# ATTORNEYS' FEES IN TRUST AND ESTATE LITIGATION

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### I. <u>ATTORNEYS' FEES, COSTS, AND EXPENSES GENERALLY</u>

In general, attorneys' fees are not recoverable either in an action in tort or a suit upon a contract unless expressly provided by statute or by contract between the parties.

- <u>A.</u> <u>Grounds for Recovery</u>. In general, attorneys' fees incurred in litigation are not recoverable either in an action in tort or a suit upon a contract unless expressly provided for by statute or by contract between the parties. "The availability of attorney's fees under a particular statute is a question of law for the court." *Holland v. Wal-Mart Stores*, *Inc.*, 1 S.W.3d 91, 94 (Tex. 1999). Statutes providing for the recovery of attorneys' fees are strictly construed. *In Re Estate of Van Meter*, No. 2-08-289-CV, 2009 WL 885955,\*3 (Tex. App.-Fort Worth 2009, no pet.)(mem. op.).
- <u>B.</u> <u>Common Fund Doctrine</u>. One exception to the general rule that attorneys' fees are recoverable only if authorized by statute or a contract is known as the "Common Fund Doctrine." See Knebel v. Capital National Bank in Austin, 518 S.W.2d 795 (Tex. 1974). A court in the exercise of its equitable powers may award attorneys' fees to a litigant out of a fund, such as an estate, where the litigant expended the litigant's own funds to maintain a successful suit for the benefit of a common fund. The equitable objective is that of distributing the burden of such expenses among those who share in an accomplished benefit. The rule is founded upon the principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses, including reasonable attorneys' fees, and that the most equitable way of securing such contribution is to make such expenses a charge on the fund so protected or recovered. <a href="Id.">Id.</a> at 799.</a>
- Costs and Expenses. In general, expenses incurred in prosecuting or defending a lawsuit are not recoverable as costs, unless permitted by a statute or equitable principle. The term "costs" generally refers to fees and charges required by law to be paid to the courts or some of their officers, the amount of which is fixed by statute or the court's rules, and generally includes: (i) county clerk and service fees, (ii) court reporter fees for the original stenographic transcripts, and (iii) guardian ad litem fees. See Shaikh v. Aerovivas de Mexico, 127 S.W.3d,76, 82 (Tex. App.—Houston [1st Dist.] 2003, no writ). Examples of expenses that may not fall within the meaning of the term "costs" include: (i) the cost of copies of deposition transcripts, (ii) the cost of CDs, (iii) litigation documents, and (iv) travel expenses to take a deposition. Id.

# II. RECOVERY OF FEES IN ESTATE LITIGATION

# A. Statutory Provisions

# 1. <u>Declaratory Judgment Act.</u>

**A.** <u>Fees and Costs.</u> Section 37.009 of the Texas Civil Practice and Remedies Code provides as follows: "In any proceeding under this chapter, the court may award costs and reasonable attorney's fees as are equitable and just." See also Canales v. Zapatero, 773 S.W.2d 659, 661 (Tex. App.—San Antonio 1989, writ denied); Fuqua v. Fuqua, 750 S.W.2d 238, 246 (Tex. App.—Dallas 1998, writ denied).

**B.** Trust and Estates. Tex. Civ. Prac. & Rem. Code Ann. Section 37.005 provides, in part, as follows: "A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, ...., or cestui que trust in administration of a trust or of the estate of a decedent, .... may have a declaration of rights or legal relations in respect to the trust or estate: (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights and legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts."

The Declaratory Judgments Act entrusts attorneys' fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, See e.g., Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex.1997), or to rule without supporting evidence. *Beaumont Bank v. Buller*, 806 S.W.2d 223, 226 (Tex.1991).

The award of attorneys' fees in a declaratory judgment action lies within the discretion of the trial court, and is not dependent upon a finding that a party "substantially prevailed." *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996); *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985); *Hachar v. Hachar*, 153 S.W.3d 138 (Tex. App.-San Antonio 2004, no pet.); *Horne v. Ross*, 777 S.W.2d 755, 757 (Tex. App.-San Antonio 1989, no writ;. Decisions have been upheld where the trial court failed to award attorneys' fees to the prevailing party and where the trial court awarded attorneys' fees to the losing party. *Oake*, 692 S.W.2d at 454; *District Judges of Collin County v. Commissioners Court of Collin County*, 677 S.W.2d 743 (Tex.App.-Dallas 1984, writ ref'd n.r.e.).

