

**BEXAR COUNTY PROBATE COURT
ADMINISTRATIVE ORDER NUMBER 2016-02**

IN RE:	§	IN THE PROBATE COURT
	§	
ADMINISTRATIVE ORDER NO. 2016-02	§	
	§	
	§	BEXAR COUNTY, TEXAS

**ADMINISTRATIVE ORDER ON APPLICATION FOR TRUSTEE'S
REQUEST FOR COMPENSATION TO BE DEEMED UNREASONABLY LOW**

The Court finds that there is an inconsistent evidentiary presentation in applications presented to the court on trustee's request to determine commissions unreasonably low for trusts established pursuant to Tex. Estates Code § 1301.101, *et seq.* Since trustee's commissions are to be "... determined, paid, reduced, and eliminated in the same manner as compensation of a guardian under Subchapter A, Chapter 1155" Tex. Estates Code 1301.101 (b)(2), the Court has determined that guidelines are appropriate for a determination of the trustee's request to deem the commission unreasonably low.

Tex. Estates Code § 1301.101 provides, in pertinent part, the following regarding trustee's commissions:

SUBCHAPTER C. TERMS OF MANAGEMENT TRUST

Sec. 1301.101. REQUIRED TERMS. (a) Except as provided by Subsection (c), a management trust created for a ward or incapacitated person must provide that:

* * *

(5) subject to the court's approval and Subsection (b), a trustee is entitled to receive reasonable compensation for services the trustee provides to the person for whom the trust is created as the person's trustee.

(a-1) A management trust created for a person who has only a physical disability must provide that the trustee of the trust:

* * *

(2) is entitled to receive, without the court's approval, reasonable compensation for services the trustee provides to the person as the person's trustee.

(b) A trustee's compensation under Subsection (a)(5) must be:

* * *

(2) determined, paid, reduced, and eliminated in the same manner as compensation of a guardian under Subchapter A, Chapter 1155.

The Texas Estates Code provides, in relevant sections, a statutory limit on compensation: Guardian of the Estate (§ 1155.003) and Guardian of the Person and Estate Maximum Aggregate compensation (§ 1155.005) and Modification of Unreasonably Low Compensation (§ 1155.006).

TEX. ESTATES CODE § 1155.003 provides:

Sec. 1155.003. COMPENSATION FOR GUARDIAN OF THE ESTATE.

(a) The guardian of an estate is entitled to reasonable compensation on application to the court at the time the court approves an annual or final accounting filed by the guardian under this title.

(b) A fee of five percent of the gross income of the ward's estate and five percent of all money paid out of the estate, subject to the award of an additional amount under Section 1155.006(a) following a review under Section 1155.006(a)(1), is considered reasonable under this section if the court finds that the guardian has taken care of and managed the estate in compliance with the standards of this title.

Tex. Estates Code § 1155.006 (b) provides: “A finding of unreasonably low compensation may not be established under Subsection (a) solely because the amount of compensation is less than the usual and customary charges of the person or entity serving as guardian.”

The Court finds that it would be beneficial to set a standard for a factual analysis in support of the trustee's argument that the statutory compensation is unreasonably low. The Court has reviewed the analysis and factors that a court applies in the reasonableness of attorneys fees as analogous to trustee's request to deem its compensation unreasonable low.

Rule 1.04 (c) of the Texas Rules of Professional Conduct provides, in pertinent part:

(c) Factors that may be considered in determining the reasonableness of a fee includes, but not to the exclusion of other relevant factors, the following:

(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 on results obtained or uncertainty of collection before the legal services have been rendered.

In the case of *Arthur Anderson Co. v. Perry Equipment Corporation*, 945 S.W. 2d 812, 818 (Tex. 1997), the Supreme Court applied these factors.

In addition, the Court in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) and its progeny have enumerated a non-exclusive list of at least 12 factors to consider in awarding attorney fees.

The Court has determined that there is a need for the trustee to establish, factually, the trustee's compensation request above the statutory amount. Like *Johnson*, the Texas Rule of Disciplinary Rules of Professional Conduct Rule 1.04(b) and in the *Arthur Anderson* case, the factors are not exclusive either in scope or in the application solely to attorneys fees; the Court finds, therefore, that the factors considered in determining reasonable attorneys fees are analogous to the factors that the court should consider to support a finding of an unreasonably low trustee commission.

IT IS THEREFORE, ORDERED that on all future applications for trustee compensation where the applicant seeks to recover fees in excess of those authorized by statute and therein seeks to have the court deem the compensation unreasonably low, the applicant shall, in separately numbered paragraphs, identify and describe in detail the factual basis that support the following factors, as applicable, to the management and administration of the trust in support of a request to deem the statutory compensation unreasonably low, including, but not limited to:

- (1) the time and labor required as demonstrated by detailed time entries describing the work performed by trustee;
- (2) the novelty, difficulty and complexity of the financial issues involved;
- (3) the amount requested and the source for payment of the fees;
- (4) whether the beneficiary receives Medicaid and has an applied income;
- (5) the time limitations imposed, e.g., urgent situations, by the circumstances or the beneficiary or the estate;
- (6) the relationship between the applicant and the beneficiary;
- (7) whether or not other assistance was also given by hired professionals or para-professionals such as case managers, real estate agents or other paid service providers;
- (8) the likelihood that the acceptance of the particular appointment precluded other employment by the applicant;
- (9) the total estate value and the type of assets that are managed;
- (10) the location of the ward, particular issues in managing the trust, working with the beneficiary or ward;
- (11) the additional services and benefits provided by a corporate fiduciary providing trust services;
- (12) the benefit to the court of employing a corporate fiduciary and trustee.

IT IS FURTHER ORDERED that on all future applications, the applicant shall provide a calculation of the statutory commission pursuant to Tex. Estates Code §§ 1155.002 or 1155.003 and 1155.005, as applicable.

This order is effective for all applications to deem trustee's statutory commission unreasonably low filed on or after June 1, 2016.

Signed April 27, 2016.



Judge Kelly M. Cross
Presiding Judge
Bexar County Probate Court No. 1



Judge Tom Rickhoff,
Presiding Judge
Bexar County Probate Court No. 2