STATE OF NEW YORK

6046

2017-2018 Regular Sessions

IN ASSEMBLY

February 22, 2017

Introduced by M. of A. BUCHWALD, WEINSTEIN, WEPRIN -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary

AN ACT to amend the surrogate's court procedure act, in relation to the commissions of donees of a power in trust, including donees of a power during minority

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 2306 of the surrogate's court procedure act is amended to read as follows:

§ 2306. Annual statements to be furnished to beneficiaries

Any trustee**, donee of a power during minority or donee of a power in trust** who is not required to furnish annual statements under either 2308 or 2309 because he **or she** has not retained annual commissions shall nevertheless be required to furnish the annual statements referred to in those sections to any beneficiary receiving income or any person interested in the principal of the trust who shall request such statements**, or in the case of a power during minority or of a power in trust, to the beneficiary of the power in trust, or to a person to whom a payment not exceeding $10,000 could be made under subdivision 1 of section 2220 of this chapter**.

§ 2. The opening paragraph of subdivision 1 of section 2307 of the surrogate's court procedure act, as amended by chapter 474 of the laws of 1994, is amended to read as follows:

Except as otherwise provided in paragraph (f) of this subdivision on the settlement of the account of any fiduciary other than a trustee**, a donee of a power during minority or a donee of a power in trust,** the court must allow to him **or her** the reasonable and necessary expenses actually paid by him **or her** and if he **or she** be an attorney of this state and shall have rendered legal services in connection with his **or her** official duties, such compensation for his **or her** legal services as

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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appear to the court to be just and reasonable and in addition thereto it must allow to the fiduciary for his **or her** services as fiduciary, and if there be more than one, apportion among them according to the services rendered by them respectively the following commissions:

§ 3. Section 2308 of the surrogate's court procedure act, the section heading and subdivision 1, as amended by chapter 503 of the laws of 1980, paragraph (c) of subdivision 1 as added by chapter 376 of the laws of 2001, subdivision 2 as amended by chapter 654 of the laws of 1993, subdivision 3 as amended by chapter 243 of the laws of 2001, subdivisions 4, 6, 7 and paragraph (d) of subdivision 9, as amended and subdivision 12 as added by chapter 237 of the laws of 1978, paragraph (a) of subdivision 5 as amended and subdivision 13 as added by chapter 936 of the laws of 1984, paragraphs (a) and (b) of subdivision 6, as amended by chapter 245 of the laws of 1991, and subdivision 8 as amended by chapter 685 of the laws of 1967, is amended to read as follows:

§ 2308. Commissions of trustees**, donees of power during minority and donees of powers in trust** under wills of persons dying, or under lifetime trusts created, on or before August 31, 1956

1. On the settlement of the account of any trustee **or donee of power in trust** under the will of a person dying on or before August 31, 1956, or under a lifetime trust established on or before August 31, 1956, the court must allow him **or her** his **or her** reasonable and necessary expenses actually paid by him **or her** and if he **or she** be an attorney of this state and shall have rendered legal services in connection with his **or her** official duties, such compensation for his **or her** legal services as shall appear to the court to be just and reasonable and in addition thereto it must allow to the trustee **or to the donee of the power in trust** for his **or her** services as trustee **or donee of the power in trust** the following commissions from **trust** principal **or property subject to the power in trust**:

(a) For receiving principal **or property subject to the power in trust**

(1) all sums of money constituting principal **or property subject to the power in trust** not exceeding $2,000 at the rate of 3 per cent;

(2) all additional sums of principal **or property subject to the power in trust** not exceeding $10,000 at the rate of 1 1/2 per cent;

(3) all sums of principal **or property subject to the power in trust** above $12,000 at the rate of 1 1/4 per cent; and

(b) For paying out principal **or property subject to the power in trust** at the rate of 1 per cent.

(c) Notwithstanding the provisions of section 8 of chapter 237 of the laws of 1978, commissions provided by paragraph (a) of this subdivision for receiving principal **or property subject to the power in trust** shall not be allowed to a trustee **or donee of a power in trust** who qualifies to act as such on or after June 5, 1978, and shall not be allowed on additions of property received on or after June 5, 1978; such commissions on any increments in property that are payable by reason of any sale, exchange or liquidation of such property shall be allowed on the lesser of (1) the amount of such increments on the date of sale, exchange or liquidation of such property and (2) the amount of such increments on June 5, 1978; and such commissions on any increments in property that are payable by reason of any distribution of such property shall be allowed on the lesser of (1) the amount of such increments on the date of distribution of such property and (2) the amount of such increments on the effective date of this paragraph.

2. In addition to the commission allowed by subdivision one a trustee or a donee of a power in trust shall be entitled to annual commissions at the following rates:

(a) $10.50 per $1,000 or major fraction thereof on the first $400,000 of principal or property to the power in trust;

(b) $4.50 per $1,000 or major fraction thereof on the next $600,000 of principal or property subject to the power in trust; and

(c) $3.00 per $1,000 or major fraction thereof on all additional principal or property subject to the power in trust.