# 2. Texas Probate Code Provisions.

<u>Attorneys' Fees During Estate Administration.</u> Texas Probate Code Section 242 allows personal representatives to recover all reasonable attorneys' fees necessarily incurred in connection with the proceedings and management of the estate on satisfactory proof to the court.

#### B. Will Contests.

(i) TPC Section 243. Texas Probate Code §243 provides as follows:

"When any person designated as executor in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings. When any person

designated as a devisee, legatee, or beneficiary in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding **in good faith, and with just cause**, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he **may** be allowed out of the estate his necessary **expenses and disbursements**, including **reasonable attorney's fees**, in such proceedings."

Tex. Prob. Code Ann. §243 (Vernon 2003). Executors and administrators are not the only parties potentially entitled to fees in a will contest. Persons designated as devisees, legatees, or beneficiaries who defend or prosecute any proceeding in good faith and with just cause for the purpose of having the will or alleged will admitted to probate may recover necessary expenses and disbursements, including reasonable attorneys' fees. The party claiming recovery for attorneys' fees must prove that the amount expended was reasonable and necessary. See In Estate of Arndt, 187 S.W.3d 84, 90 (Tex. App---Beaumont, 2005, no pet.). Section 243 is a reimbursement statute the purpose of which is to compensate the claimant in a will contest for actual expenses and disbursements. Russell v. Moeling, 526 S.W.2d 533 (Tex.1975). To be entitled to a recovery of attorneys' fees, a jury must find that the "good faith and just cause" standard had been met. Alldrige v. Spell, 774 S.W.2d 707, 711 (Tex. App.—El Paso 1989, no writ).

Recovery of fees under Texas Probate Code §243 is conditioned on a finding that the claimant acted in good faith and with just cause. See Huff v. Huff, 124 S.W.2d 327, 300 (Tex. 1939); Alldridge v. Spell, 774 S.W.2d 707, 711 (Tex. App—Texarkana 1989, no writ). A party does not have to prevail to receive reimbursement of fees under §243.

It is important to note that all will contestants are not entitled to recovery of fees under §243. The contestant <u>must</u> be a beneficiary under a will. Potential intestate heirs who would take if a will is invalidated through a will contest are <u>not</u> entitled to recovery of fees under §243 (even if successful).

- (ii) <u>Contingent Fees.</u> The term "reasonable attorney's fees" means a reasonable fee certain for the services rendered, and the statute does not authorize the allowance of an amount that might be reasonable for a fee contingent upon successful prosecution of the litigation. See *Salmon v. Salmon*, 395 S.W.2d 29, 31 (Tex. 1965). Because of the uncertainty of recovery of a contingent fee under Tex. Prob. Code. Ann. §243, the party on a contingent fee contract should consider a fee arrangement based on the greater of (i) reasonable attorneys' fees based on an hourly rate that are awarded by a jury, and (ii) a contingent fee.
- (iii) Personal Representative Obligation to Reimburse Fees. If a personal representative is not awarded fees in a will contest either because the fees incurred were not reasonable and necessary or because the personal representative is found not to have defended or prosecuted the Will in good faith and with just cause, the personal representative is charged with reimbursing the estate for any fees paid by the personal representative out of the estate to the personal representative's attorneys. For this reason, an attorneys' fee agreement

should make it clear that the attorney is not undertaking to insure the recovery of attorneys' fees, unless the attorney and client have agreed otherwise.

## C. Removal of Executors Or Forcing Compliance with Statutory Duties.

(i) <u>Tex. Prob. Code Section 245</u>. Under Section 245 of the Texas Probate Code, a court may assess reasonable attorneys' fees against the personal representative of the estate when the representative is removed for cause or in an action to obtain the representative's compliance with a statutory duty. Section 245 of the Probate Code provides as follows:

When a personal representative neglects to perform a required duty or if a personal representative is removed for cause, the personal representative and the sureties on the personal representative's bond are liable for:

- (1) costs of removal and other additional costs incurred that are not authorized expenditures, as defined by this code; and
- (2) reasonable attorney's fees incurred in removing the personal representative or in obtaining compliance regarding any statutory duty the personal representative has neglected.

Tex. Prob. Code Ann. § 245 (Vernon. 2010). The Court has the power to award fees to the Estate or to the beneficiaries who bring the removal action. *In Re Estate of Vrana*, No. 04-09-00377-CV, 2010 WL 46387777 (Tex. November 18, 2010)(independent executor that was removed ordered to pay \$153,162.45 to complaining beneficiaries to reimburse them for fees incurred in removal). Thus, a non-complying personal representative may not only be denied their own attorneys' fees, but may be charged with payment of opposing counsel fees.

- (ii) <u>Tex. Prob. Code Section 149C.</u> Section 149C of the Texas Probate Code pertains to removal of Independent Executors and provides, in part, as follows:
- (c) An independent executor who defends an action for his removal in good faith, whether successful or not, shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorneys' fees, in the removal proceedings.
- (d) Costs and expenses incurred by the party seeking removal incident to removal of an independent executor appointed without bond, including reasonable attorney's fees and expenses, may be paid out of the estate.

If a finding is made that the independent executor defended his removal in good faith, whether or not the independent executor is removed, attorneys' fees shall be awarded to the independent executor out of the estate. At the same time, the Court may award fees out of the estate to the party attempting to remove the independent executor. *Garcia v. Garcia*, 878 S.W.2d 678 (Tex. App.—Corpus Christi 1994, no writ).

**D.** Contingent Fee Contracts by Personal Representative Seeking Recovery of Estate Property. Section 233(c) of the Texas Probate Code provides as follows:

"A personal representative, including an independent executor or independent administrator, may convey or contract to convey for services of an attorney a contingent interest that exceeds one-third of the property sought to be recovered under this section only on approval of the court in which the estate is being administered. The court must approve a contract entered into or conveyance made under this section before an attorney performs any legal services. A contract entered into or conveyance made in violation of this section is void, unless the court ratifies or reforms the contract or documents relating to the conveyance to the extent necessary to cause the contract or conveyance to meet the requirements of this section."

Thus, if the estate has a potential claim against a third party, an attorney's contingent fee contract must provide for a contingent fee of one third (1/3) or less. If the contract provides for a contingent fee of over one third (1/3), then court approval must be obtained prior to the attorney rendering any services.

# B. Attorneys' Fees Paid by Third Parties.

A party whose attorneys' fees are paid by a third party will be considered as incurring the fees if the party is under an obligation to reimburse the paying party in the event of a recovery of attorneys' fees. *In Re Ray Ellison Grandchildren Trust* 261 S.W.3d 111, 127 (Tex. App. - San Antonio - 2008, pet. denied). "Proof of fees actually incurred or paid [is] not [a] prerequisite[] to the recovery of attorney's fees in Texas." *AMX Enters., L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 520 (Tex. App.—Fort Worth 2009, no pet.); see also *In Re Estate of Belton Kleberg Johnson, Deceased*, No. 04-08-00079-CV,2010 WL 4872325 (Tex. December 1, 2010)(fees awardable under Texas Trust Code Section 114.064 even if fees paid by trusts for claimants).

### C. Jury Charge.

A trial court has wide discretion in submitting jury questions." *Moss v. Waste Mgmt. of Tex., Inc.,* 305 S.W.3d 76, 81 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Appellate courts review an allegation of jury charge error for an abuse of discretion. *Tex. Dep't of Human Servs. v. E.B.,* 802 S.W.2d 647, 649 (Tex. 1990). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or if it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985).

The following are examples of Jury Charges in a Will Contest:

A. Question 1: Do you find from a preponderance of the evidence that Party prosecuted (or defended) the document dated \_\_\_\_\_ in good faith and with just cause, whether successful or not?

"Good Faith" means an action that is prompted by honesty of intention or a reasonable belief that the action was probably correct."

"With Just Cause" means that the actions of the person were based on reasonable grounds and there was a fair and honest cause or reason for the actions."

