception.³⁸

Clearly, what can be gleaned from the foregoing is that reasonable compensation for the corporate fiduciary under SCPA 2312 relies upon much of the same criteria applied in *Potts* and *Freeman* in the fixing legal fees. Whether these same criteria can and should be applied to the individual fiduciary requires consideration of the view outside the state of New York, as well as some New York cases that have taken this approach.

Reasonable Compensation for Individual Fiduciaries: The National View

The Uniform Probate Code

The Rolison Memo in support of SCPA 2312 noted that of the 30 jurisdictions that had specific statutory authorization for reasonable compensation, 14 had adopted the Uniform Probate Code (UPC) provisions on reasonable compensation in some form.³⁹ As originally written in 1969, the UPC did not provide a definition of reasonable compensation. However, it did provide for reasonable compensation for personal representatives⁴⁰ (appointed under wills), for “any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding,”⁴¹ and for trustees and employees of a trust.⁴²

Today, the UPC sets forth a definition of reasonable compensation, in a comment to § 5-417. That section, which provides for reasonable compensation for guardians, conservators, lawyers, and others appointed by the court in a guardianship or protective proceeding, states:

While the size of the estate is an important factor in setting compensation, in many cases there will be no estate . . . Among the factors listed are skill, experience and time devoted to duties; the amount and character of the property; the degree of difficulty; responsibility and risk assumed; the nature and cost of services rendered by others; and the quality of the performance.⁴³

The UPC also provides for reasonable compensation for “personal representatives,”⁴⁴ which are defined as fiduciaries “who shall observe the standards of care applicable to trustees” and who are “under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will.”⁴⁵ As such, “personal representatives” under the UPC appear to be executors, and although the UPC does not define reasonable compensation specifically in this context, arguably, the definition previously set forth concerning reasonable compensation for guardians and conservators should be applied to the personal representative context as well.

Restatement of Trusts

In addition to case law, courts often find respected authorities, such as Restatements, highly persuasive when evaluating an issue of first impression. As such, consideration of how the Restatement of Trusts defines

reasonable compensation is worthwhile. To this extent, the Restatement, like the UPC, relies on a list of *Potts/Freeman*-type criteria for determining reasonable compensation for trustees:

1. local custom;
2. the trustee's skill, experience and facilities;
3. the time devoted to trust duties;
4. the amount and character of the trust property;
5. the degree of difficulty, responsibility, and risk assumed in administering the trust;
6. the nature and costs of services rendered by others; and
7. the quality of the trustee's performance.⁴⁶

Additionally, the Uniform Trust Code (UTC) provides in a comment that trustees are entitled to reasonable compensation, and extracts the factors listed above from the Restatement as those relevant in determining reasonable compensation, and further, that reasonable compensation should be based on "the totality of the circumstances."⁴⁷

Decisions from Other States

On the national front, courts have applied factors similar to those set forth in *McDonald*, the Restatement and the UPC in determining reasonable compensation for individual fiduciaries. In *Hayward v. Plant*, an early decision issued by the highest court in Connecticut, the court affirmed a determination made by the trial court as to the reasonable compensation of executors for administering what was considered a very large estate at the time.⁴⁸ Specifically, in reaching its determination, the trial court took into account the gross amount of the estate, the time and effort expended by each executor, the difficulty and complexity of the problems dealt with, the broad powers and discretion granted the executors under the will, the manner of their exercise of the same, the results obtained, and all of the other circumstances and facts disclosed by the evidence.⁴⁹

The compensation awarded to the executors was thereafter challenged on the basis that the awards were excessive and constituted an abuse of judicial discretion.⁵⁰ In affirming the compensation awards determined by the trial court, the appellate court explicitly held that

"reasonable" means what is fair in view of the size of the estate, the responsibilities involved, 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, and the time and service required, and any other circumstances which . . . are relevant.⁵¹

The court reasoned that consideration of such factors and awards of separate awards due to each executor, makes sense in light of the fact that "the services of the several executors differed widely."⁵²

A more recent Connecticut opinion adhered to the factors listed in *Hayward* in determining reasonable compensation for an individual trustee.⁵³ The Connecticut Court of Probate stated that the nine *Hayward* criteria are to be analyzed one by one with regard to the trustee's performance; however, each criterion needs to be reviewed ultimately as contributing to the totality of the circumstances of the case.⁵⁴ Notably, the court stated that the "sheer size and weight [of the trust] alone compel the conclusion that the work required of its Trustees would be very substantial," and further, the court there was satisfied that the trustee "devoted sufficient time to the discharge of her fiduciary obligations" despite the fact that she did not keep time records.⁵⁵ Although the court reduced the trustee's requested compensation by approximately 30%, it seemingly did so solely because the trustee did not follow the consultative process mandated by the testator, namely, that she did not consult with her co-trustee before making decisions,⁵⁶ an issue which is likely unique to that particular case.