Such annual commissions shall be computed either on the value of the principal of the trust or of the property subject to the power in trust at the end of the period for which the commissions are payable or, at the option of the trustee or of the donee of the power in trust, on the value of the principal of the trust or of the property subject to the power in trust at the beginning of such period, provided that the option elected by the trustee or of the donee of the power in trust for the first period for which such commissions are payable shall be used during the continuance of the trust or of the power in trust and shall be binding on any successor or substitute trustee or trustees or successor or substitute donees of the power in trust. In the case of a trust or power in trust which prior to January 1, 1994 computed annual commissions on the basis of a 12 month period (other than a calendar year), the trustee's or donee's prior election of such 12 month period shall be binding unless, prior to January 1, 1995, the trustee or donee makes a new election to compute annual commissions on the basis of a calendar year either on the value of the principal of the trust or of the property subject to the power in trust at the end of, or at the option of the trustee or donee of the power in trust at the beginning of, the calendar year for which the commissions were payable, which new election shall be used during the remaining continuance of the trust or of the power in trust and shall be binding on any successor or substitute trustee or trustees or donee or donees of the power in trust. The computation shall be made on the basis of a 12 month period but the amount so computed payable to a trustee or donee of a power in trust shall be proportionately reduced or increased for any payments made in partial distribution of the trust or of the property subject to the power in trust or receipt of any additional property into the trust or by the donee of a power in trust within such period and shall be proportionately reduced in any period for which such commissions are payable to the trustee or donee of the power in trust if the period is less than 12 months. For the purpose of computing the annual commissions the value of any principal asset when received by the trust or by the donee of a power in trust shall be the presumptive value of the asset at the beginning and end of the period for which such commissions are payable. In computing the value of the principal of the trust or of the property subject to the power in trust the trustee or the donee of the power in trust may use the presumptive value in respect of any principal asset or may use the actual value of the asset. On the settlement of the account of the trustee or of the donee of a power in trust any person interested may dispute the amount of any commission claimed or retained. The burden of proving that the actual value of any principal asset differs from its presumptive value is upon the trustee, the donee of the power in trust or other person claiming the difference.

3. Unless the will otherwise explicitly provides, the annual commissions allowed by subdivision two of this section shall be payable one-third from the income of the trust or of the property subject to the

power in trust and two-thirds from the principal of the trust or from the property subject to the power in trust. However, in the case of a trust whose definition of income is governed by 11-2.4 of the estates, powers and trusts law, such annual commissions shall be payable from the corpus of any such trust after allowance for the unitrust amount and shall not be payable out of such unitrust amount.

4. The commissions allowed by subdivision 2 may be retained by a trustee or donee of a power in trust provided he or she furnishes annually as of a date not more than 30 days prior to the end of the trust year selected by the trustee or the calendar 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 or to the beneficiary of the power in trust who shall make a demand therefor, a statement showing the principal assets or the property subject to the power in trust on hand on that date, and at least annually or more frequently if the trustee or donee of a power in trust so elects, a statement showing all his or her receipts of income and principal or property subject to the power in trust during the period with respect to which the statement is rendered including the amount of any commissions retained and the basis upon which the commissions were computed. A trustee or donee of a power in trust shall not be deemed to have waived any commissions by reason of his or her failure to retain them at the time when he or she becomes entitled thereto; provided however that commissions from income for any given trust or calendar year shall be allowed and retained only from income derived from the trust or from the property subject to the power in trust during that year and shall not be supplied from income on hand in respect of any other trust or calendar year. If a beneficiary receiving income does not desire to be furnished with any such statement his or her advice to the trustee or to the donee of the power in trust to that effect in writing shall thereafter excuse the trustee or donee of the power in trust from furnishing such statement to the beneficiary unless and until the beneficiary requests such annual statements from the trustee or donee of the power in trust.

5. (a) During the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust after the termination of a life use or uses the trustee shall be entitled to and may retain commissions from income in an amount annually equal to 6 per cent of income collected in each year.

(b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the trustee shall not be entitled to any commission from principal.

(c) In the case of such a trust which continues after the termination of a life use or uses the trustee for the period of the measuring life or lives shall be entitled to commissions from income and principal at the rates and according to the terms otherwise provided in this section, except that he or she shall not be entitled to any commissions for paying out any amount of principal.

6. (a) If the gross value of the principal of the trust or of the property subject to the power in trust accounted for amounts to $400,000 or more and there is more than 1 trustee or donee of the power in trust, each trustee or donee of the power in trust is entitled to the full compensation for receiving and paying out principal or property subject to the power in trust allowed herein to a sole trustee or donees of the power in trust unless there are more than 3, in which case the compen-

sation to which 3 would be entitled must be apportioned among the trustees **or donees of the power in trust** according to the services rendered by them respectively, unless the trustees **or donees of the power in trust** 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. If the gross value of the principal of the trust **or of the property subject to the power in trust** accounted for is:

(i) less than $100,000 and there is more than 1 trustee **or donee of the power in trust** the full compensation for receiving and paying out principal **or property subject to the power in trust** allowed herein to a sole trustee **or donee of the power in trust** must be apportioned among them according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee **or donee of the power in trust** is entitled to the full compensation for receiving and paying out principal **or property subject to the power in trust** allowed pursuant to this subdivision to a sole trustee **or donee of the power in trust** unless there are more than 2 trustees **or donees of the power in trust** in which case the full compensation for paying out principal **or property subject to the power in trust** allowed pursuant to this subdivision to 2 trustees **or donees of the power in trust** must be apportioned among them according to the services rendered by them respectively,

unless the trustees **or donees of the power in trust** shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.