Answer "Yes" or "No"

If you answered Question 1 "Yes", then answer Question 2. Otherwise, do not answer Question 2.

B. Question 2: What do you find from a preponderance of the evidence are the reasonable and necessary fees and expenses for the services of Party's attorneys in connection with prosecuting their application to probate the will or alleged will dated \_\_\_\_\_(or in defending the will), stated in dollars and cents?

Answer with an amount, stated in dollars and cents, if any.

a.	For preparation and trial:	Answer: \$
b.	For an appeal to the Court of Appeals:	Answer: \$
C.	For preparing or responding to a petition for review in the Supreme Court of Texas:	Answer: \$
d.	For briefing and oral argument in the Supreme Court of Texas:	Answer: \$

#### III. RECOVERY OF FEES IN TRUST LITIGATION

Sources of authority regarding attorneys' fees in trust litigation include the Declaratory Judgment Act, provisions of the Texas Trust Code, and the terms of the trust agreement. A trustee who retains an attorney to advise him in the administration of a trust is the real client of the attorney, not the trust beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996). Such trustee hires the attorney to represent himself in carrying out his fiduciary capacities. The attorney hired by the trustee represents the trustee in his capacity as trustee. The attorney can *never* represent the trust because the trust is not a legal entity.

#### A. Statutory Provisions

# 1. Declaratory Judgment Act.

- A. <u>Fees and Costs</u>. Section 37.009 of the Texas Civil Practice and Remedies Code provides as follows: "In any proceeding under this chapter, the court may award costs and reasonable attorney's fees as are equitable and just." *Canales*, 773 S.W.2d 659 at 661; *Fuqua*, 750 S.W.2d 238 at 246.
- **B.** Trust and Estates. Tex. Civ. Prac. & Rem. Code Ann. Section 37.005 provides, in part, as follows: "A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, ...., or cestui que trust in administration of a trust or of the estate of a decedent, ....

may have a declaration of rights or legal relations in respect to the trust or estate: (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights and legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts."

The Declaratory Judgment Act entrusts attorneys' fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law. It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, see e.g., Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex.1997), or to rule without supporting evidence, Beaumont Bank v. Buller, 806 S.W.2d 223, 226 (Tex.1991).

The award of attorneys' fees in a declaratory judgment action lies with the discretion of the trial court, and is not dependent upon a finding that a party "substantially prevailed." *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985); see Horne v. Ross, 777 S.W.2d 755, 757 (Tex. App. - San Antonio 1989, no writ); Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 637 (Tex. 1996); Hachar, 153 S.W.3d 138. Decisions have been upheld where the trial court failed to award attorneys' fees to the prevailing party and where the trial court awarded attorneys' fees to the losing party. *Oake*, 692 S.W.2d 454; District Judges of Collin County v. Commissioners Court of Collin County, 677 S.W.2d 743 (Tex.App.-Dallas 1984, writ ref'd n.r.e.).

#### 2. Texas Trust Code Provisions.

- **A.** Employment of Attorney. Texas Trust Code §113.018 provides that "A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate." Section 113.018 of the Texas Property Code authorizes a trustee to employ an attorney, but it does not address the conditions for reimbursement of attorneys' fees from the trust estate. Tex. Prop. Code Ann. § 113.018 (Vernon 1995),
- **B.** Award of Attorneys' Fees. Section 114.064 provides for the award of attorney's fees in actions "under this code." Tex. Prop. Code Ann. § 114.064 (Vernon 1995). Section 114.064 of the Texas Trust Code provides that "[i]n any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." Tex. Prob. Code Ann. § 114.064 (Vernon 2007).

