



## FEATURE: FIDUCIARY PROFESSIONS

By **Joseph C. Mahon**

### Reasonable Compensation

Florida court considers whether the “lodestar” method applies to determine trustee fees

**R**obert Rauschenberg, “one of the most prominent and prolific artists of the twentieth century,”<sup>1</sup> died in 2008, leaving an estate valued at \$605,645,595 for federal estate tax purposes. The bulk of the assets, including two closely held companies—Robert Rauschenberg, Inc. and Untitled Press, Inc., which operated the decedent’s art businesses—were held in the Robert Rauschenberg Revocable Trust, first created in 1994 and last amended and restated in 2008. Rauschenberg had resigned as trustee in 2005 and named as successor trustees three “long time friends, business associates and confidants,”<sup>2</sup> Bill Goldston, an art professional, Bennet Grutman, an accountant, and Darryl Pottorf, an artist.

Rauschenberg made bequests of real estate and cash totaling \$11.6 million to several individuals, including his son, Christopher Rauschenberg, largely through charitable remainder trusts. His revocable trust agreement then passed the balance of the assets to the Robert Rauschenberg Foundation, Inc. (the Foundation).

In 2011, the Foundation, as sole residuary beneficiary, petitioned the Florida Court to “review the Trustees’ fee issue and determine a reasonable fee,” alleging that the trust agreement is silent as to the trustees’ fee and that the trustees are entitled to a “reasonable fee” under Fla. Stat. Section 736.0708.<sup>3</sup>

The Foundation then asked the court to determine the methodology for calculating the trustees’ reasonable compensation, asking the court to adopt the “lodestar method.”<sup>4</sup> This approach, prominent in bankruptcy practice, determines the number of hours reasonably

worked, eliminating excessive, duplicative and unproductive time, and the reasonable hourly rate for the services within the community. The product of these two factors is used to establish a target or “lodestar” for the compensation, which may then be adjusted for other factors, including the results obtained.<sup>5</sup>

In response, the trustees stated that they seek total fees of \$60 million on assets that they claimed grew in value to over \$2 billion due to their efforts.<sup>6</sup> The trustees also submitted the certifications of two expert witnesses opining that, in their experience, the lodestar method is never used to determine trustee fees.

Thus arises a classic confrontation over “reasonable compensation,” with potential application throughout the country.

#### Reasonable Compensation

As a “reasonable compensation” jurisdiction for trustees, Florida is in the majority of states. As “Survey of Jurisdictions,” pp. 15-16, shows, most of the states allow reasonable compensation for executors and trustees. The Uniform Trust Code (UTC), adopted by 26 states and the District of Columbia, provides for trustees to receive reasonable compensation.<sup>7</sup> Other states provide for reasonable compensation by statute, court rule or case law.

Only six states provide statutory fee schedules for trustees, including New York and New Jersey, both of which limit statutory fees to individual trustees and allow corporate fiduciaries reasonable compensation. Thirteen states provide schedules for executors’ fees. Interesting variations arise from state to state. In some states, the statutory rate is stated as a cap. In other states providing for statutory fees, additional compensation is allowed for extraordinary services rendered. In California, the statutory fees for executors convert to reasonable compensation for assets in excess of



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\$25 million. A few states with statutes that provide for reasonable compensation specifically set forth factors to be considered. Other states address the factors for determining reasonable compensation by case law.

The *Restatement of Trusts (Third)* (*Restatement Third*) also provides that “[a] trustee is entitled to reasonable compensation out of the trust estate for services as trustee, unless the terms of the trust provide otherwise or the trustee agrees to forego compensation.”<sup>8</sup> In the comments, the *Restatement Third* recognizes that some states still prescribe formulas for trustee compensation and that courts, nonetheless, generally retain

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authority over compensation.<sup>9</sup> The *Restatement Third* then lists factors to be considered in determining compensation, including: local custom; trustee's skill, experience and facilities; time spent; amount and character of the trust property; difficulty, responsibility and risk assumed; nature and costs of services rendered by others; and quality of the trustee's performance.<sup>10</sup>

**Florida's Trustee Fee Statute**  
While Florida is a reasonable compensation state, it also has an extensive statutory scheme to consider, including fee schedules setting presumptively reasonable compensation.

