



HIGH VALUE ESTATES: PROPOSAL FOR COMPENSATING PERSONAL REPRESENTATIVES AND ATTORNEYS FOR ORDINARY SERVICES IN PROBATE ESTATES THAT EXCEED \$25 MILLION

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The Probate Code requires court approval for all compensation paid to the personal representative of an estate. The probate court is guided by a statutory framework that specifies compensation for “ordinary” services based on a fixed rate schedule applied to the total value of the assets of the estate up to \$25 million. For an estate with assets valued in excess of \$25 million, ordinary compensation with respect to the value over \$25 million must be set at a reasonable level, as determined in the court’s discretion. In addition to ordinary compensation, the statute provides for compensation for specifically enumerated “extraordinary” services, which is only awardable if the compensation for “ordinary” services is insufficient to adequately compensate the personal representative for the extraordinary services provided.

The court’s role in approving and determining fees serves two purposes. First, it encourages personal representatives to act, since the personal representative will be paid for his or her services in accordance with a court’s order. Second, the hearing regarding fees gives all beneficiaries and other interested parties an opportunity to object to a request for unreasonable fees.

I. LEGAL FRAMEWORK

A variety of California laws pertain to the compensation of the personal representative of a decedent’s estate in a probate proceeding. This section summarizes the applicable statutory provisions, as well as the rules of court and the relevant case law interpreting these provisions.

A. Statutes

No compensation may be paid without a court order.¹ The California Probate Code provides for two distinct methods for determining the compensation of a personal representative, described by the Court of Appeal as follows:

“To begin with, in every case the personal representative and his or her attorney are entitled to compensation based upon a sliding scale of percentages of the value of the estate accounted for (Prob. Code sections 10800, 10810.) Because this compensation is intended as payment for the services which are involved in substantially every probate case, it is commonly known as ‘statutory’ or ‘ordinary’ compensation or as compensation for ‘statutory’ or ‘ordinary’ services. The second approach provides for compensation for services which are not involved in the typical probate case, and that approach authorizes the court to allow additional compensation for those unusual services—so-called ‘extraordinary’ services. Section 10801 (as to personal representatives) ... provide[s] that the probate court ‘may allow additional compensation for extraordinary services ... in an amount the court determines is just and reasonable.’ Compensation determined by this second approach is commonly known as ‘extraordinary’ compensation or as compensation for ‘extraordinary’ services.”²

1. Ordinary Compensation

A personal representative is entitled to ordinary compensation “as a matter of right.”³ Generally, compensation under the statutory formula is mandatory, and the court has no discretion to alter the amount. There is a narrow exception to this rule—a court may reduce the compensation of the personal representative or the attorney for the personal representative if the court determines that all of the following three circumstances occurred: 1) the time taken for the administration exceeds the time prescribed by law or by the court; 2) the time taken was within the control of the personal representative; and 3) the delay was not in the best interest of the estate or interested persons.⁴

The statute provides that such compensation shall be “based on the value of the estate accounted for by the personal representative, as follows:

- (1) Four percent on the first one hundred thousand dollars (\$100,000).
- (2) Three percent on the next one hundred thousand dollars (\$100,000).
- (3) Two percent on the next eight hundred thousand dollars (\$800,000).
- (4) One percent on the next nine million dollars (\$9,000,000).
- (5) One-half of one percent on the next fifteen million dollars (\$15,000,000).



(6) For all amounts above twenty-five million dollars (\$25,000,000), a reasonable amount to be determined by the court.²⁵

For purposes of this computation, the “value of the estate” is the “total amount of the appraisal value of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.”²⁶

Based on the statutory formula, an estate valued at \$25 million will entitle the personal representative to compensation in the amount of \$188,000.