The trial court is given discretion to award costs and attorneys' fees that are "reasonable and necessary" following a determination by the court that the fees are "equitable and just." Section 114.064 of the Texas Trust Code allows for recovery of costs whereas Section 243 of the Texas Probate Code allows for the recovery of expenses and disbursements. See Johnson, 2010 WL 4872325. The granting or denying of attorney's fees under this section is within the sound

discretion of the trial court, and a reviewing court may not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles. *Hachar*, 153 S.W.3d at 142; see Lee v. Lee, 47 S.W.3d 767, 793-94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Section 114.064 provides the Court with broad discretion in awarding attorneys' fees, even to the extent of awarding fees to parties who do not prevail in litigation and who are not beneficiaries of the subject trust. See In Re Ray Ellison, 261 S.W.3d at 26-27. ("The granting or denying of attorney's fees under the Trust Code is within the sound discretion of the trial court, and a reviewing court may not reverse the trial court's judgment absent a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles."); See Texarkana Nat. Bank v. Brown, 920 F.Supp 706 (E.D. Tex.1996)(bank trustee found to have breached fiduciary duty ordered to pay \$238,084 of attorneys' fees to beneficiaries to reimburse them for attorneys' fees).

- C. Reimbursement of Expenses. Texas Trust Code §114.063 provides that: "(a) A Trustee may discharge and reimburse himself from trust principal or income or partly from both for: ... (2) expenses incurred while administering or protecting the trust ... "
- **D.** Remedies for Breach of Trust. Texas Trust Code Section 114.008 provides that a court may compel a trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property.
- **E.** <u>Judicial Control of Discretionary Powers.</u> Texas Trust Code Section 116.006(d) provides that a trustee who reasonably believes that one or more beneficiaries of the trust will object to the manner in which the trustee intends to exercise or not exercise a discretionary power to adjust under Section 116.005 may petition the Court to determine whether the proposed exercise or non exercise of the power was an abuse of discretion. The Trustee is required to advance all fees and costs. Upon conclusion of the proceeding, the Court is granted the power to award fees to or against the beneficiaries or the Trustee.

# B. Terms of Trust Agreement

The terms of a trust agreement can affect payment of attorneys' fees. For example, assume that one of two co-trustees employs counsel, and that the terms of the trust agreement require that all actions by co-trustees must be approved by the joint and unanimous consent of both co-trustees. The employment of the attorney was not authorized, and thus the trust should not be held liable for any attorneys' fees. See Conte v. Conte, 56 S.W.3d 830 (Tex. App--Houston [1st Dist.] 2001, no pet.).

The question has arisen as to whether the terms of a trust agreement can affect the Court's power to award fees authorized by statute. If, for example, a trust agreement provides that under no circumstances shall the trustee be liable for or assessed attorneys' fees if the Trustee acted reasonably, the question is whether the standard in the trust agreement can impact the statutory award of attorneys' fees under, for example, Tex. Trust Code Section 114.064. It is not clear whether a statutory right to

recover attorneys' fees, or to have attorneys' fees assessed against the opposing counsel, can be circumvented by the express terms of an instrument. See Hoenig v. Texas Commerce Bank, 939 S.W.2d 656 (Tex. App.-San Antonio 1996, no writ)(terms of trust document did not affect trial court's power to award attorney's fees pursuant to Tex. Trust Code Section 114.064).

# C. Attorneys' Fees Paid by Third Parties

A party whose attorneys' fees are paid by a third party will be considered as incurring the fees if the party is under an obligation to reimburse the paying party in the event of a recovery of attorneys' fees. *Ellison*, 261 S.W.3d at 127. "Proof of fees actually incurred or paid [is] not [a] prerequisite[] to the recovery of attorney's fees in Texas." *AMX Enters.*, *L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 520 (Tex. App.—Fort Worth 2009, no pet.).

# D. Attacks Against Trustee Defendants.

Under Texas law, a trustee may charge the trust for attorneys' fees that the trustee, acting reasonably and in good faith, incurs defending charges of breach of trust. *Stone v. King*, No. 13-98-022-CV, 2000 WL 35729200,\*8(Tex. November 20, 2000)(not designated for publication). *See Grey v. First Nat'l Bank*, 393 F.2d 371, 387 (5th Cir.1968) (applying Texas law), cert. denied, 393 U.S. 961(1968); *DuPont v. Southern Nat'l Bank*, 575 F.Supp. 849, 864 (S.D.Tex.1983), *modified*, 771 F.2d 874 (5th Cir.1985). A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee. *See DuPont*, 575 F.Supp. at 864.