(b) If the value of the principal of the trust **or of the property subject to the power in trust** for the purpose of computing the annual commissions allowed by subdivision 2 amounts to $400,000 or more and there is more than one trustee **or donee of the power in trust,** each trustee **or donee of the power in trust** is entitled to the full annual commission allowed herein to a sole trustee **or donee of the power in trust** unless there are more than 3, in which case the annual commissions to which 3 would be entitled must be apportioned among the trustees **or donees of the power in trust** according to the services rendered by them respectively, unless the trustees **or donees of the power in trust** shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. If the value of the principal **or of the property subject to the power in trust** for the purpose of computing the annual commission allowed by subdivision 2 amounts to:

(i) less than $100,000 and there is more than 1 trustee **or donee of the power in trust,** the annual commissions from income and the annual commission allowed herein to a sole trustee **or donee of the power in trust** must be apportioned among the trustees **or donee of the power in trust** according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee **or donee of the power in trust** is entitled to the full annual commission allowed pursuant to this subdivision to a sole trustee **or donee of the power in trust** unless there are more than 2 trustees **or donees of the power in trust** in which case the full annual commissions allowed pursuant to this subdivision to 2 trustees **or donees of the power in trust** must be apportioned among them according to the services rendered by them respectively,

unless the trustees **or donees of the power in trust** shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. However, if from a trust **or from property subject to a power in trust** having a value of $400,000 or more, or if from a trust **or from property subject to a power in trust** having a value of $100,000 or more but less than $400,000, as the case may be, at the beginning of a trust year **or of the calendar year in the case of a power in trust**, any payments in partial distribution of the trust **or of the property subject to the power in trust** shall be made during the trust **or calendar** year so as to reduce the trust **or of the property subject to the power in trust** to a value of less than $400,000 or $100,000, as the case may be, at the end of the trust **or calendar** year, then the annual commission allowed herein shall, on a proportionate basis, be those allowed to a trustee of a trust **or to the donees of a power in trust over property** having a value of $400,000 or more, of a trust **or to the donees of a power in trust over property** having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust **or calendar** year to the date of the distribution and shall, on a proportionate basis, be those allowed to trustees of a trust **or to the donees of a power in trust over property** having a value of either $100,000 or more but less than $400,000 or less than $100,000, as the case may be, for the remainder of the trust **or calendar** year and the part of such commissions payable from principal and computed from the beginning of the trust **or calendar** year to the date of distribution shall be charged ratably to the property remaining in the trust and to the property distributed from the trust on the basis of their respective values. Further, if during a trust year **or a calendar year in the case of power in trust** additional property shall be received into a trust which had a value of less than $100,000 **or by a donee of a power in trust the property subject to which had a value of less than $100,000**, or into a trust which had a value of $100,000 or more but less than $400,000 **or by a donee of a power in trust the property subject to which had a value of $100,000 or more but less than $400,000**, as the case may be, at the beginning of the trust **or calendar** year so that because of the additional property the trust **or the property subject to the power in trust** shall have a value of $100,000 or more or of $400,000 or more, as the case may be, at the end of the trust **or calendar** year, then the annual commission allowed herein **to the trustee or to the donee of the power in trust** shall, on a proportionate basis, be those allowed to trustees of a trust **or to donees of a power in trust over property** having a value of less than $100,000, or to trustees of a trust **or to the donees of the power in trust** having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust **or calendar** year to the date of the receipt of the additional property and shall, on a proportionate basis, be those allowed to trustees of a trust **or to donees of a power in trust over property** having a value of $100,000 or more but less than $400,000, or **to trustees** of a trust **or to donees of a power in trust over property** having $400,000 or more, as the case may be, for the remainder of the trust **or calendar** year.

(c) Notwithstanding any provisions of paragraphs (a) and (b) of this subdivision to the contrary, if during the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses or during the continuance of such a trust after the termination of a life use or uses, the annual income of the

trust amounts to $4,000 or more and there is more than 1 trustee, each trustee is entitled to the full commission allowed under subdivision 5 to a sole trustee unless there are more than 2, in which case the commissions to which 2 trustees would be entitled must be apportioned among the trustees 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 to any one of them; provided however, if during the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses created prior to April 1, 1948, the annual income of the trust amounts to $4,000 or more and there is more than 1 trustee each trustee is entitled to the full commission allowed under subdivision 5 to a sole trustee unless there are more than 3, in which case the commission to which 3 trustees would be entitled must be apportioned among the trustees 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 to any one of them. If the annual income of the trust amounts to less than $4,000 and there is more than 1 trustee the commissions to which a sole trustee would be entitled under subdivision 5 must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

7. Where a trustee **or donee of a power in trust** is for any reason entitled or required to collect the rents of and manage real property the net amount of rents collected and not the gross amount shall be used in making computation of commissions allowed by subdivision 5 hereof and in addition to the commissions herein provided he **or she** shall be allowed and may retain for such services 6 per cent of the gross rents collected, but there shall be only 1 such additional commission regardless of the number of trustees **or donees of the power in trust**. If there are 2 or more trustees **or donees of the power in trust** the additional commission herein provided must be apportioned among them according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

8. A trustee who prior to September 1, 1966 shall have received the maximum amount of commissions on principal permitted by subdivision 8 of section 285-a of the surrogate's court act as that subdivision existed prior to that date, shall not be entitled to annual principal commissions for the period from the date when he **or she** shall receive such maximum and September 1, 1966, but shall be entitled to receive commissions from and after September 1, 1966 at the rates and in the manner provided in this section. A trustee who has become entitled to annual principal commissions pursuant to section 285-a of the surrogate's court act as it existed prior to September 1, 1966, but has not received them, may receive an amount of commissions not in excess of the amount he **or she** would have been entitled to if he **or she** had taken such commissions, and be entitled to receive in addition commissions from and after September 1, 1966 at the rates and in the manner provided in that section.