This statutory fee compensates the personal representative for “typical services rendered to collect, care for, maintain, and preserve estate property,” and “routine tasks, such as marshaling and inventorying assets, processing claims, collecting rents and receipts, and maintaining the estate books.”²⁷

2. *Extraordinary Compensation*

The probate court is authorized to allow compensation in addition to the ordinary compensation determined by the statutory formula described above. In this regard, the statute provides that “the court may allow additional compensation for extraordinary services by the personal representative in an amount the court determines is just and reasonable.”²⁸ Thus, in contrast to the statutory formula for ordinary compensation, there are no set rates for extraordinary compensation.⁹

In defining “extraordinary services” for the purposes of awarding additional compensation, courts have noted that “the term ‘extraordinary services’ has a highly technical definition”¹⁰ that includes specific types of services that are “exceptional or nonroutine.”¹¹ Specifically, “extraordinary” compensation is awarded for “sales of real or personal property, carrying on decedent’s business pursuant to court order, court proceedings to determine the testator’s intention concerning undisclosed beneficiaries, defense of personal representative’s account, [and] securing a loan to pay estate debts.”¹² “‘Extraordinary’ services also may include services in connection with such matters as litigation with third parties [and] federal estate tax matters.”¹³ However, if the estate is more complicated and requires more work, effort, and skill than is required in the simple estate, that does not change the nature of the services from ordinary to extraordinary.¹⁴

In determining whether to award extraordinary compensation, courts consider a variety of issues, including whether the statutory fee constitutes adequate compensation

not only for the ordinary services but for the extraordinary services rendered; whether the service rendered was necessary or beneficial to the estate; and the character of the service rendered—that is, was it performed in carrying out the ordinary duties of the personal representative, or was it in fact extraordinary.¹⁵ Courts routinely examine whether ordinary compensation would itself provide reasonable compensation in deciding whether to award extraordinary compensation in addition to the statutory compensation and, even in cases where the [representative’s] services fall within the ambit of what could be considered extraordinary, the court may conclude the individual has been adequately compensated through the ordinary fees for those extraordinary services.¹⁶

B. Court Rules

California probate proceedings are governed by both state rules of court and local court rules for the particular county in which the proceeding is held. State and local rules of court do not amend or supplement the statutory formula for ordinary compensation. However, both state and local rules address the issue of compensating personal representatives.

1. *State Rules*

The California Rules of Court expressly provide that “[a]n award of extraordinary compensation to the personal representative or to the attorney for the personal representative is within the discretion of the court.”¹⁷

California Rule of Court 7.703 identifies specific types of services that may constitute extraordinary services that merit additional compensation, including: “(1) Selling, leasing, exchanging, financing, or foreclosing real or personal property; (2) Carrying on decedent’s business if necessary to preserve the estate or under court order; (3) Preparing tax returns; and (4) Handling audits or litigation connected with tax liabilities of the decedent or of the estate.”¹⁸

A petition for extraordinary compensation must include a detailed statement that enumerates a variety of supporting facts. Specifically, it must: “(1) show the nature and difficulty of the tasks performed; (2) Show the results achieved; (3) Show the benefit of the services to the estate; (4) Specify the amount requested for each category of service performed; (5) State the hourly rate of each person who performed services and the hours spent by each of them; (6) Describe the services rendered in sufficient detail to demonstrate the productivity of the time spent; and (7) State the estimated amount of statutory compensation to be paid by the estate, if the petition is not part of a final account or report.”¹⁹ In addition to these factors,



“[t]he court may consider the amount of statutory compensation when determining compensation for extraordinary services.”²⁰

2. Local Rules

The county in which an estate is administered may also have local rules that guide a court’s award of extraordinary fees. For example, the local rules in San Mateo County provide that “[e]xtraordinary fees may be awarded for extraordinary services, including but not limited to the following: (1) Sales, leases, exchanges, financing or foreclosure of real or personal property. (2) Contested or litigated claims against the estate. (3) Preparation of income, sales, withholding, gift or estate tax returns and handling of audits or litigation connected with tax liabilities. (4) Litigation connected with estate assets. (5) Carrying on the decedents’ business. (6) Will contest.”²¹

C. Case Law

Few California cases define the standards for determining ordinary and extraordinary compensation in probate proceedings. However, the Estate of Jean Paul Getty involved a dispute over the payment of ordinary compensation to the estate’s executors. In 1976, Jean Paul Getty died, “leaving the largest estate ever subject to probate in the State of California,” which was valued at approximately \$760 million on the original inventory and at nearly \$1.4 billion at the time of the final account.²² At the time of Mr. Getty’s death, the Probate Code’s statutory fee provisions awarded ordinary fees based on a graduated schedule for estates of up to \$500,000, and a flat rate of 1% for values above \$500,000.²³ On that basis, the two co-executors of the estate were awarded statutory fees in the total amount of approximately \$13.5 million (or about \$6.8 million each).²⁴ This compensation was awarded exclusively under the authority of the ordinary compensation statute. Under the will, the co-executors were not entitled to extraordinary fees.²⁵