# IV. RECOVERY OF ATTORNEYS' FEES IN BREACH OF FIDUCIARY DUTY ACTIONS CASES AGAINST EXECUTORS AND TRUSTEES

In general, attorneys' fees are not recoverable on breach of fiduciary claims. *Western Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360, 377-378 (Tex. App.—Fort Worth, 2007); *Hooks v. Hooks*, No. 02-03-00263-CV, 2004 WL 1635838, at \*2 (Tex.App.-Fort Worth July 22, 2004, no pet.) (mem.op.) (citing *Musquiz v. Marroquin*, 124 S.W.3d 906, 913 (Tex. App.-Corpus Christi 2004, pet. denied)).

Attorneys' fees incurred in actions involving claims of breach of fiduciary duty against an executor or trustee are recoverable if authorized by statute. For example, if an executor fails to comply with a statutory duty, and thereby breaches a duty, a party may recover fees to enforce the executor's statutory duties under Texas Probate Code §245. In addition, claims for breach of fiduciary duty for which no statutory recovery for attorneys' fees may exist independently may be inextricably intertwined with claims for which attorneys' fees are authorized. See Lee, 47 S.W.3d 767 (held: claims involving removal of executor and trustee inextricably intertwined with claims for breach of fiduciary duty, conversion, fraudulent concealment, constructive fraud and/or fraud, negligence, and gross negligence).

# V. <u>SEGREGATION OF RECOVERABLE FEES</u> <u>FROM NON RECOVERABLE FEES</u>

Segregation of fees is required of the party seeking recovery of fees when claims for which recovery is legally appropriate are joined with claims where fees are not recoverable.

Common claims in trust and estate litigation for which attorneys' fees are not recoverable include (i) tortuous interference, (ii) breach of fiduciary duty (unless otherwise recoverable by statute or contract), and (iii) imposition of a constructive trust.

In Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 313 (Tex. 2006), the Supreme Court reaffirmed the general rule requiring segregation of attorneys' fees. The Court held that intertwined facts underlying claims for which attorney's fees are recoverable and unrecoverable do not excuse a party from segregating fees between claims—"it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." Id. at 313-14; see Varner v. Cardenas, 218 S.W.3d 68, 69 (Tex. 2007) (per curiam) (stating Chapa holds "a prevailing party must segregate recoverable from unrecoverable attorney's fees in all cases"). Thus, the general duty to segregate fees applies unless a party meets its burden of establishing that the same discrete legal services were rendered with respect to both a recoverable and unrecoverable claim. Chapa, 212 S.W.3d at 313-14; Hong Kong Dev., Inc. v. Nguyen, 229 S.W.3d 415, 455 (Tex. App.— Houston [1st Dist.] 2007, no pet.). Whether, and the extent to which attorneys' fees can be segregated, is a mixed question of law and fact. Osborne v. Jauregui, Inc., 252 S.W.3d 70, 76 (Tex. App.—Austin 2008, pet. denied); see Lee, 47 S.W.3d 767 (held: claims involving removal of executor and trustee inextricably intertwined with claims for breach of fiduciary duty, conversion, fraudulent concealment, constructive fraud and/or fraud, negligence, and gross negligence).

In *In Re Estate of Belton Kleberg Johnson, Deceased* the Court did not require segregation of fees incurred in a will and trust contest because there was a statutory basis for recovery of fees in connection with both the will contest and the trust contest. *Johnson*, 2010 WL 4872325.

#### VI. RULE 167 OFFERS OF SETTLEMENT; REFUSE OFFERS AT ONE'S PERIL

#### A. In General.

Chapter 42 of the Texas Civil Practice and Remedies Code and Rule 167 of the Texas Rules of Civil Procedure provide that certain litigation costs may be awarded against a party who rejects an offer to settle a claim for monetary damages. If a settlement offer is rejected, and the judgment to be awarded on the monetary claims covered by the offer is "significantly less favorable" to the offeree than was the offer, the court must award the offeror litigation costs against the offerree from the time the offer was rejected to the time of judgment.

#### B. Monetary Claim.

Rule 167 applies to monetary claims, but does not define the term "monetary claim." Tex. R. Civ. P. 97(d).