9. A trustee who has been acting prior to July 1, 1956 shall be entitled to have commissions on principal and income theretofore received by him **or her** computed, allowed and paid under the methods and at the rates set forth herein, except as follows:

(a) If prior to July 1, 1956 a trustee has been allowed or has retained commissions for receiving and paying out or for distributing any item of principal he **or she** shall be entitled to no further commissions on the item.

(b) If prior to July 1, 1956 a trustee has been allowed or retained commissions on any item of principal received but not paid out or distributed by him **or her** he **or she** shall be entitled to no further commissions for receiving the item.

(c) Any trustee who became entitled to an annual principal commission under subdivision 1 (b) of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 and who has not retained such commission may retain an amount equal to one-half of such annual principal commission. A trustee who because of the provisions of subdivision 2 of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 either was not entitled to retain an annual principal commission under subdivision 1 (b) thereof or was required to credit such annual principal commission against his **or her** commission for receiving principal, may retain an amount equal to 1/2 of such annual principal commission. If a trustee has been allowed by decree or has retained any such annual principal commission one-half the amount thereof shall be deducted from the amount of commissions to which the trustee would otherwise be entitled under the provisions of subdivision 1.

(d) The annual principal commissions allowed by subdivision 3 of this section as it existed on September 1, 1967 shall not be allowed or retained in respect of any trust year ending prior to April 1, 1948, but for any trust year ending on or after April 1, 1948 and prior to July 1, 1956, the annual principal commission which may be allowed or retained shall be computed at the rates in effect on the date such trust year ended.

(e) If prior to July 1, 1956 a trustee has been allowed or has retained commissions on any item of income received and paid out by him **or her** prior to September 1, 1943 or on any item of income collected by him **or her** subsequent to September 1, 1943 he **or she** shall be entitled to no further commission on the item.

10. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests or rents payable to a trustee **or donee of a power in trust** is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

11. Where the will provides a specific compensation to a trustee **or donee of a power in trust** he **or she** is not entitled to any other allowances for his **or her** services.

12. If a trustee of a trust **or donee of a power in trust** is authorized or required by the terms of the will to accumulate income for any purpose permitted by law, any income so accumulated which is not added to principal of the trust **or to the principal of the property subject to the power in trust** shall be deemed a separate trust **or separate fund subject to the power in trust** for purposes of this subdivision and the trustee **or donee of the power in trust** shall be entitled to commissions in respect thereof at the rates and according to the terms and provisions of subdivisions 1 and 2 of this section as though, for purposes of computing commissions of the trustee, income so accumulated was principal.

13. For the purposes of this section, the term "trustee" shall mean any trustee who is not a corporate trustee **and the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is not a corporate fiduciary** provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee**, and further provided that the term "property subject to the power in trust" shall include property subject to a power during minority**.

§ 4. Section 2309 of the surrogate's court procedure act, the section heading and subdivision 1 as amended by chapter 503 of the laws of 1980, subdivision 2 as amended by chapter 654 of the laws of 1993, subdivision 3 as amended by chapter 243 of the laws of 2001, paragraph (a) of subdivision 5 as amended and subdivision 11 as added by chapter 936 of the laws of 1984, subdivisions 6 and 7 as amended by chapter 303 of the law of 1976, paragraphs (a) and (b) of subdivision 6 as amended by chapter 245 of the laws of 1991, and the opening paragraphs of paragraphs (a) and (b) of subdivision 6 as amended by chapter 514 of the laws of 1993, is amended to read as follows:

§ 2309. Commissions of trustees**, of donees of powers during minority and of donees of powers in trust** under wills of persons dying, or lifetime trusts established, after August 31, 1956

1. On the settlement of the account of any trustee **or donee of a power in trust** under the will of a person dying after August 31, 1956, or under a lifetime [~~inter~~] trust established after August 31, 1956, the court must allow to him **or her** his **or her** reasonable and necessary expenses actually paid by him **or her** and if he **or she** be an attorney of this state and shall have rendered legal services in connection with his **or her** official duties, such compensation for his **or her** legal services as shall appear to the court to be just and reasonable and in addition thereto it must allow to the trustee **or donee of a power in trust** for his **or her** services as trustee **or donee of a power in trust** a commission from principal **or from the property subject to the power in trust,** for paying out all sums of money constituting principal **or property subject to the power in trust** at the rate of 1 per cent.

2. In addition to the commission allowed by subdivision 1 hereof a trustee **or donee of a power in trust** shall be entitled to annual commissions at the following rates:

(a) $10.50 per $1,000 or major fraction thereof on the first $400,000 of principal **or property subject to the power in trust**.

(b) $4.50 per $1,000 or major fraction thereof on the next $600,000 of principal **or property subject to the power in trust**.

(c) $3.00 per $1,000 or major fraction thereof on all additional principal **or property subject to the power in trust**.