The primary beneficiary of the Getty estate was a charitable entity (the Getty Museum) that was run by the same individuals who were acting as co-executors of the estate. The court “fearing the ‘windfall’ to be realized by the executors and the attorneys for this huge estate in receiving payments for their services at the statutory rates fixed by the Probate Code invited ‘the Attorney General to consider, negotiate and take appropriate action’ to challenge the application of [the statutes] to the Getty estate on behalf of the Getty Museum, the charitable entity over which the Attorney General exercises supervisory and protective powers and responsibilities.”²⁶

In this regard, the court observed that “[o]rdinarily, the museum trustees would be the ones to take action on behalf of the charitable beneficiary to challenge this monumental

windfall of commissions and fees to executors and their attorneys for administering what is essentially a liquid, one-asset estate. However, the composition of the museum’s board of trustees makes it doubtful that the board could impartially consider this question, let alone take vigorous action, by reason of the conflicts of interest present between the trustees’ duties as guardians of a charitable trust and their personal welfare as executors, of the estate, affiliates of attorneys for the estate, and officers and employees of Getty Oil Company. When charitable trustees are unable to act to protect the interests of their beneficiary, the duty to act devolves upon the Attorney General of California.”²⁷

The California Attorney General appealed the compensation award, contending that the court should have limited the fee to a reasonable amount, “so as to avoid requiring the payment of commissions and fees which so far exceed the reasonable value of services rendered as to create a monumental windfall, unjustly enriching fiduciaries at the expense of the estate, a result which is both absurd and contrary to the statutory purpose to protect estates against excessive commissions and fees.”²⁸ In 1983, the Court of Appeal upheld the fee award on the grounds that the ordinary compensation was mandatory and not subject to modification by the Court on the basis of reasonableness or otherwise.

In 1987, the California Legislature amended the statute regarding ordinary compensation to allow a commission based on a graduated schedule with respect to the value of estates up to \$25 million and to permit the court to award “a reasonable amount” of compensation with respect to the value over \$25 million. This modification was “no doubt in response to *Estate of Getty*.”²⁹

Conrad Hilton’s estate proceedings provide guidance as to an award for extraordinary services. Conrad Hilton died in 1979, leaving an estate valued between \$400 and \$750 million.³⁰ In the early years of the estate’s administration, the court awarded the two co-executors interim payments of ordinary compensation in the total amount of \$1,482,653.13 (or approximately \$740,000 each, assuming they shared the commission equally).³¹ The executors’ attorney received an identical amount of ordinary compensation and an additional award of extraordinary compensation. After the statute changed, the attorney for the executors sought further compensation in the amount of \$2.5 million for extraordinary services rendered over a long period of time leading up to the final accounting and distribution in 1992. The court denied the request on the theory that the prior awards reasonably compensated the attorney both for the ordinary services and the extraordinary



services, including those for which he had not yet received compensation.³²

The authors found no other reported case involving the probate of an estate requiring the court to determine the “reasonable amount” of the executor’s ordinary compensation for the value of an estate in excess of \$25 million. This absence of case authority is not particularly surprising, given the popularity in California of planning with fully-funded revocable trusts, which typically allow a decedent’s estate to avoid the probate process.

In general, the Legislature’s reaction to *Estate of Getty* and the court’s decision in *Estate of Hilton*, suggest that “reasonable compensation” under the current law may not represent a “windfall” to the executor and may not be “excessive” in relation to the services performed by the executor, but may preclude a further award for extraordinary services in very large estates.

II. COMPENSATION FOR ORDINARY SERVICES OF PERSONAL REPRESENTATIVES AND THEIR ATTORNEYS FOR ESTATES WITH ASSETS HAVING A TOTAL VALUE IN EXCESS OF \$25 MILLION

Because there are no statutory guidelines or rules on what the court must consider in determining the “reasonable amount” of compensation for ordinary services with respect to the portion of an estate having a total value in excess of \$25 million, it may be difficult to propose to the court a method for determining this reasonable amount, especially in cases where the personal representative is not a licensed professional fiduciary. This article proposes requesting compensation for ordinary services based on an extension of the statutory rate schedule as set forth in Appendix B.

