

December 1938

Trusts--Fiduciaries--Right of Fiduciary to Collect Extra Compensation for Legal Services

A. F. G.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Estates and Trusts Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

A. F. G., *Trusts--Fiduciaries--Right of Fiduciary to Collect Extra Compensation for Legal Services*, 45 W. Va. L. Rev. (1938).

Available at: <https://researchrepository.wvu.edu/wvlr/vol45/iss1/11>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

In *Hewitt v. Hewitt* our court, by expressly limiting the rule of continuity in *Vickers v. Vickers* to apply in only those cases containing an element of reconciliation or condonation,¹⁰ and by overruling that part of the *Martin* case which allows pendency of litigation between the spouses to be counted, has adopted so much of each as is in accord with prevailing opinion. Thus, the result is a rule which is free from inconsistencies and easy to apply. As one court succinctly remarked, "It is like 'time out' in a football game, and if, after taking 'time out', there is at least two years left, the requirement of the statute is met."¹¹

C. E. G.

TRUSTS — FIDUCIARIES — RIGHT OF FIDUCIARY TO COLLECT EXTRA COMPENSATION FOR LEGAL SERVICES. — *P*, an attorney, performed legal services for decedent's estate of which he was one of three co-executors, these services having been rendered with the consent of one of the other two. *P* petitioned for compensation for these services in addition to the fee of \$750 allowed to him for his work as executor. The commissioner found the legal services worth \$2,000, but the chancellor disallowed the claim. *P* appealed. Reversed. Held, that a liberal construction of the statute¹ allowing a fiduciary any reasonable expenses incurred by him as such permits an executor rendering valuable legal services to the estate to be paid a reasonable compensation therefor as a part of his executor's fee. *Tyler v. Reynolds*.²

It has long been an established principle in equity that an executor or administrator who acts as attorney for the estate can receive no extra compensation for services rendered by him in that capacity.³ This view is predicated primarily on the fear held by courts that "the administrator in selecting himself to perform the duties of an attorney for the estate would become his own employer, and would be under temptation of self-interest which might lead him to act contrary to the duties of his trust."⁴ Today, there is

¹⁰ *Burk v. Burk*, 21 W. Va. 445 (1883); *Phelan v. Phelan*, 135 Ill. 445, 25 N. E. 751 (1890); Note (1912) 39 L. R. A. (N. S.) 1133.

¹¹ *Hartpence v. Hartpence*, 121 Atl. 513, 514 (N. J. Eq. 1923).

¹ W. VA. REV. CODE (1931) c. 44, art. 4, § 14.

² 197 S. E. 735 (W. Va. 1938).

³ *Baldwin's Ex'r v. Carleton*, 15 La. 394 (1840); *Willard v. Bassett*, Adm'r, 27 Ill. 37, 79 Am. Dec. 393 (1861); *Doss v. Stevens*, 13 Colo. App. 535, 59 Pac. 67 (1899); *Estate of Lankershim*, 6 Cal. (2d) 568, 58 P. (2d) 1282 (1936).

⁴ *Estate of Lankershim*, 6 Cal. (2d) 568, 572, 58 P. (2d) 1282 (1936).

an apparent trend in the American decisions away from the established view on this question,⁵ many courts holding as did the West Virginia court in the *Tyler* case,⁶ that an executor or administrator may receive a reasonable compensation for necessary legal services rendered by him to the estate.⁷ In determining what is a reasonable compensation, courts adopting the new view curiously⁸ limit the amount paid to the executor to a sum less than that which he would have been required to pay to another attorney for rendering the same services.⁹

In some jurisdictions this modern liberal tendency is due largely to new statutes covering the question,¹⁰ in others, however, as in West Virginia where there is no statute expressly authorizing the payment,¹¹ it more directly results from a realization by the courts that where fees are limited in amount and payable to the personal representative only for services necessarily and properly performed,¹² the danger of his being tempted to act in his own interests is slight. Further justification for the view is found in the fact that a denial of extra compensation would result in an unjust enrichment of the estate¹³ at the expense of the personal representative who is often chosen to act in this capacity because of his

⁵ 3 BOGERT, TRUSTS AND TRUSTEES (1935) § 490; RESTATEMENT, TRUSTS (1935) § 242d as to trustees performing legal services for the trust estate.

⁶ 197 S. E. 735 (W. Va. 1938).