Such annual commissions shall be computed either on the value of the principal of the trust **or of the property subject to the power in trust** at the end of the period for which the commissions are payable or, at the option of the trustee **or donee of the power in trust**, on the value of the principal of the trust **or of the property subject to the power in trust** at the beginning of such period, provided that the option elected by the trustee **or donee of the power in trust** for the first period for which such commissions are payable shall be used during the continuance of the trust **or of the power in trust** and shall be binding on any successor or substitute trustee or trustees**, donee or donees**. In the case of a trust which prior to January 1, 1994 computed annual commissions on the basis of a 12 month period (other than a calendar year), the trustee's prior election of such 12 month period shall be binding

unless, prior to January 1, 1995, the trustee makes a new election to compute annual commissions on the basis of a calendar year either on the value of the principal of the trust at the end of, or at the option of the trustee at the beginning of, the calendar year for which the commissions were payable, which new election shall be used during the remaining continuance of the trust and shall be binding on any successor or substitute trustee or trustees. The computation shall be made on the basis of a 12-month period but the amount so computed payable to a trustee shall be proportionately reduced or increased for any payments made in partial distribution of the trust or the receipt of any additional property into the trust within such period and shall be proportionately reduced in any period for which such commissions are payable to the trustee if the period is less than 12 months. For the purpose of computing the annual commissions the value of any principal asset when received by the trust **or donee of a power in trust** shall be the presumptive value of the asset at the beginning and end of the period for which such commissions are payable. In computing the value of the principal of the trust **or of the property subject to the power in trust** the trustee **or donee of the power in trust** may use the presumptive value in respect of any principal asset or may use the actual value of the asset. On the settlement of the account of the trustee **or donee of a power in trust** any person interested may dispute the amount of any commission claimed or retained. The burden of proving that the actual value of any principal asset **or asset subject to the power in trust** differs from its presumptive value is upon the trustee **or donee of a power in trust** or other person claiming the difference.

3. Unless the will or lifetime trust instrument otherwise explicitly provides the annual commissions allowed by subdivision 2 shall be payable one-third from the income of the trust **or property subject to the power in trust** and two-thirds from the principal of the trust **or property subject to the power in trust**. However, in the case of a trust whose definition of income is governed by **section** 11-2.4 of the estates, powers and trusts law or a charitable remainder annuity trust or a charitable remainder unitrust, as defined in section six hundred sixty-four of the Internal Revenue Code of nineteen hundred eighty-six, as amended, such annual commissions shall be payable from the corpus of any such trust after allowance for the annuity or unitrust amounts and shall not be payable out of such annuity or unitrust amounts.

4. The commissions allowed by subdivision 2 may be retained by a trustee provided he **or she** furnishes annually as of a date no more than 30 days prior to the end of the trust year selected by the trustee, 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 **and by a donee of a power in trust if he or she furnishes annually as of a date no more than 30 days prior to the end of the calendar year to the beneficiary of the power in trust**, a statement showing the principal assets on hand on that date, and at least annually or more frequently if the trustee **or donee of the power in trust** so elects, a statement showing all his **or her** receipts of income and principal **or property subject to the power in trust** during the period with respect to which the statement is rendered including the amount of any commissions retained and the basis upon which the commissions were computed. A trustee **or donee of a power in trust** shall not be deemed to have waived any commissions by reason of his **or her** failure to retain them at the time when he **or she** becomes entitled thereto; provided however that **in the case of a trust** commis-

sions 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 of any other trust year **and in the case of property subject to a power in trust commissions payable from income for any given calendar year shall be allowed and retained only from income derived from the property during that year and shall not be supplied from income on hand in respect of any other calendar year**. If a beneficiary receiving income does not desire to be furnished with any such statements his **or her** advice to the trustee **or to the donee of the power in trust** to that effect in writing shall thereafter excuse the trustee **or donee of the power in trust** from furnishing such statement to the beneficiary unless and until the beneficiary requests such annual statements from the trustee **or donee of the power in trust**.

5. (a) During the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust after the termination of a life use or uses the trustee shall be entitled to and may retain commissions from income in an amount annually equal to 6 per cent of income collected in each year.

(b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the trustee shall not be entitled to any commission from principal.

(c) In the case of such a trust which continues after the termination of the measuring life use or uses the trustee for the period of the measuring life use or uses shall be entitled to commissions from income and principal at the rates and according to the terms specified in subdivision 2 and except in respect of principal paid out to a charity or for charitable uses shall be entitled to a commission for distributing all sums of principal at the rate specified in subdivision 1.

6. (a) Subject to **section** 2313 regarding multiple commissions of executors [~~or~~]**,** trustees**, or donees of a power in trust created** under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the gross value of the principal of the trust **or of the property subject to the power in trust** accounted for amounts to $400,000 or more and there is more than 1 trustee **or donee** each trustee **or donee** is entitled to the full compensation for paying out principal allowed herein to a sole trustee **or donee** unless there are more than 3, in which case the compensation to which 3 would be entitled must be apportioned among the trustees **or donees of the power in trust** according to the services rendered by them respectively unless [~~the trustees~~] **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. If the gross value of the principal of the trust **or of the property subject to the power in trust** accounted for is:

(i) less than $100,000 and there is more than 1 trustee **or donee of the power in trust,** the full compensation for paying out principal allowed herein to a sole trustee **or donee of the power in trust** must be apportioned among them according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee **or donee of the power in trust** is entitled to the full compensation for paying out principal allowed herein to a sole trustee **or donee of the power in trust** unless there are more than 2 trustees **or donees of the power in trust** in which case the full compensation for paying out principal allowed herein to 2 trustees **or donees of a power of trust** must be

apportioned among them according to the services rendered by them respectively, unless the trustees **or donees of the power in trust** shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.