A. Extension of the Statutory Formula

As noted, the personal representative is entitled to ordinary compensation as determined under the graduated rate schedule set forth in the statute for the portion of the estate valued at \$25 million (*i.e.*, \$188,000), plus an additional “reasonable” amount for the portion of the estate above that amount. The authors’ proposed compensation structure would compute this additional “reasonable” amount by extending the schedule of graduated percentage rates as follows:

The statute provides for compensation of the personal representatives at the rate of 0.50% of the value of the estate over \$10 million up to \$25 million. The authors’ proposed extended rate schedule would also apply that rate to the portion of the estate over \$25 million up to \$100 million, so that brackets in

excess of \$1 million are fixed in multiples of ten. The authors propose to reduce the rate of compensation by half for each sequential bracket. Thus, the next bracket of the extended schedule would provide for compensation at the rate of 0.25% of the value of the estate over \$100 million up to \$1 billion. The next bracket of the extended schedule would provide for compensation at the rate of 0.125% of the value of the estate over \$1 billion up to \$10 billion. The next bracket of the extended schedule would provide for compensation at the rate of 0.0625% of the value of the estate over \$10 billion up to \$100 billion.

This rate schedule is consistent with the current statutory scheme as it continues the pattern of assigning a new rate to each bracket based on multiples of ten (*i.e.*, the bracket of the first \$100 million is followed by a bracket for the additional value up to \$1 billion) and reducing the assigned rate by one-half the rate for the previous bracket (*i.e.*, 0.5% is followed by 0.25%). In the statutory schedule, the rate applicable to the first \$1 million of the value of the estate is 2% (with the exception of 4% and 3% brackets that apply to the first \$200,000), and the rate applied to the next \$9 million in value is one-half of that, or 1%.

The magnitude of an estate valued at more than \$25 million, combined with the likely complex nature of the assets in an estate of this size, poses unusual risks and responsibilities for which the personal representative should be adequately compensated. The personal representative of such an estate is likely to bear both tremendous responsibilities and substantial risk of liability. A substantial compensation based on an extension of the current graduated rate schedule applied to the total value of the assets of the estate—at a minimum—bears a logical relationship to the size of the estate and, therefore, the degree of responsibility and risk involved.

B. Application of the Extended Schedule to Attorneys’ Fees for Ordinary Services

Probate Code section 10810 provides an identical compensation schedule for ordinary services provided by the attorney for the personal representative. Although the attorney is a professional and generally charges for services provided based on an hourly rate, applying the same logically extended schedule to compensate the attorney for ordinary services provided to the personal representative would be consistent with the current statutory scheme, as the attorney also bears greater responsibility and risk.



III. APPLICATION OF THE EXTENDED STATUTORY COMPENSATION SCHEDULE TO TRUSTEES OF ADMINISTRATIVE TRUSTS

Probate Code section 15681 provides: “If the trust instrument does not specify the trustee’s compensation, the trustee is entitled to reasonable compensation under the circumstances.” However, there is little guidance on how to determine the amount of compensation that is reasonable for a person serving as trustee of an administrative trust, i.e., a revocable trust after the death of the settlor. Determining what is reasonable compensation for a nonprofessional trustee of an administrative trust can be difficult and often leads to disagreement (and litigation) between the trustee and the beneficiaries.

For ongoing trusts, corporate trustees generally charge an annual fee based on the fair market value of the trust assets, often with a minimum amount of compensation each year. If the trustee’s fee is based on the percentage of the trust’s value, that percentage typically decreases as the fair market value of the trust increases. For example, the fee of a corporate trustee for a trust with a value of \$15 million would likely be in the range of \$110,000 to \$130,000 per year. In the authors’ experience, corporate trustees do not typically distinguish between ordinary and extraordinary services for this purpose. However, some corporate trustees charge a fee based on the statutory fee schedule that applies to the personal representative of an estate for trust settlement services required upon a trustor’s death.

Individual professional fiduciaries typically charge an hourly fee, similar to an attorney, although likely at a lower hourly rate. The total fee will necessarily depend on the complexity of the particular trust administration, since a more complex trust administration will consume more of the professional fiduciary’s time. As with a corporate trustee, an individual professional fiduciary generally makes no distinction between ordinary services (i.e., marshalling, inventorying, and distributing the assets) and extraordinary services (i.e., selling real estate and filing tax returns).

Reasonable compensation for an individual, non-professional trustee of an administrative trust is more difficult to determine, given that the individual is not in the business of providing trust administration services. In many ways, the duties of the trustee of an administrative trust are much more like the duties of the personal representative of a probate estate than they are like the duties of a trustee of an ongoing trust. Consequently, the reasonable compensation for the services of the trustee of an administrative trust might best be determined by reference to the statutory schedule applicable to ordinary services of personal representatives of probate estates.

Although few probate estates have total assets valued at more than \$25 million, many administrative trusts hold assets that exceed that amount. Therefore, the statutory schedule of compensation paid to a personal representative for ordinary services rendered to a probate estate may provide a straightforward measure of the reasonable compensation for the ordinary services rendered by the trustee of an administrative trust, since the tasks performed by each fiduciary are similar. Following this model, the trustee of an administrative trust with assets valued at \$15 million would receive a fee for “ordinary” services in the amount of \$138,000. If the trust had assets with a total value of \$45 million, the trustee fee would be \$288,000.

Depending on the circumstances, it also may be reasonable and appropriate for the trustee of an administrative trust to receive an additional fee for extraordinary services, such as selling real estate and filing an estate tax return. As noted above, there is no fixed statutory scheme for determining reasonable compensation for extraordinary services performed by a personal representative. Therefore, the facts and circumstances of the specific situation would inform the amount of the fee that might exceed the fee for “ordinary” services computed based on the extended statutory scale. For example, the trustee of an administrative trust with assets valued at \$15 million might sell several real properties and file an estate tax return as part of the trust administration. The authors suggest that it may be reasonable for the trustee to receive an additional fee for these services in excess of the \$138,000 fee for ordinary services computed on the statutory schedule. Of course, the particular circumstances in any given case may or may not support the payment of an additional fee for extraordinary services, over and above the fee computed on the statutory schedule.

In addition, the trustee of an administrative trust presumably will have legal counsel, who will be paid an hourly rate or another fee arrangement agreed upon by the trustee and the attorney. The authors do not suggest that the statutory fee schedule for probate matters be applied to attorneys representing trustees of administrative trusts. Given that an attorney is in the business of practicing law, it seems to us that his or her typical hourly fee, or other standard fee arrangement, best represents reasonable compensation for the attorney. In summary, given the increased risks and responsibilities imposed on a fiduciary who administers a large trust or estate, extending the statutory fee schedule to determine the fees for ordinary services due to those fiduciaries provides a helpful benchmark for determining the reasonableness of that fee.

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APPENDIX A

STATUTORY COMPENSATION FOR PERSONAL REPRESENTATIVES AND ATTORNEYS FOR ORDINARY SERVICES

California Probate Code §§ 10800 and 10810

If the Value of the Probate Estate is:

The Personal Representatives' Compensation and Attorneys' Fees are:

<i>From</i>	<i>To</i>	<i>Compensation +</i>	<i>Fees +</i>	<i>%</i>	<i>On Excess Over</i>
\$-0-	\$100,000	\$-0-	\$-0-	4	\$-0-
100,000	200,000	4,000	4,000	3	100,000
200,000	300,000	7,000	7,000	2	200,000
300,000	400,000	9,000	9,000	2	300,000
400,000	500,000	11,000	11,000	2	400,000
500,000	600,000	13,000	13,000	2	500,000
600,000	700,000	15,000	15,000	2	600,000
700,000	800,000	17,000	17,000	2	700,000
800,000	900,000	19,000	19,000	2	800,000
900,000	1,000,000	21,000	21,000	2	900,000
1,000,000	10,000,000	23,000	23,000	1	1,000,000
10,000,000	25,000,000	113,000	113,000	½	10,000,000
25,000,000	∞	188,000	188,000	*	25,000,000

Additional compensation is also allowed in the court's discretion for extraordinary services performed by the executor, administrator, or attorney, including selling or mortgaging estate property, continuing the decedent's business, contesting or litigating claims, and tax return preparation and tax planning.