The Florida provision for trustee compensation is straightforward. Adopted in 2006 as part of the Florida Trust Code, Fla. Stat. Section 736.0708 provides:

If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

No reported cases cite the Florida statute.

The statute takes its language from UTC Section 708. The commentary on Section 708 refers liberally to the *Restatement of Trusts*, both *Second* and *Third* (which was still in draft form in 2000), indicating that the services actually rendered should be closely examined and that a trust may also benefit from special skills of the trustee. The comments to the *Restatement Third* refer to the leading Florida case on the factors to be considered in establishing reasonable compensation, *West Coast Hospital Ass'n v. Florida National Bank*.<sup>11</sup>

The Florida court in *West Coast Hospital Ass'n*, citing Bogert, *Trusts & Trustees*, Section 976 held:

The following factors may be influential in enabling the court to reach a conclusion as to the appropriate amount of pay which should be granted the trustee in a given case: The amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration



### SPOT LIGHT

#### Make Like a Tree and...

“Le Regard Interieur” (19 1/4 in. by 14 1/2 in.) by René Magritte, sold at Sotheby’s recent Impressionist, Modern & Surrealist Art Evening Sale in London on Feb. 5, 2014. A Belgian surrealist, Magritte’s work frequently displays a collection of ordinary objects in an unusual context, giving new meanings to familiar things.

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### Survey of Jurisdictions

*Laws regarding fees of executors and testamentary trustees*

Key: RC=Reasonable compensation; SF=Statutory fee; NS=No statute

Jurisdiction	Executor's Fees	Testamentary Trustee's Fees	Comments	Adopted Uniform Trust Code?
Alabama	RC; Extra compensation allowed for extraordinary services; Ala. Code § 43-2-848 (1975)	RC; Ala. Code § 19-3B-708		Yes; effective Jan. 1, 2007
Alaska	RC; Alaska Stat. § 13.16.430	RC; Alaska Stat. § 13.16.440		No
Arizona	RC; Arizona Statutes 14-3719	NS; Arizona Statutes 14-10708		Yes; effective Jan. 1, 2009
Arkansas	RC, not to exceed statutory schedule; Ark. Code § 28-48-108	RC; Ark. Code § 28-73-708		Yes; effective Aug. 12, 2005
California	SF up to \$25 million and RC over \$25 million; Cal. Probate Code § 10800	RC over \$25 million; Cal. Trust Law § 15681	Additional allowance for extraordinary services, Cal. Probate Code § 10801	No
Colorado	NS	NS	Statute repealed	No
Connecticut	NS	NS	<i>Hayward v. Plant</i> , 98 Conn. 374, sets forth RC factors	No
Delaware	RC; Del. Code Title 12 § 2305; Del. Chancery Court Rule 192	RC; Del. Code Title 12 § 3561		No
District of Columbia	RC; D.C. Stat. § 19-1307.08	RC; D.C. Stat. § 19-1307.08		Yes; effective March 10, 2004
Florida	RC; Fla. Stat. § 733.61	RC; Fla. Stat. § 736.0708	Presumptive statutory schedule for personal representative fees, subject to adjustment based on nine factors; presumptive statutory schedule for attorneys' fees	Yes; effective July 1, 2007
Georgia	SF; Ga. Code § 53-6-60; extra compensation provided by Ga. Code § 53-6-62	SF; Ga. Code § 53-12-210		No
Hawaii	RC; Hawaii Stat. § 5603-719			No
Idaho	RC; Id. Code § 15-3-709	RC; Id. Code § 15-7-205		No
Illinois	755 ILCS 5/27-1 and RC; 755 Ill. Stat. § 5/27-1	RC; 760 Ill. Stat. § 5/7	760 ILCS 5/7	No
Indiana	RC; Ind. Code § 29-1-10-13	RC; Ind. Code § 30-4-5-16		No
Iowa	RC, subject to statute ceiling; Iowa Code § 633A.197	RC, subject to statute ceiling; Iowa Code § 633A.4109		No
Kansas	RC; Kan. Stat. § 59-1717	RC; Kan. Stat. § 59-1717		Yes; effective Jan. 1, 2003
Kentucky	Statutory ceiling of 5%; Ky. Stat. § 395.150	Repealed	Extra compensation allowed for extraordinary services	Kentucky Trust Code introduced in 2014
Louisiana	RC, with statutory rate in default of agreement; La. Code of Civil Procedure Art. 3351	RC; La. Civil Code Ancillaries § 2181		No
Maine	RC; 18-A Maine Stat. § 3-721	RC; 18-B Maine Stat. § 708	Statute sets forth factors to consider	Yes; effective July 1, 2005
Maryland	RC, subject to statutory ceiling; Md. Code § 7-601	RC; Md. Code § 14-103		No
Massachusetts	RC; Mass. Gen. L. 190B § 3-719	RC; Mass. Gen. L. 203E § 708		Yes; effective July 8, 2012
Michigan	RC; Mich. L. § 700.3719.	RC; Mich. L. § 700.7708		Yes; effective April 1, 2010
Minnesota	RC; Minn. Stat. § 524.3-719	RC		No
Mississippi	RC; Miss. Code § 91-7-299	RC		No