(b) Subject to **section** 2313 regarding multiple commissions of executors [~~or~~]**,** trustees**, or donees of a power in trust created** under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the value of the principal of the trust **or of the property subject to the power in trust** for the purpose of computing the annual commissions allowed by subdivision 2 amounts to $400,000 or more and there is more than one trustee **or donee of a power in trust** each trustee **or donee of a power in trust** is entitled to the full annual commission allowed herein to a sole trustee **or donee of a power in trust** unless there are more than 3, in which case the annual commissions to which 3 would be entitled must be apportioned among the trustees **or donees of the power in trust** according to the services rendered by them respectively unless the trustees **or donees of the power in trust** shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. If the value of the principal **of the trust or of the property subject to the power in trust** for the purpose of computing the annual commission allowed by subdivision 2 amounts to:

(i) less than $100,000 and there is more than 1 trustee **or donee of the power in trust,** the annual commission allowed herein to a sole trustee **or donee of a power in trust** must be apportioned among the trustees **or donees of the power in trust** according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee **or donee of the power in trust** is entitled to the full annual commission allowed herein to a sole trustee **or donee of a power in trust** unless there are more than 2 trustees **or donees of the power in trust** in which case the full annual commissions allowed herein to 2 trustees **or donees of a power in trust** must be apportioned among them according to the services rendered by them respectively, unless the trustees **or donees of the power in trust** shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. However, if from a trust **or from property subject to a power in trust** having a value of $400,000 or more, or if from a trust **or from property subject to a power in trust** having a value of $100,000, or more but less than $400,000, as the case may be, at the beginning of a trust year **or of the calendar year** any payments in partial distribution of the trust **or of the property subject to the power in trust** shall be made during the trust **or calendar** year so as to reduce the trust **or the property subject to the power in trust** to a value of less than $400,000 or $100,000, as the case may be, at the end of the trust **or calendar** year, then the annual commissions allowed herein shall, on a proportionate basis, be those allowed to trustees of a trust **or to the donees of a power in trust over property** having a value of $400,000 or more, or of a trust **or to the donees of a power in trust over property** having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust **or calendar** year to the date of the distribution and shall, on a proportionate basis, be those allowed to trustees of a trust **or to the donees of a power in trust over property** having a value of either $100,000 or more but less than $400,000 or less than $100,000,

as the case may be, for the remainder of the trust **or calendar** year and the part of such commissions payable from principal and computed from the beginning of the trust **or calendar** year to the date of distribution shall be charged ratably to the property remaining in the trust **or still subject to the power in trust after such distribution** and to the property distributed from the trust **or to the beneficiary of the power in trust** on the basis of their respective values. Further, if during a trust **or calendar** year additional property shall be received into a trust which had a value of less than $100,000 **or by a donee of a power in trust the property subject to which had a value of less than $100,000**, or into a trust which had a value of $100,000 or more but less than $400,000 **or by a donee of a power in trust the property subject to which had a value of $100,000 or more but less than $400,000**, as the case may be, at the beginning of the trust year **or calendar year**, so that because of the additional property the trust **or the property subject to the power in trust** has a value of $100,000 or more but less than $400,000, or of $400,000 or more, as the case may be, at the end of the trust **or calendar** year, then the annual commissions allowed herein **to the trustee or to the donee of the power in trust** shall, on a proportionate basis, be those allowed to trustees of a trust **or to donees of a power in trust over property** having a value of less than $100,000, or to trustees of a trust **or to donees of a power in trust over property** having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust **or calendar** year to the date of the receipt of the additional property and shall, on a proportionate basis, be those allowed to trustees of a trust **or to donees of a power in trust over property** having a value of $100,000 or more but less than $400,000, or **to trustees** of a trust **or to donees of a power in trust over property** having $400,000 or more, as the case may be, for the remainder of the trust **or calendar** year.

(c) Notwithstanding any provision of paragraphs (a) and (b) of this subdivision to the contrary, if during the continuance of a trust not measured at any time directly or indirectly by a life or lives or during the continuance of a trust after the termination of the measuring life or lives, the annual income of the trust amounts to $4,000 or more and there is more than 1 trustee, each trustee is entitled to the full commissions allowed under subdivision 5 to a sole trustee unless there are more than 2, in which case the commissions to which 2 trustees would be entitled must be apportioned among the trustees 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 to any one of them. If the annual income of the trust amounts to less than $4,000 and there is more than 1 trustee the commissions to which a sole trustee would be entitled under subdivision 5 must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

7. Where a trustee **or donee of a power in trust** is for any reason entitled or required to collect the rents of and manage real property the net amount of rents collected and not the gross amount shall be used in making computation of commissions allowed by subdivision 5 and in addition to the commissions herein provided he **or she** shall be allowed and may retain for such services 6 per cent of the gross rents collected, but there shall be only one such additional commission regardless of the number of trustees **or donees of the power in trust**. If

there are 2 or more trustees **or donees of the power in trust** the additional commission herein provided for must be apportioned among them according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

8. If a trustee **or donee of a power in trust** is either authorized or required by the terms of the will to accumulate income for any purpose permitted by law he **or she** shall be entitled to commissions from the income so accumulated, including income derived from the investment of such accumulated income, at the rate of 2 [~~per cent~~] **percent** of the first $2,500 of such income distributed during the administration of the trust and 1 [~~per cent~~] **percent** of all such income distributed in excess of $2,500 and he **or she** may retain such commissions at the time or times such income is distributed.

9. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered, shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests or rents payable to a trustee **or to a donee of a power in trust** is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

10. Where the will provides a specific compensation for a trustee **or a donee of a power in trust** he **or she** is not entitled to any other allowances for his **or her** services.

