§ 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 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; 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 or lifetime trust instrument otherwise explicitly provides, the annual commissions allowed by this section shall be payable one-third from the income of the trust and two-thirds from the principal of the 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, 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 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 established after the termination of a life use or uses the trustee shall be entitled to and may retain annual commissions according to the terms specified in subdivision 2 of this section, but only to the extent of 80 percent of the rates stated therein. Notwithstanding any other provision of law, with respect to any portion of such trust which exceeds a principal value of twenty million dollars, the trustee may only take annual commissions to the extent of 50 percent of the rate specified in paragraph (c) of subdivision 2 of this section.

(b) In the case of a trust described in paragraph (a) of this subdivision, a trustee shall not be entitled to any commission from

principal as specified in subdivision 1 of this section for paying out 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 donee of the power in trust 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 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 donees of a power in trust over property having a value of $400,000 or more, 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 distribution 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 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 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.

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 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 shall be deemed a separate trust for purposes of this subdivision and the trustee shall be entitled to commissions in respect thereof at the rates and according to the terms and provisions of subdivisions 1, 2 and 5 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 of a donee of a power during minority with the rights and duties of a guardian under section 1714 of this chapter provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee.