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**ESTATE TAX MEMORANDUM**

**TO:** CPAs, Clients & Associates

**FROM:** David L. Silverman, Esq.

**DATE:** April 29, 2010

**RE:** Executor and Trustee Commissions Under the New York EPTL

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This Memorandum of Law discusses the determination of Trustee and Executor commissions under the Surrogate's Court Procedure Act.

**A. Executor Commissions**

**1. Statutory Commission Rates**

In New York, Executor commissions are set out by statute. Surrogate's Court and Procedure Act (SCPA) § 2307 provides that a fiduciary other than trustee is entitled to a commission rate of 5 percent on the first \$100,000 in the estate, 4 percent on the next \$200,000, 3 percent on the next \$700,000, 2-1/2 percent on the next \$4,000,000 and 2 percent on any amount above \$5,000,000. Executor commissions are in addition to the reasonable and necessary expenses actually paid by the Executor.

**2. Commission Base**

In general, any asset which the fiduciary takes under his administration, and with respect to he assumes a risk would be included in the decedent's estate for calculation of the fiduciary's commission. Damages recovered in court actions by the personal representative are general assets of the estate subject to full commissions. [29 Carmody-Wait 2D §168:19]. The value of non testamentary assets such as joint property, life insurance payable other than to the estate, Totten Trust accounts) are not included in the commission base. Property transferred by the decedent in his lifetime in trust, is not part of the testamentary estate, and not included in the commission base. However, if the assets of the trust are paid to the estate or used to pay claims, expenses, taxes or other estate charges, those assets will be subject to commissions.

### **3. Advance Payment of Executor Commissions**

Executor commissions are paid after administration of the estate upon the settlement of the account of the fiduciary under SCPA § 2307(1). SCPA § 2310 and § 2311 permit advance payment of executor commissions by application and approval of the Surrogate's Court. A fiduciary may request an advance payment on account of commissions to which the fiduciary would be entitled if he were then filing an account. Commissions paid to an Executor are considered taxable income, and must be reported on the Executor's income tax return.

## **B. Trustee Commissions**

### **1. Commissions Based On Sums of Money Paid Out**

Surrogate's Court and Procedure Act (SCPA) § 2309(1) provides:

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Any advice herein is not intended or written by our firm to be used, and cannot be used by any taxpayer, for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code, nor does such advice constitute legal advice for a particular case, since state laws vary as do factual circumstances. Advice from our firm relating to Federal tax matters may not be used in promoting, marketing or recommending any entity, investment plan or arrangement to any taxpayer.

On the settlement of the account of any trustee under the will of a person dying after August 31, 1956, or under a[n] [inter vivos] trust . . . the court must allow to him his reasonable and necessary expenses actually paid by him . . . and in addition it must allow the trustee for his services as trustee a commission from principal for paying out all sums of money constituting principal at the rate of 1 per cent.

Therefore, the trustee is entitled to a commission of 1 percent for all money paid out of the marital trust.

## **2. Annual Commissions**

In addition to the commission of 1 percent described above, SCPA § 2309(2) provides for annual commissions at the following rates:

- (a) \$10.50 per \$1,000 or major fraction thereof on the first \$400,000 of principal.
- (b) \$4.50 per \$1,000 or major fraction thereon on the next \$600,000 of principal.
- (c) \$3.00 per \$1,000 or major fraction thereof on all additional principal.

Annual commissions may be computed either at the end of the year or, at the option of the trustee, at the beginning of the year; provided, that the option selected shall be used throughout the period of the trust. The computation is made on the basis of a 12-month period but shall be adjusted for upward or downward for any payments made in partial distribution of the trust or the receipt of any new property into the trust within that period.

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### **3. Source of Payment of Annual Commissions**

SCPA § 2309(3) provides that annual commissions shall be paid one-third from the income of the trust and two-thirds from the principal, unless the will or trust otherwise directs.

### **4. Annual Accounting to Beneficiaries**

The trustee is required to furnish annually as of a date no more than 30 days prior to the end of the trust year to each beneficiary currently receiving income, and to any other beneficiary interested in the income and to any person interested in the principal of the trust who shall make a demand therefor, a statement showing the principal assets on hand on that date, and at least annually a statement showing all receipts of income and principal during the period including the amount of any commissions retained by the trustee. SCPA § 2309(4) provides that a trustee shall not be deemed to have waived any commissions by reason of his failure to retain them when he becomes entitled thereto; provided however that commissions payable from income for any given trust year shall be allowed and retained only from income derived from the trust during that year and shall not be supplied from income on hand in respect to any other trust year.

### **5. Effect of Multiple Trustees on Commissions**

The will of John Smith names three trustees. The following paragraphs discuss the effect of multiple trustees on the determination of trustee commissions.

#### **a. Effect of Multiple Trustees on Amounts Paid Out**

SCPA § 2309(6)-(a) provides that, “subject to 2313,” if gross value of the trust exceeds

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\$400,000 and there is more than one trustee, each trustee is entitled to full compensation for paying out principal allowed herein to a sole trustee unless there are more than 3.

**b. Effect of Multiple Trustees on Annual Commissions**

SCPA § 2309(6)-(b) provides that, “subject to 2313,” if the value of the principal of the trust for the purpose of computing the annual commissions allowed

- (1) Amounts to \$400,000 or more and there is more than one trustee each trustee is entitled to a full commission allowed herein to a sole trustee unless there are more than three trustees.
- (2) Amounts to between \$100,000 and \$400,000, each trustee is entitled to a full commission unless there are more than two trustees, in which case commissions must be apportioned according to the services rendered, unless the trustees shall have agreed in writing otherwise.
- (3) Amounts to less than \$100,000, one full trustee commission must be apportioned among all trustees according to the services rendered.

**c. Effect of SCPA § 2313 on Multiple Commissions For Amounts Paid Out and Annual Commissions**

As noted above, SCPA § 2313 modifies the rules described in the above two paragraphs

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for determining trustee commissions where multiple trustees are involved. The rules provided by SCPA § (6)(a) and (b) are modified by SCPA § 2313 by providing that if there are more than two trustees (or executors) “no more than two commissions shall be allowed unless the decedent has specifically provided otherwise in a signed writing.” SCPA § 2313 further provides that the “compensation thus allowable must be apportioned among the fiduciaries according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.”

Very Truly Yours,

David L. Silverman

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