⁷ *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93 (1881); *Pomeroy v. Mills*, 37 N. J. Eq. 578 (1883); *Sloan v. Duffy*, 117 Wis. 480, 94 N. W. 342 (1903); *Estate of Wilson*, 83 Neb. 252, 119 N. W. 522 (1909); *Nelson v. Schoonover*, 89 Kan. 779, 132 Pac. 1183 (1913); *Holder v. Allen*, 150 Tenn. 669, 266 S. W. 772 (1924); *In re Fisher's Will*, 159 Misc. 190, 287 N. Y. Supp. 252 (1936).

⁸ In stressing the fact that the executor is to be paid not the usual attorney's fees but a reasonable amount for his legal services, it seems that courts imply that the legal fees generally charged are unreasonable.

⁹ *Sloan v. Duffy*, 117 Wis. 480, 94 N. W. 342 (1903); *Harris v. Martin*, 9 Ala. 895 (1846).

This sum is generally held not to be payable to the executor in the form of an attorney's fee, but is included in the amount paid to him for his work in the administration of the estate.

In *Fulton v. Davidson*, 3 Heisk. 614 (Tenn. 1870), the court allows the personal representative the usual attorney's fee, but this case is expressly repudiated by *Holder v. Allen*, 150 Tenn. 669, 266 S. W. 772 (1924), a later case in the same court, which lays down the less liberal rule adopted by the West Virginia court.

¹⁰ *Sloan v. Duffy*, 117 Wis. 480, 94 N. W. 342 (1903); *Estate of Wilson*, 83 Neb. 252, 119 N. W. 522 (1909); *Parker v. Wright*, 103 N. J. Eq. 535, 143 Atl. 870 (1929).

¹¹ W. VA. REV. CODE (1931) c. 44, art. 4, § 14.

¹² *Tyler v. Reynolds*, 197 S. E. 735 (W. Va. 1938); *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93 (1881).

¹³ 3 BOGERT, TRUSTS AND TRUSTEES § 490.

knowledge and ability in legal matters¹⁴ and who should not be discouraged by the court from applying such knowledge and ability to the problems of the estate.

A. F. G.

WILLS — WITNESSES — WHETHER ACKNOWLEDGMENT OF SIGNATURE MEETS REQUIREMENT THAT WITNESSES SIGN IN THE PRESENCE OF EACH OTHER. — *A* prepared a will for *B*, which *B* executed at the same time *A* signed as witness. Ten days later, in the presence of *B* and *A*, *C* signed as witness after *B* acknowledged the will to be his and *A* acknowledged his signature as witness. *Held*, that the signing by *A* was in conformity with the provision of the statute¹ stipulating that witnesses must sign in the presence of each other. *Wade v. Wade*.²

The problem raised here is strictly one of statutory interpretation. A literal interpretation of the words "in the presence of" would seem to indicate that the witnesses must sign in the physical presence of each other.³ Cases interpreting similar statutes have held that failure of strict compliance with the letter of the statute made the will void.⁴ Other authority says that the requirement of "presence" will be met if the signing is done in such a manner that each witness is in a position to see the other sign if he desires to do so.⁵

In the instant case the court cites with approval cases which give a liberal interpretation to statutory requirements that the witnesses sign in the presence of the testator⁶ and applies the principle laid down in those cases to the West Virginia requirement that witnesses sign in the presence of each other. The principle, developed in the cited cases and approved by the court in the instant case, is

¹⁴ It is interesting to compare with this the attitude of the court in the case of *Owen v. Stoner*, 148 Miss. 397, 114 So. 613 (1927), where it is argued that the very fact that an attorney is chosen to serve as executor or administrator indicates that it was intended that his legal services should be rendered to the estate gratuitously.

¹ W. VA. REV. CODE (Michie, 1937) c. 41, art. 1, § 8.

² 195 S. E. 339, 115 A. L. R. 686 (W. Va. 1938).

³ 1 HARRISON, WILLS AND ADMINISTRATION (1927) 105.

⁴ *In re Moxon's Estate*, 234 Mich. 170, 207 N. W. 924 (1926); *Peeson v. Coronel*, 45 Philippine 216 (1923); *Coque v. Sioca*, 43 Philippine 405 (1922); *Roberts v. Welch*, 46 Vt. 162 (1873).

⁵ *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62 (1859).

⁶ *Sturdivant v. Birchett*, 10 Gratt. 67 (Va. 1853); *Cunningham v. Cunningham*, 80 Minn. 180, 83 N. W. 58, 51 L. R. A. 642, 81 Am. St. Rep. 256 (1900); *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822 (1890); *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464 (1883).