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Jurisdiction	Executor's Fees	Testamentary Trustee's Fees	Comments	Adopted Uniform Trust Code?
Missouri	SF; Mo. Stat. § 473.153	RC; Mo. Stat. § 456.7-708	RC allowed in excess of fee schedule	Yes; effective Jan. 1, 2005
Montana	SF; Mont. Code § 72-3-631	RC; Mont. Code § 72-38-708	Extra compensation allowed for extraordinary services	Yes; effective Oct. 1, 2003
Nebraska	RC; Neb. Stat. § 30-2480	RC; Neb. Stat. § 30-3864		Yes; effective Jan. 1, 2005
Nevada	SF; Nev. Stat. § 150.020	RC; Nev. Stat. § 153.070	Extra compensation allowed for extraordinary services; Nev. Stat. § 150.030	No
New Hampshire	RC	RC; N.H. Stat. § 564-B:7-708	Extra compensation allowed for extraordinary services	Yes; effective Aug. 19, 2006
New Jersey	SF; N.J. Stat. § 3B:18-12, et seq.	SF; N.J. Stat. § 3B:18-23, et seq.	RC for corporate executors and trustees; extra compensation allowed for extraordinary services	No
New Mexico	RC; N.M. Stat. § 45-3-719	RC; N.M. Stat. § 46A-7-708		Yes; effective July 1, 2003
New York	SF; N.Y. SCPA § 2307	SF; N.Y. SCPA § 2309	RC for corporate executors and trustees	No
North Carolina	RC subject to statutory ceiling of 5%; N.C. Stat. § 28A-23-3	RC with list of factors; N.C. Stat. § 32-54		Yes; effective Jan. 1, 2005
North Dakota	RC; N.D. Code § 30.1-18-19	RC; N.D. Code § 59-15-08		Yes; effective Aug. 1, 2007
Ohio	SF; Ohio Code § 2113.35; additional commissions for extraordinary services; Ohio Code § 2113.36	RC; Ohio Code § 5807.08	Subject to reduction for cause	Yes; effective Jan. 1, 2007
Oklahoma	SF; 58 Okla. Stat. § 527	RC; 60 Okla. Stat. § 175.48	Extra compensation allowed for extraordinary services	No
Oregon	SF; Ore. Stat. § 116.173	RC; Ore. Stat. § 130.635 (text subject to final changes by Ore. Office of Legislative Counsel)	Extra compensation allowed for extraordinary services	Yes; effective June 26, 2013
Pennsylvania	RC; 20 Pa. Stat. § 3537	RC; 20 Pa. Stat. § 7768		Yes; effective Nov. 6, 2006
Rhode Island	RC; R.I. Gen. L. § 33-14-8	RC; R.I. Gen. L. § 18-6-1		No
South Carolina	RC subject to statutory ceiling of 5%; S.C. Code § 62-3-719	RC subject to statutory ceiling of 5%; S.C. Code § 62-7-708	Extra compensation allowed for extraordinary services	Yes; effective Jan. 1, 2014
South Dakota	RC with factors to consider; S.D. L. § 29A-3-719	RC with factors to consider; S.D. L. § 55-3-14		No
Tennessee	RC; Tenn. Code § 30-2-606	RC; Tenn. Code § 35-15-708		Yes; effective July 1, 2004
Texas	SF with ceiling; Tex. Estates Code § 352.002.	RC; Tex. Property Code § 114.061	Extra compensation allowed for extraordinary services	No
Utah	RC; Utah Code § 75-3-718	RC; Utah Code § 75-7-708		Yes; effective July 1, 2004
Vermont	RC; 14 Vt. Stat. § 1065; additional fees as provided by 32 Vt. Stat. § 1143	RC, with factors to consider; 14A Vt. Stat. § 708		Yes; effective July 1, 2009
Virginia	RC	RC; Va. Code § 64.2-761		Yes; effective Oct. 1, 2012
Washington	RC; Wash. Code § 11.48.210	RC; Wash. Code § 11.98.070(26)		No
West Virginia	SF; W. Va. Stat. § 44-4-12a	RC; W. Va. Stat. § 44D-7-708	Extra compensation allowed for extraordinary services	Yes; effective June 10, 2011
Wisconsin	SF; Wisc. Stat. § 857.05	NS (a version of the UTC has been adopted and will be effective on July 1, 2014)	Extra compensation allowed for extraordinary services	Yes; effective July 1, 2014
Wyoming	SF; Wyo. Stat. § 2-7-803	RC; Wyo. Stat. § 4-10-708	Extra compensation allowed for extraordinary services	Yes; effective July 1, 2003