11. For the purposes of this section, the term "trustee" shall mean any trustee who is not a corporate trustee **and the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is not a corporate fiduciary** provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee **and further provided that the term "property subject to the power in trust" shall include property subject to a power during minority**.

§ 5. Section 2312 of the surrogate's court procedure act as added by chapter 936 of the laws of 1984, subdivision 2, 3, 7, 9 and paragraphs (d) and (e) of subdivision 10 as amended by chapter 511 of the laws of 1987, paragraph (b) of subdivision 4 as amended by chapter 245 of the laws of 1991, and subdivision 5 as amended by chapter 243 of the laws of 2001, is amended to read as follows:

§ 2312. Commissions of corporate trustees, **including when acting as donees of powers during minority or donees of power in trust**

1. If the will or lifetime trust instrument makes provisions for specific rates or amounts of commissions (other than a general reference to commissions allowed by law or words of like import) for a corporate trustee, or, if a corporate trustee has agreed to accept specific rates or amounts of commissions, a corporate trustee**, whether as trustee or as donee of a power in trust, including for purposes of this section as donee of a power during minority, created under the provisions of the will or lifetime trust instrument,** shall be entitled to be compensated in accordance with such provisions or agreement, as the case may be.

2. For trusts having a principal value of more than four hundred thousand dollars **and as donee of a power in trust where the property subject to the power, including for purposes of this section the property subject to a power during minority, has a principal value of more than four hundred thousand dollars** and subject to the provisions of subdivision 4 of this section, if the will or lifetime trust instrument does

not make provisions for specific rates or amounts of commissions, or, contains only a general reference to commissions allowed by law or words of like import, a corporate trustee shall be entitled to such commissions as may be reasonable, and the court, upon application of a person interested in the trust **or in the fund held by the corporate trustee as donee of a power in trust**, may review the reasonableness of the commission of such corporate trustee.

3. Subject to the provisions of paragraph (a) of subdivision 4 of this section and regardless of the principal value of the trust: (a) during the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust after the termination of a life use or uses a corporate trustee shall be entitled to and may retain commissions from income in accordance with the provisions of subdivision 1 or 2 hereof, as the case may be.

(b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses a corporate trustee shall not be entitled to any commission from principal.

(c) In the case of such a trust which continues after the termination of the measuring life use or uses a corporate trustee for the period of the measuring life use or uses shall be entitled to commissions from income and principal according to the provisions of subdivision 1 or 2 hereof, as the case may be, and except in respect of principal paid out to a charity or for charitable uses shall be entitled to a commission for distributing all sums of principal in accordance with the provisions of subdivision 1 or 2 hereof, as the case may be.

4. Notwithstanding anything contained in this chapter, the estates, powers and trusts law or any other provision of law to the contrary,

(a) Except as otherwise provided by paragraph (b) of this subdivision and subdivision three of this section, a corporate trustee of any trust created under will or lifetime trust instrument**, or as donee of a power in trust created under will or lifetime instrument**, whether in existence on or after the effective date of this section, shall be entitled to receive at least the compensation provided for an individual trustee under subdivisions 1, 2, 5 **(but only as trustee)**, 6, 7 and 12 of section 2308 and subdivisions 1, 2, 5 **(but only as trustee)**, 6, 7 and 8 of section 2309, as the case may be, in effect after the effective date of this section, at the time and in the manner provided by such sections, unless the will or lifetime trust instrument or an agreement between the trustee and the testator or grantor or by the trustee shall provide otherwise.

(b) A corporate trustee shall, in addition to the compensation permitted by the provisions of paragraph (a) of this subdivision, be entitled to annual commissions at the rate of not more than $12.35 per thousand or major fraction thereof, in lieu of the annual commissions provided under paragraph (a) of this subdivision, on trusts having a principal value of not more than four hundred thousand dollars **and shall be entitled to annual commissions at the same rate as donee of a power in trust where the property subject to the power has a principal value of not more than four hundred thousand dollars,** and such annual commissions shall be deemed reasonable compensation, unless the will or lifetime trust instrument or an agreement between the corporate trustee and the testator or grantor or by the corporate trustee shall provide otherwise. A corporate trustee shall be entitled to receive such commissions from time to time during the trust **or calendar** year and shall otherwise be

governed by the provisions of sections 2308 and 2309, as the case may be, in effect from time to time.

5. Unless the will or lifetime trust instrument expressly provides otherwise, the commissions allowable by subdivision 1, 2 or 4 hereof, as the case may be, shall be payable one-third from the income of the trust **or from the income of the property subject to the power in trust** and two-thirds from the principal of the trust **or from the property subject to the power in trust**. However, in the case of a trust whose definition of income is governed by **section** 11-2.4 of the estates, powers and trusts law or a charitable remainder annuity trust or a charitable remainder unitrust, as defined in section six hundred sixty-four of the Internal Revenue Code of nineteen hundred eighty-six, as amended, such commissions shall be payable from the principal of any such trust after allowance for the annuity or unitrust amounts and shall not be payable out of such annuity or unitrust amounts.

