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**Who Pays the Attorney's Fees in Trust Litigation?**

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## WHO PAYS THE ATTORNEY'S FEES IN TRUST LITIGATION?

A common question that arises during litigation concerning trusts is how the attorney's fees in the case are going to be paid. There are often several parties, trustees, beneficiaries, potential third parties, who are potentially all looking at each other for payment of attorney's fees in contested litigation. That being said, the reality of payment and the expense of litigation may come to surprise beneficiaries when they begin to contemplate litigation regarding their trust. The purpose of this paper is to highlight both the statutory provisions and case law guidance provided regarding the payment of attorney's fees in trust litigation.

### **I. The Trustee's Attorney's Fees**

#### *A. General Considerations*

As an initial matter, the payment of a trustee's attorney's fees finds its roots in the Texas Property Code in provisions that are often referred to as the Texas Trust Code. Specifically, Texas Property (Trust) Code Section 113.018 provides that a trustee may employ attorneys, accountants, and agents "reasonably necessary in the administration of the trust estate." TEX. PROP. CODE §113.018(a). The statutory authority which governs the administration of trusts understands that there are times that the trustee will need assistance. The Texas Property (Trust) Code continues later to provide the following:

- (a) A trustee may discharge or reimburse himself from trust principal or income or partly from both for:
  - (1) advances made for the convenience, benefit, or protection of the trust or its property;
  - (2) expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property; and
  - (3) expenses incurred for any action taken under Section 113.025.

TEX. PROP. CODE §114.063(a). Of particular importance to the inquiry at hand are subsections (1) and (2), which provide the trustee latitude in paying expenses to protect the trust or its property and administration of the trust. The question then becomes whether the litigation itself fulfills those goals. In the litigation context, especially in those situations involving potential breaches of trust or breaches of fiduciary duty, the question of whether the trustee's attorney's fees may be paid from the Trust revolve around whether a benefit can be conferred on the trust.

The questions of whether attorney's fees are "reasonably necessary" and whether the trust was benefitted by the Trustee's actions come into play when the court is assessing the costs of litigation. Texas Property (Trust) Code §114.064(a) permits the court to "make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just" in a proceeding falling within the purview of the Texas Property (Trust) Code. Ultimately, the question of who pays what falls into the lap of the trial court. While the determination of whether fees are

reasonable and necessary are fact questions to be determined by the fact finder, the award of attorney's fees under Texas Trust Code Section 114.064 is a question of law for the court to decide in its discretion. *Lesikar v. Moon*, 237 S.W.3d 361, 375 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Beyond these provisions, the Texas Property (Trust) Code does not explicitly provide for a template or guidelines on how trial courts should go about assessing the trustee's fees in trust litigation. Rather, many of the considerations of how and when a trustee should be permitted to assess its attorney's fees against the trust's assets are the subject of case law precedent.

As we approach the context of filing a lawsuit, the beneficiary about to engage in long, protracted litigation with a trustee should be wary – the trustee, based upon the statutory authority cited herein, potentially has, at least at the opening of the litigation, the upper hand. A trustee has access to, and use of, the trust's assets and, in many cases, might be able to outspend the beneficiary. There may be ways to attempt to constrict the trustee's ability to make use of the funds or assets of the trust, but that relief is not guaranteed nor is it mandatory.

### *B. The Trustee's Attorney's Fees in Litigation*

Litigation in the trust context most often involves claims of breach of fiduciary duty or breach of trust. Said another way, litigation in the trust context, often involves a disagreement between the beneficiary and the trustee about how the trust assets should be or have been administered. Thus, there is often disagreement about whether the assessment of the trustee's attorney's fees against the trust is proper. The precedent in Texas is that, generally, a trustee may charge the trust for its attorney's fees incurred in defending charges of breach of trust, so long as the trustee is acting reasonably and in good faith. *Grey v. First Nat'l Bank*, 393 F.2d 371, 387 (5th Cir. Tex. 1968); *Moody Found. v. Estate of Moody*, 1999 Tex. App. LEXIS 8597 (Tex.App. – Austin, Nov. 18, 1999, pet. denied); *Rowland v. Moore*, 168 S.W.2d 911, 916 (Tex. Civ. App.--Fort Worth 1943), *rev'd on other grounds*, 141 Tex. 469, 174 S.W.2d 248 (Tex. 1943). For example, in *Grey*, trust beneficiaries complained about the award of attorney's fees to First National as Trustee of the O'Connor Trust, stating that they believed the trust was "surcharged with fees for an attorney who defended [the Trustee] contrary to the best interests of the trust beneficiaries." *Grey*, 393 F.2d at 387. The beneficiaries in *Grey* had filed suit against First National, claiming that the trustee of the O'Connor Trust had breached its duties to the beneficiaries. *See id.* The appellate court, noting that the jury found no breach of First National's fiduciary duties, held that they "may assume that First National was acting reasonably and in good faith." *Id.*

Based upon the Court's ruling in *Grey* and the subsequent case law that flows therefrom, if a trustee is acting reasonably and in good faith in defending itself from the breach of trust or breach of fiduciary duty claim, the payment of the fees is going to be approved by the Court under the discretion that is granted to it under Texas Property (Trust) Code §114.064(a). To be clear, however, Texas Property (Trust) Code §114.064(a) is not a "prevailing party" or loser pays statute. There is clear discretion built into the mechanism of the analysis. For example, in *American Nat'l Bank v. Biggs*, 274 S.W.2d 209 (Tex.Civ.App.—Beaumont 1954, writ ref'd n.r.e.), the court of appeals examined a situation regarding an alleged breach of trust, wherein the trustees of a trust classified royalties as income and paid the sums to the life tenants of the property, which happened to include the trustees. *American Nat'l*, 274 S.W.2d at 213. The remaindermen brought suit for

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