Florida also has a list of factors that it utilizes in determining reasonable compensation for fiduciaries that it appears to apply to both individuals and corporate fiduciaries. In *West Coast Hospital Association v. Florida National Bank of Jacksonville*,⁵⁷ the Supreme Court of Florida stated that the following factors are "influential in enabling the court to reach a conclusion as to the appropriate amount of pay which should be granted the trustee in a given case:"

The amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the cestuis to the trustee and intended to be applied toward his compensation.⁵⁸

Recently, the Florida District Court of Appeals revisited this issue in a case involving the estate of Robert Rauschenberg, who died in 2008 at his home on Captiva Island, Fla.⁵⁹ Mr. Rauschenberg devised his residuary estate to a trust, the beneficiary of which was the Robert Rauschenberg Foundation (the "Foundation"), and which had three named individual trustees.⁶⁰ The trust did not contain a provision addressing trustee compensation.⁶¹ During several years of the trustees' management of the trust, its assets had increased in value from approximately \$600 million to almost \$2 billion, and as such, the trustees sought significant compensation for their services rendered to the trust.⁶²

The Foundation, the primary beneficiary of the estate, advocated for a determination of reasonable trustee compensation based on the “lodestar” method, which was set forth in a 1985 Florida Supreme Court case,⁶³ and would determine the reasonableness of the compensation due to the trustees by multiplying the number of hours reasonably expended by a reasonable hourly rate,⁶⁴ i.e., the value of the services performed. The trustees, on the other hand, requested over \$50 million in fees based on the factors set forth in *W. Coast Hosp. Ass’n*.⁶⁵ Ultimately, the court held that the lodestar method did not apply to trustee fees, and it upheld the trial court’s award of \$24,600,000 to the trustees based on what it deemed a proper interpretation of the factors set forth in *W. Coast Hosp. Ass’n*.⁶⁶ As a result of the opinion, factors invoking *quantum meruit* lodged in much of the same criteria established in *Potts/Freeman* are currently those considered by the courts in Florida in determining reasonable compensation for individual fiduciaries.

As evidenced in case law⁶⁷ and court rule,⁶⁸ California relies on a substantially similar list of factors as Florida in determining reasonable compensation allowable to a trustee. Moreover, California Probate Code § 15681 specifically provides that a trustee “is entitled to reasonable compensation under the circumstances” if the trust instrument is silent on the issue of compensation.

Courts in other states use similar factors in determining reasonable compensation due to fiduciaries. For example, an appellate court in Tennessee has held that:

When a court sets a reasonable fee for a trustee, it should take into account the size of the trust, the nature and number of the assets, the income produced, the time and responsibility required, the expertise required, any management or sale of real estate and closely held business interests, any involvement in litigation to protect the trust property, and other relevant factors . . . [s]imilarly, reasonable compensation to an executor should be fixed with reference to the entire estate and services.⁶⁹

Similarly, the Supreme Court of Alabama has held that:

In assessing the reasonableness of an executor’s compensation, Alabama courts consider the following factors: the novelty and difficulty of the administrative process, the skill requisite to perform the service, the likelihood that the acceptance of the particular employment will preclude other employment, the fee customarily charged in the locality for similar services, the amount involved and the results obtained, the requirements imposed by the circumstances and condition of the estate, the nature and length of the professional relationship with the decedent, the experience, reputation, diligence, and ability of the person performing the services, the liability, financial or otherwise, of the personal representative, or the risk and responsibility involved.⁷⁰



North Carolina has a statutory scheme that *mandates* the court’s consideration of 11 enumerated factors, similar to those considered in Alabama and Tennessee, in determining reasonableness of compensation due to a trustee.⁷¹ Interestingly, under the statute, the court must take into consideration “[o]ther factors which the trustee or the clerk of superior court deems to be relevant” in reaching its determination, providing flexibility in determining reasonable compensation for trustees under unique circumstances.⁷²

Reasonable Compensation for Individual Fiduciaries: New York Case Law

While New York courts have infrequently addressed the meaning of reasonable compensation for the individual fiduciary other than by reference to the statutory commission rates, in the few instances in which they have, reliance upon the *Potts/Freeman* criteria is apparent. Principles of reasonable compensation in the individual

fiduciary context are not foreign to New York Surrogate's Courts, which have routinely invoked the standard, albeit with little analysis, as a basis for awarding fees to a preliminary executor, the estate of a deceased fiduciary, and a resigning fiduciary.⁷³ Even the Court of Appeals has addressed this issue in the context of an individual trustee's request for compensation, as noted below.⁷⁴

The term *quantum meruit* has often been employed by courts when confronted with the task of determining reasonable compensation.

More specifically, SCPA 1412(7) provides that if a will is denied probate or a preliminary executor's letters are revoked for any reason during the pendency of the probate proceeding, the preliminary executor is entitled to "receive only such compensation, if any, as the court shall determine to be reasonable and just for the services rendered by him to the estate"; however, not to exceed the commissions to which an executor would be entitled. Thus, in *In re Bernstein*,⁷⁵ a guardian ad litem appointed to represent the interests of secondary income beneficiaries contended that the deceased preliminary executor should receive only a modest compensation for her services since she received preliminary letters only 13 days before her death. The court disagreed and awarded the preliminary executor's estate \$10,000 in commissions, after finding that she unofficially served the estate for approximately four-and-a-half months after the decedent's death, in locating, inventorying and preserving the estate assets.⁷⁶

Similarly, a deceased fiduciary's estate is entitled to reasonable compensation measured by the value of the services rendered.⁷⁷ The fixation of such reasonable compensation rests in the sound discretion of the court but may not exceed the amount of commissions as fixed by statute.⁷⁸ Although in practice Surrogate's Courts frequently defer to the rate tables governing commissions due under SCPA 2307, 2308, and 2309,⁷⁹ courts have acknowledged that such rate tables "have little relationship to the length of service of the fiduciary or the value of his services."⁸⁰ Similarly, appellate courts have indicated that such determination should in fact be based on *quantum meruit* considerations.⁸¹

The foregoing principles have also been applied when a fiduciary resigns from office. *In re Smith*⁸² is a case in point. There, a general guardian sought leave to resign. The court held that the guardian had forfeited her right to receive statutory compensation but that she would be reasonably compensated for services properly performed. Notably, after referring to the usual rules for computing, receiving and paying out commissions pursuant to statutory rates, the Surrogate's Court held that it had to further consider the amount involved, the time the fiduciary

served, the nature of her duties, and her performance in discharging them.

Significantly, separate and apart from the foregoing circumstances, in *In re Schell* the Court of Appeals indicated a willingness to look beyond the statutory rate tables in determining the compensation of the fiduciary where the testator's will contained a provision directing that he be allowed "reasonable compensation" for his services.⁸³ To this extent, the Court opined that the testator must have intended that reference be made "to the special circumstances of his estate and the services which he has required [him] to perform," and noted that "the duties of the trustee were onerous, and involved more than the mere receipt and disbursement of money."⁸⁴ Accordingly, the Court remanded the case to the lower court for a determination of whether the sum claimed by the trustee was or was not reasonable in light of such circumstances.⁸⁵

Since *Schell*, there has been one other case that indicated that the approach in *Schell* would be followed in similar cases. In *In re Sprague*, the Surrogate's Court, Erie County stated that where a will "provides that a reasonable compensation shall be given to an executor, beyond the commissions, and without fixing the amount, the court will allow a fair amount according to the services rendered."⁸⁶

Although such language seemingly would involve consideration of multiple factors in determining the nature and value of the services rendered, the court did not elaborate on how it would reach such a determination.⁸⁷ As such, although the court in this case impliedly indicated that the approach taken in *Schell* should be followed, there have been no cases since *Schell* that explicitly hold that the unique circumstances of an estate will be considered in determining reasonable compensation due to an individual fiduciary under a will or trust instrument.