6. The commissions allowed by subdivision 1, 2 or 4 thereof, as the case may be, may be retained, at any time or from time to time during the year in which such commissions are earned, by a corporate trustee, provided it furnishes annually as of a date no more than 30 days prior to the end of the year selected by the corporate trustee, 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, **and, when acting as donee of a power in trust, to the beneficiary of the power in trust,** a statement showing the principal assets **or assets subject to the power in trust** on hand on that date, and at least annually or more frequently if the trustee so elects, a statement showing all his **or her** receipts of income and principal **or of property subject to the power in trust** during the period with respect to which the statement is rendered including the amount of any commissions retained and the basis upon which the commissions were computed. A corporate trustee shall not be deemed to have waived any commissions by reason of its failure to retain them at the time when it becomes entitled thereto; provided however that commissions payable from income for any such year shall be allowed and retained only from income derived from the trust during such year and shall not be supplied from income on hand in respect of any other year. If a beneficiary receiving income **or a beneficiary of a power in trust of which the corporate trustee is donee** does not desire to be furnished with any such statements his **or her** advice to the trustee to that effect in writing shall thereafter excuse the corporate trustee from furnishing such statements to the beneficiary unless and until the beneficiary requests such annual statements from the trustee. Upon enactment of, and subject to subdivision 1 of this section, a corporate trustee shall continue to receive commissions in the manner provided for a trustee **or when acting as donee of a power in trust in the manner provided for a donee of a power in trust** under sections 2308 and 2309, as the case may be, in effect immediately before the effective date of this section until the end of the then current trust **or calendar** year, and thereafter, a corporate trustee may receive commissions in accordance with the provisions of subdivision 2 or 4 of this section. A corporate trustee shall not change from the commissions provided for by subdivision 2 or 4 of this section, as the case may be, during a trust's calendar or fiscal year **or the calendar year in the case of a power in trust** but a corporate trustee may change from the commissions provided for by subdivision 2 to the commissions provided for by subdivision 4 of this section, or vice versa, only at

the beginning of a calendar or fiscal year of a trust **or a calendar year in the case of a power in trust**, as the case may be.

7. On the settlement of the account of any trustee **or donee of a power in trust** under a will or lifetime trust instrument, in addition to the commissions provided for by this section, the court must allow to the corporate trustee **including a corporate trustee acting as donee of a power in trust the** corporate trustee's reasonable and necessary expenses actually paid by the trustee.

8. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered, shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests, rents or other income payable to a trustee **or donee of a power in trust** is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

9. A trustee who prior to September 1, 1966 shall have received the maximum amount of commissions on principal permitted by subdivision 8 of section 285-a of the surrogate's court act as that subdivision existed prior to that date, shall not be entitled to annual principal commissions for the period from the date when he **or she** shall have received such maximum to September 1, 1966, but shall be entitled to receive commissions from and after September 1, 1966 at the rates and in the manner provided in section 2308 as in effect immediately before enactment of this section. A trustee who is entitled to annual principal commissions pursuant to section 285-a of the surrogate's court act as it existed prior to September 1, 1966, but has not received them, may receive an amount of commissions not in excess of the amount he **or she** would have been entitled to if he **or she** had taken such commissions, and be entitled to receive in addition commissions from and after September 1, 1966 at the rates and in the manner provided in section 285-a of this act.

10. A trustee who has been acting prior to July 1, 1956 shall be entitled to have commissions on principal and income theretofore received by him **or her** computed, allowed and paid under the methods and at the rates set forth herein, except as follows:

(a) If prior to July 1, 1956 a trustee has been allowed or has retained commissions for receiving and paying out or for distributing any item of principal he **or she** shall be entitled to no further commissions on the item.

(b) If prior to July 1, 1956 a trustee has been allowed or retained commissions on any item of principal received but not paid out or distributed by him **or her** he **or she** shall be entitled to no further commissions for receiving the item.

(c) Any trustee who became entitled to an annual principal commission under subdivision 1 (b) of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 and who has not retained such commission may retain an amount equal to one-half of such annual principal commission. A trustee who because of the provisions of subdivision 2 of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 either was not entitled to retain an annual principal commission under subdivision 1 (b) thereof or was required to credit such annual principal commission against his **or her** commission for receiving principal, may retain an amount equal to one-half of such annual principal commission. If a trustee has been allowed by decree or has retained any such annual principal commission one-half the amount thereof shall be

deducted from the amount of commissions to which the trustee would otherwise be entitled under the provisions of subdivision 1 of surrogate's court procedure act section 2308.

(d) The annual principal commissions allowed by subdivision 3 of surrogate's court procedure act section 2308 as it existed on September 1, 1967 shall not be allowed by decree or retained in respect of any trust year ending prior to April 1, 1948, but for any trust year ending on or after April 1, 1948 and prior to July 1, 1956, the annual principal commission which may be allowed by decree or retained shall be computed at the rates in effect on the date such trust year ended.

(e) If prior to July 1, 1956 a trustee has been allowed by decree or has retained commissions on any item of income received and paid out by him **or her** prior to September 1, 1943 or on any item of income received by him **or her** subsequent to September 1, 1943 he **or she** shall be entitled to no further commission on the item.

(f) For purposes of this section, the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is a corporate fiduciary and the term "property subject to the power in trust" shall include property subject to a power during minority.

§ 6. Section 2313 of the surrogate's court procedure act, as amended by chapter 471 of the laws of 1995, is amended to read as follows:

§ 2313. Multiple commissions of executors or trustees**, donees of powers during minority, or donees of power in trust** under wills of persons dying, or lifetime trusts established, after August 31, 1993

With respect to wills of persons dying, or lifetime trusts established, after August 31, 1993, if there are more than two executors or trustees, **donees of a power during minority, or donees of a power in trust,** no more than two commissions shall be allowed unless the decedent **or creator** has specifically provided otherwise in a signed writing, and the compensation thus allowable must be apportioned among the fiduciaries **or donees of the power in trust** 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.

§ 7. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.