* A reasonable amount to be determined by the court.



APPENDIX B

PROPOSED EXTENSION OF THE STATUTORY COMPENSATION FOR PERSONAL REPRESENTATIVES AND ATTORNEYS FOR ORDINARY SERVICES

If the Value of the Probate Estate is: The Personal Representatives' Compensation and Attorneys' Fees are:

<i>From</i>	<i>To</i>	<i>Compensation +</i>	<i>Fees +</i>	<i>%</i>	<i>On Excess Over</i>	<i>Effective Rate</i>
\$-0-	\$100,000	\$-0-	\$-0-	4	\$-0-	0%
100,000	200,000	4,000	4,000	3	100,000	4%
200,000	1,000,000	7,000	7,000	2	200,000	3.5%
1,000,000	10,000,000	23,000	23,000	1	1,000,000	2.3%
10,000,000	100,000,000	113,000	113,000	1/2	10,000,000	1.13%
100,000,000	1,000,000,000	563,000	563,000	1/4	100,000,000	0.563%
1,000,000,000	10,000,000,000	2,813,000	2,813,000	1/8	1,000,000,000	0.281%
10,000,000,000	100,000,000,000	14,063,000	14,063,000	1/16	10,000,000,000	0.141%

Additional compensation is also allowed in the court's discretion for extraordinary services performed by the executor, administrator, or attorney, including selling or mortgaging estate property, continuing the decedent's business, contesting or litigating claims, and tax return preparation and tax planning.

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| 1 Prob. Code, sections 10830, 10831. | 17 Cal. Rules of Court, rule 7.703(a). |
| 2 <i>Estate of Hilton</i> (1996) 44 Cal.App.4th 890, 894-895. | 18 Cal. Rules of Court, rule 7.703(b). |
| 3 <i>Estate of Buchman</i> (1955) 138 Cal.App.2d 228, 235. | 19 Cal. Rules of Court, rule 7.702. |
| 4 Prob. Code, section 12205, subd. (a). | 20 Cal. Rules of Court, rule 7.703(a). |
| 5 Prob. Code, section 10800, subd. (a). | 21 Super. Ct. San Mateo County, Local Rules, rule 4.84(C). |
| 6 Prob. Code, section 10800, subd. (b). | 22 <i>Estate of Getty</i> (1983) 143 Cal.App.3d 455, 458. |
| 7 <i>Estate of Daley</i> (Sept. 16, 2008, A120213) [nonpub. opn.]. | 23 Former Prob. Code, section 901. |
| 8 Prob. Code, section, 10801, subd (a). | 24 <i>Estate of Getty, supra</i> , 143 Cal.App.3d at p. 458. |
| 9 <i>Estate of Fernandez</i> , (Dec. 7, 2010, G041272) [nonpub. opn.]. | 25 <i>Id.</i> at p. 459. |
| 10 <i>Estate of Hilton, supra</i> , 44 Cal.App.4th at p. 895. | 26 <i>Id.</i> at pp. 459-460. |
| 11 <i>Estate of Daley</i> (Sept. 16, 2008, A120213) [nonpub. opn.]. | 27 <i>Id.</i> at p. 459 [citing <i>Estate of Getty</i> (1978) 85 Cal. App. 3d 755, 760-761]. |
| 12 <i>Ibid.</i> | 28 <i>Id.</i> at p. 460. |
| 13 <i>Estate of Hilton, supra</i> , 44 Cal.App.4th at p. 895. | 29 <i>Estate of Hilton, supra</i> , 44 Cal.App.4th at p. 900. |
| 14 <i>Estate of Buchman</i> (1955) 138 Cal.App.2d 228, 235. | 30 <i>Id.</i> at p. 896. |
| 15 <i>Ibid.</i> (internal citations omitted). | 31 <i>Id.</i> at pp. 897-898. |
| 16 <i>Estate of Gilkison</i> (1998) 65 Cal.App.4th 1443, 1448; <i>Estate of Hilton, supra</i> , 44 Cal.App.4th at p. 914. | 32 <i>Id.</i> at p. 914. |