— Joseph C. Mahon

of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the cestuis [sic] to the trustee and intended to be applied toward his compensation.

Given this legislative history, a Florida court may reasonably be expected to apply its own case law predating the adoption of its trust code.

The UTC doesn't otherwise provide authority supporting the use of the lodestar method. The Uniform Laws Annotated Reporter lists one District of Columbia case citing Section 708, concerning special needs trusts, in which compensation for one trust was based on hours worked and for another trust on a percentage of the assets managed.<sup>12</sup>

### Personal Representative Fees

Florida also provides reasonable compensation for personal representatives of an estate. But, it does so pursuant to a more complex scheme. Florida first provides a statutory schedule "presumed to be reasonable compensation" of 3 percent of the first \$1 million, 2.5 percent of the next \$4, million, 2 percent of the next \$5 million and 1.5 percent of assets in excess of \$10 million.<sup>13</sup> In addition, the statute allows reasonable compensation for extraordinary services, including selling real estate, conducting litigation, being involved in tax proceedings, continuing a business or protecting a homestead.<sup>14</sup> Each of two personal representatives is allowed a full commission when the estate is greater than \$100,000 and more than two share two commissions.<sup>15</sup>

Any interested person may petition the court to increase or decrease the personal representative's compensation for ordinary services or to award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. The statute expressly provides that, in determining

reasonable compensation for the personal representative, the court is to consider eight factors, giving each weight as the court determines to be appropriate. The factors include: (1) promptness, efficiency and skill; (2) responsibilities and potential liabilities; (3) nature and value of the assets; (4) beneficial or detrimental results of the services; (5) complexity and novelty of the issues presented; (6) participation in tax planning and tax return preparation, review or approval; (7) nature of the assets, probate, non-probate and exempt, the expenses,

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liabilities and compensation paid to other professionals and fiduciaries; and (8) delay in payment of compensation. The court also considers any other relevant factors.<sup>16</sup>

### Lodestar Method

Florida law also allows "reasonable compensation" for attorneys representing trustees and personal representatives.<sup>17</sup> The Florida statute provides a schedule for attorney compensation that's "presumed to be reasonable total compensation for ordinary services of all attorneys employed generally to advise a trustee concerning the trustee's duties in initial trust administration." The trustees' attorneys are allowed 75 percent of the statutory fee presumed reasonable for a personal representative's attorneys under Fla. Stat. 733.6171.