Conclusion

While reasonable compensation for the individual fiduciary has yet to be well defined in New York, when addressing the issue of reasonable compensation for the corporate fiduciary, and, in the several instances involving the preliminary executor, deceased fiduciary or resigning fiduciary, New York Surrogate's Courts have considered more than just the time value of the services performed, and relied, instead, on the criteria established by the court in *Potts*⁸⁸ and *Freeman*⁸⁹ for the determination of an appropriate award. The authors agree with this approach, which finds support not only with the N.Y. Court of Appeals, but also on the national stage in the UPC, Restatement and case law, all of which are of the view that a multitude of factors impact the assessment of a reasonable fee in this context. Indeed, this analysis provides the fair and equitable result that most testators and grantors, as well as the judiciary, seek to accomplish when reasonable compensation is at issue. Nevertheless, whether New York courts firmly adopt this approach for the individual fiduciary remains to be seen. In the

interim, wills or inter vivos trust instruments with little more than a direction that reasonable compensation be paid to the individual fiduciary may well be the subject of litigation as to the meaning of the term. Perhaps, in order to mitigate disputes regarding this issue, practitioners may wish to include in the instrument a list of factors to be considered in making this determination. ■

1. *See Will of Grant*, 155 Misc. 2d 819, 820 (Sur. Ct., N.Y. Co. 1993).
2. *Id.*
3. SCPA 2312.
4. *See In re Potts*, 123 Misc. 346 (Sur. Ct., Columbia Co. 1924), *aff'd*, 213 A.D. 59 (4th Dep't 1925), *aff'd*, 241 N.Y. 593 (1925).
5. *See In re Freeman*, 34 N.Y.2d 1 (1974).
6. *See, e.g., John Anthony Rubino & Co. v. Swartz*, 84 A.D.3d 599, 599 (1st Dep't 2011).
7. *Quantum Meruit Definition*, Dictionary.law.com, <http://dictionary.law.com/Default.aspx?selected=1692>; *see also De Graff, Foy, Conway and Holt-Harris v. McKesson & Robbins, Inc.*, 31 N.Y.2d 862, 873 (1972).
8. *See Ruggiero v. Gross Plumbing & Heating, Inc.*, 226 A.D.2d 984, 986 (3d Dep't 1996).
9. 34 N.Y.2d at 9.
10. *See Freeman*, 34 N.Y.2d at 9; *Potts*, 123 Misc. at 348–49; *see also* N.Y. Ct. R. § 207.45.
11. *See Freeman*, 34 N.Y.2d at 9; *Potts*, 123 Misc. at 348–49.
12. 31 A.D.3d 64, 65 (2d Dep't 2006) (emphasis added).
13. *See id.* at 67–68.
14. 127 A.D.3d 800, 801 (2d Dep't 2015) (internal quotations omitted).
15. *See id.*; *see also DeGregorio v. Bender*, 52 A.D.3d 645, 646 (2d Dep't 2008) (“An award in quantum meruit should be made after weighing all the relevant factors”); *Ogletree, Deakins, Nash, Smoak & Stewart, P.C. v. Albany Steel, Inc.*, 243 A.D.2d 877, 879 (3d Dep't 1997) (“The amount of compensation to be fixed under the theory of quantum meruit depends on the court’s interpretation of various factors in its determination of the reasonable value of the services rendered” (internal quotations omitted)).
16. *See generally Evans-Freke v. Showcase Contracting Corp.*, 85 A.D.3d 961, 963 (2d Dep't 2011), where the court considered relevant factors such as previously agreed upon hourly labor rates, industry standard, rates charged by contractor’s replacement, and invoices admitted at trial, in determining compensation due to contracting company for renovation services rendered, under theory of *quantum meruit*.
17. SCPA 2312(2) (emphasis added).
18. Sen. Jay P. Rolison, Jr., Memorandum in Support of S. B. 9572, p. 1 (N.Y. 1984).
19. *Id.* at p. 9.
20. *Id.* at p. 6.
21. *Id.* at p. 9–10 (emphasis added).
22. *Id.* at p. 6.
23. 138 Misc. 2d 577, 577 (Sur. Ct., Westchester Co. 1988).
24. *Id.*
25. *See id.* at 579.
26. *See id.* at 579, 580.
27. *See id.* at 581, 583.
28. 187 Misc. 2d 566, 566 (Sur. Ct., Westchester Co. 2000).
29. *Id.*
30. *See id.* at 571.
31. *See id.* at 573–74.
32. *Id.* at 578–79.
33. *See id.* at 580.
34. N.Y.L.J., June 10, 2002, p. 35, col. 4 (Sur. Ct., Westchester Co.).
35. *Id.*, (citing *In re Prankard*, 187 Misc. 2d 566, 566 (Sur. Ct., Westchester Co. 2000)).
36. N.Y.L.J., June 4, 2010, p. 31, col. 3 (Sur. Ct., Westchester Co.).
37. *Id.*
38. *Id.*
39. Today, that number has increased to 17, and includes Massachusetts, New Jersey, and South Carolina, with an even greater number of states, although declining to adopt the UPC in full, modeling their state-specific statutes off of UPC provisions, including New York and California. *See* Uniform Probate Code (UPC) Adoption by the States, AmericanBar.org, http://www.americanbar.org/content/dam/aba/publications/litigation_committees/trust/50-state-probate-code-survey.authcheckdam.pdf.
40. Uniform Probate Code § 3-719 (1969) (UPC).
41. UPC § 5-417 (1973).
42. UPC § 7-205 (1973).
43. UPC § 5-417, comment (2010).
44. UPC § 3-719 (2010).
45. UPC § 3-703 (2010).
46. Restatement (Third) of Trusts § 38 (2012).
47. UPC § 708, comment (2010).
48. 119 A. 341, 98 Conn. 374 (1923).
49. *Id.* at 341.
50. *Id.* at 344.
51. *Id.* at 345.
52. *Id.* at 346.
53. *Trust Under The Will of Thomas E. Moran*, 17 Quinipiac Prob. L.J. 28, May 9, 2002, p. *28 (Ct. of Prob., Dist. of Darien).
54. *Id.* at *41.
55. *Id.* at *41, *42–43.
56. *See id.* at *46.
57. 100 So. 2d 807, 811 (Fla. 1958).
58. *Id.*
59. Michael Kimmelman, *Robert Rauschenberg, American Artist, Dies at 82*, The New York Times (May 14, 2008), www.nytimes.com/2008/05/14/arts/design/14rauschenberg.html?_r=0.
60. *Robert Rauschenberg Found. v. Grutman*, Case No. 2D14-3794, 2016 Fla. App. LEXIS 181, at *1 (Fla. Dist. Ct. App. 2d Dist. Jan. 6, 2016).
61. *See id.* at *2.
62. *Id.*
63. *See Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145, 1151 (Fla. 1985).
64. *See Rauschenberg*, 2016 Fla. App. LEXIS 181 at *2, *3–4 (citing *Florida Patient’s Compensation Fund*, 472 So. 2d at 1151).
65. *See id.* at *2.
66. *See id.* at *6.
67. *See In re McLaughlin’s Estate*, 43 Cal. 2d 462, 468 (Cal. 1954).
68. Cal. Rules of Court, Rule 7.776.
69. *In re Estate of Wakefield*, M1998-00921-COA-R3-CV, 2001 Tenn. App. LEXIS 905, *61 (Tenn. Ct. App., Dec. 10, 2001) (internal citations omitted).
70. *Ruttenberg v. Friedman*, 97 So. 3d 114, 129–30 (Ala. 2012).
71. N.C. Gen. Stat. § 32-54(b) (in subsection (a), the statute also provides that a trustee is explicitly entitled to reasonable compensation where the trust instrument is silent on the issue).
72. *Id.*
73. *See generally*, 8-103 Warren’s Heaton on Surrogate’s Court Practice, § 103.02.
74. *See In re Schell*, 53 N.Y. 263 (1873).
75. 94 Misc. 2d 898, 900 (Sur. Ct., N.Y. Co. 1978).
76. *Id.*
77. *In re Monell*, N.Y.L.J., Oct. 10, 2003, p. 27, col. 3 (Sur. Ct., Suffolk Co.).
78. *Id.*; *see also In re Bushé*, 227 N.Y. 85, 93 (1919).
79. *See In re McGrath’s Estate*, 74 Misc. 2d 92, 96 (Sur. Ct., Kings Co. 1973).
80. *See id.* at 99.
81. *See In re Mittman*, 145 A.D.2d 635, 636 (2d Dep't 1988).
82. N.Y.L.J., June 19, 1980, p. 15 (Sur. Ct., Bronx Co.).
83. 53 N.Y. 263 (1873).
84. *Id.* at 266–67.
85. *Id.* at 267.
86. 46 Misc. 216, 218 (Sur. Ct., Erie Co. 1905) (emphasis added).
87. *See id.*
88. 123 Misc. at 348–49.
89. 34 N.Y.2d at 9.