The attorney fee schedule is similar to, but less than, the personal representative fee schedule: 3 percent of the first \$1 million, 2.5 percent of the next \$2 million, 2 percent of the next \$2 million, 1.5 percent of the next \$5 million and 1 percent of the amount in excess of \$10 million.<sup>18</sup> Legal counsel is also allowed additional fees for 11 categories of extraordinary services, including conducting litigation, being involved in tax proceedings, operating a business and resolving

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compensation issues.<sup>19</sup> And, again, any interested party may ask the court to determine the attorneys' reasonable compensation on the basis of the same factors used for determining that of a personal representative.<sup>20</sup>

Despite the statutory presumption for reasonable compensation, Florida case law adopts the lodestar method for determining a fiduciary's attorneys' fees. In *Bishop v. Estate of Rossi*, decided within the past year, the court applied case law dating from 1985 and held: "This lodestar method of determining reasonable attorney's fees, adopted by our state Supreme Court . . . applies equally to probate matters."<sup>21</sup>

### Uniform Prudent Investor Act

Another reference point for reasonable compensation is provided by the Uniform Prudent Investor Act (UPIA), adopted by 43 jurisdictions. It imposes on fiduciaries the following duty to be supervised by courts:

In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.<sup>22</sup>

The comments to the UPIA don't address the lodestar method. Nor does the lodestar method appear in the commentary on *Restatement Third*, Section 88 Power to Incur and Pay Expenses, which provides:

A trustee can properly incur and pay expenses that are reasonable in amount and appropriate to the purposes and circumstances of the trust and to the experience, skills, responsibilities, and other circumstances of the trustee.

Florida hasn't adopted the UPIA *per se*, but has separately adopted its central provisions.<sup>23</sup> Florida also separately entitles trustees to reimbursement "for reasonable expenses that were properly incurred in the administration of the trust."<sup>24</sup>

Standard compensation for asset management is a percentage fee that varies with the services provided and assets managed. Annual fees range from a few basis points<sup>25</sup> for custodian services to less than 1/2 percent for fixed income, to 1 percent or more for management of publicly traded equity portfolios, with the fee percentages being reduced the greater the value of the assets

managed. Private placements and hedge funds typically charge 2 percent annually, plus a 20 percent performance fee. The practices for financial services provide different examples of fees that may be considered reasonable.

Reasonable compensation as a percentage of the assets administered gives effect to several of the factors found in the authorities discussed above. It creates proportionality to the assets, which may seem generous in some cases, but which also creates a ceiling in other cases. The dollar value of assets often correlates to the responsibilities and potential liabilities of the service provider. The quantum of the assets may reflect tax or other complex issues they present, as well as the results obtained. The dollar value may also reflect the extraordinary matters that give rise to additional



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#### Caleidoscope

"Vollmond In Mauern" (9 7/8 in. by 8 1/4 in.) by Paul Klee, sold for \$686,931 at Sotheby's recent Impressionist, Modern & Surrealist Art Evening Sale in London on Feb. 5, 2014. The German-Swiss Klee was a natural draftsman, who experimented with and, eventually, got deep into color theory, writing about it extensively.

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compensation under the Florida and other statutes.

In contrast, the use of the lodestar method in bankruptcy may indicate its limitation as a measure of reasonable compensation. By definition, bankruptcy involves insolvency or the failure of a business. It's in essence a salvage operation, in which the success of the undertaking is likely to be no greater than the creditor's claims. Any beneficial results belong to creditors already receiving less than 100 cents on the dollar. The lawyers and other professionals involved in a bankruptcy proceeding need to be paid their hourly rates to have any incentive to be involved. In the bankruptcy setting, the lodestar method's lack of focus on the quantum of assets and the results obtained is understandable. When solvency isn't an issue, and all interested parties may benefit from the results obtained, the lodestar method may be less appropriate.

### *Rauschenberg Facts*

The Rauschenberg estate had an initial estate tax value

of \$605 million. It included two companies in the business of marketing the decedent's artwork. The trustees were familiar with the decedent's business prior to his death. They claim that, through their efforts in operating the businesses owned by the trust during the few years after Rauschenberg's death, they increased the value of the assets to more than \$2 billion, as substantiated by appraisals from Christie's. The \$60 million of total commissions sought for services as trustees, presumably since at least 2008, is 10 percent of the date-of-death asset value. But, it's only 3 percent of the ending value, which is the amount presumed to be reasonable compensation for two or more personal representatives under Florida law, without any extraordinary compensation for operating the business.

By all appearances, the trustees' actual task was the same as serving as an executor or personal representative of the estate. Wisely, the trustees' own estimate of the value of their services is consistent with the Florida statutory scheme for personal representatives.

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When the requested compensation is what the statute presumes to be reasonable as a percentage of the assets administered, how unreasonable can it be?

By order dated April 11, 2012, the court in *Estate of Rauschenberg* denied the Foundation's motion to use the lodestar method to determine the trustees' reasonable compensation.<sup>26</sup> Whatever fee the Rauschenberg trustees may reasonably be allowed by the trial court, it won't be determined solely in reliance on the lodestar method.

—The author thanks Adam Osterweil, an associate



### SPOT LIGHT

#### Music Man

"Le Violoncelliste" (39 3/4 in. by 29 1/8 in.) by Marc Chagall, sold for \$11,758,145 at Sotheby's recent Impressionist, Modern & Surrealist Art Evening Sale in London on Feb. 5, 2014. A pioneer of Modernism, Chagall is considered the quintessential Jewish artist of the 20th century.

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#### Endnotes

1. As stated in the "Response to Trustee [sic] Beneficiary's Petition to Determine Trustee Fees," filed on August 15, 2011, in *Estate of Robert Rauschenberg*, Circuit Court of Florida, 20th Judicial Circuit (Lee County), File No. 08-CP-2479 (herein "*Estate of Rauschenberg*").
2. *Ibid.*
3. See "Trust Beneficiary's Petition to Determine Trustee Fees," filed on June 21, 2011, in *Estate of Rauschenberg*.
4. See "Motion to Decide the Methodology for Determining a Reasonable Trustees' Fee," filed on Jan. 12, 2012, in *Estate of Rauschenberg*.
5. See generally 9 Am.Jur. 2d Bankruptcy Section 246.
6. See "Response to Motion to Decide Methodology for Determining a Reasonable Trustees' Fee" filed on March 19, 2012, in *Estate of Rauschenberg*.
7. Uniform Trust Code (UTC) Section 708 (2005). For a map of jurisdictions that have adopted the UTC, see <http://uniformlaws.org/Act.aspx?title=TrustCode>.
8. *Restatement of Trusts (Third)* Section 38.
9. *Ibid.*, at General Comment c.
10. *Ibid.*, at General Comment c(1).
11. 100 So.2d 807, 812 (Fla. 1958), cited at *Restatement of Trusts (Third)* Section 38, Comment i.
12. *In re D.M.B.*, 979 A.2d 15 (D.C. 2009).
13. Fla. Stat. Section 733.617(2).
14. *Ibid.*, Section 733.617(3).
15. *Ibid.*, Section 733.617(5).
16. *Ibid.*, Section 733.617(7).
17. *Ibid.*, Sections 736.1007 and 733.6171.
18. *Ibid.*, Section 733.6171(3).
19. *Ibid.*, Section 733.6171(4).
20. *Ibid.*, Section 733.6171(5).
21. *Bishop v. Estate of Rossi*, 114 So.3d 235, 237 (Fl. DCA 2013), citing *Florida Patient's Comp. Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) and *In re Estate of Platt*, 586 So.2d 328, 335 (Fla. 1991).
22. Uniform Prudent Investor Act Section 7 (1994).
23. *Supra* note 13 at Section 518.11.
24. *Ibid.*, Section 736.0709.
25. A basis point is one one-hundredth of a percentage point.
26. See "Order Denying Robert Rauschenberg Foundation's Motion to Decide Methodology for Determining Reasonable Trustees' Fee," filed on April 11, 2012, in *Estate of Rauschenberg*.