# C. "Significantly Less Favorable Defined".

A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if: (1) the offeree is a claimant and the judgment would be less than 80% of the offer; or (2) the offerree is a defendant and the judgment would be more than 120% of the offer. Tex. R. Civ. P. 167(b).

#### D. <u>Litigation Costs.</u>

Litigation costs are the expenditures actually made and the obligations actually incurred-directly in relation to the claims covered by a settlement offer for: (1) court costs, (2) reasonable fees for not more than two testifying expert witnesses, and (3) reasonable attorneys fees. Tex. R. Civ. P. 167(c).

## E. Example.

Defendant offers to settle for \$1,000,000. Plaintiff rejects the offer. The jury awards the Plaintiff \$700,000. Plaintiff is liable for litigation costs after the date of Defendant's offer if the prerequisites of Rule 167 are met.

Rule 167 imposes a number of limitations on recovery of fees to prevent double recoveries or recovery of fees under other statutes. Tex. R. Civ. P. 167.

### VII. REASONABLE AND NECESSARY ATTORNEYS' FEES

To recover attorneys' fees in a trust or estate litigation matter, the attorney must provide evidence that his or her fees fees are reasonable and necessary.

# A. Reasonableness.

Attorneys' fees should be based upon:

- 1. the time and labor required, the novelty and difficulty of questions involved, and the skill requisite to perform the legal service properly;
- 2. the likelihood that the acceptance of the particular employment will preclude other employment by the firm or any of its lawyers;
- 3. the fee customarily charged in the locality for similar legal services;
- 4. the amount involved and the results obtained;
- 5. the time limitations imposed by the client or by the circumstances;
- 6. the nature and length of the professional relationship with the client;
- 7. the experience, reputation and ability of the lawyer or lawyers performing the services; and
- 8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services are rendered.

Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997); Aquila Sw. Pipeline, Inc. v. Harmony Exploration, Inc., 48 S.W.3d 225, 240-242 (Tex. App.—San Antonio 2001, pet. denied). The factors referenced in Anderson in the determination of the reasonableness of attorneys' fees were based on Rule 104 of the Texas Disciplinary Rules of Professional Conduct. A trial court is not required to consider all of the factors in every case because the factors are simply guidelines for the trial court to consider, not elements of proof. Petco Animal Supplies, Inc. v.

Schuster, 144 S.W.3d 554, 567 (Tex. App.—Austin 2004, no pet.); Academy Corp. v. Interior Buildout & Turnkey Constr., Inc., 21 S.W.3d 732, 742 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Importantly, a litigant is not required to present evidence on each of these factors. Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp., 113 S.W.3d 889, 898 (Tex. App.--Dallas 2003, no pet.); Academy Corp., 21 S.W.3d at 742 (Tex. App.--Houston [14th Dist.] 2000, no pet.).

Evidence of the reasonableness of attorneys' fees may include: (i) opposing counsel's fees, (ii) attorneys' fees bills, (iii) experience, (iv) practice areas, (v) complexity of the case, (vi) length of litigation, (vii) length of trial, (viii) level of contest by opposing counsel, (ix) number of hearings, (x) pleadings, (xi) number of depositions, (xi) number of documents, (xii) number of mediations, and (xiii) hourly rates.

#### B. Necessary.

In order to recover attorneys' fees, a party must prove that the attorneys' fees were necessary. Factors that are often considered include the amount of work in relation to the complexity of the matter, as well as an attorney's efficiency in preparing for a case. *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 961 (Tex.1996).

# C. Jury Determines Whether Fees are Reasonable and Necessary.

Evidence of applicable criteria should be presented to the jury for its determination of the reasonableness and necessity of the legal services. *Brown v. Traylor*, 210 S.W.3d 648, 658 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006, no pet.). A determination of reasonable attorneys' fees is a question for the trier of fact. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991). The amount of a fee award rests in the sound discretion of the trial court, and the court's judgment will not be reversed on appeal absent a clear abuse of discretion. *Cordova v. Sw. Bell Yellow Pages, Inc.*, 148 S.W.3d 441, 445-46 (Tex. App.--El Paso 2004, no pet.).

The trier of fact may also look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties in determining the reasonableness of the attorneys' fees. *Burnside Air Conditioning*, 113 S.W.3d at 897.

Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees.

# VIII. APPELLATE REVIEW OF AWARDS OF ATTORNEYS' FEES

# A. Availability of Fees Under Statute

The availability of attorneys' fees under a particular statute is a question of law for the court. *Holland v. Wal-Mart Stores*, Inc., 1 S.W.3d 91, 94 (Tex. 1999). An appellate court reviews purely legal questions *de novo. In Re Estate of Hawkins*, 187 SW 3d 182, 185 (Tex. App.--Fort Worth 2000, no pet.). The primary objective of an appellate court when construing a statute is to ascertain and give effect to the Legislature's intent. *Tex. Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). An appellate court may consider the objective the law seeks to obtain and the consequences of a

particular construction. The court's judgment will not be reversed on appeal absent a clear abuse of discretion. *Cordova v. Sw. Bell Yellow Pages, Inc.*, 148 S.W.3d 441, 445-46 (Tex. App.--El Paso 2004, no pet.).

# B. Sufficiency of the Evidence

There must be sufficient evidence that the attorneys' fees incurred were reasonable and necessary. Otherwise, a party can appeal an award of attorneys' fees on the ground that the evidence was legally insufficient to support the attorneys' fee award. If an appellant challenges the legal sufficiency of the evidence to support a finding on which the appellant did not have the burden of proof at trial, the appellant must demonstrate on appeal that no evidence exists to support the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, No. 05-1076, 2009 WL 795668(Tex. March 27, 2009); *Brockie v. Webb*, 244 S.W 3d 905 (Tex. App.—Dallas 2008, pet. denied); *See Johnson*, 2010 WL 4872325.

The amount of a fee award rests in the sound discretion of the trial court, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirement that fees be equitable and just, which are matters of law. Bocquet, 972 S.W.2d 19 at 21. It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, e.g., Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex.1997), or to rule without supporting evidence, Beaumont Bank v. Buller, 806 S.W.2d 223, 226 (Tex.1991). Therefore, in reviewing an attorneys' fee award, the court of appeals must determine whether the trial court abused its discretion by awarding fees when there was insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust. Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees.

The trial court's judgment will not be reversed on appeal absent a clear abuse of discretion. *Cordova v. Sw. Bell Yellow Pages, Inc.*, 148 S.W.3d 441, 445-46 (Tex. App.--El Paso 2004, no pet.). Even though the appropriate standard of review is abuse of discretion, an appellate court may nevertheless review a fee award for sufficiency of the evidence. An appellate court determines whether the trial court had sufficient information upon which to exercise discretion and, if so, whether the trial court erred in the application of its discretion. The traditional sufficiency review comes into play with regard to the first question, but does not stop there. The appellate court must proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision. Stated inversely, the appellate court must conclude that the trial court's decision was neither arbitrary nor unreasonable.

# IX. <u>EFFECT OF ATTORNEYS' FEES ON ECONOMICS OF TRUST AND ESTATE</u> <u>LITIGATION</u>

#### A. In General.

It is often more economical to settle a case in the early stages of litigation, or even prior to a suit being filed, than to engage in fully contested litigation. Unfortunately, litigants often are not informed or do not understand the significant costs and fees that can be incurred in contest trust and estate litigation.

#### B. Factors to Consider in Estimating Fees and Costs.

- <u>1.</u> <u>Opposing Counsel.</u> Counsel has substantial impact on the course of litigation. Knowing the manner in which opposing counsel operates will be a key indicator of fees to be incurred. Some attorneys, for better or for worse, do not adequately communicate the business aspects of trust and estate litigation to their clients, and manage the litigation process in a manner not conducive to settlement. Other attorneys are more thorough (or are more overly thorough) than others, which one can always predict will result in greater fees and costs. Knowing your opposing counsel can be an important factor in estimating fees and costs at the initiation of litigation.
- **2. Statutory Right to Recover Fees.** If counsel has a good possibility of recovering fees from an estate or trust, then such counsel may be more thorough than counsel would otherwise be if there was no prospect of recovery. The fees and costs incurred in trust and estate litigation matters are often greater when counsel believes that there is a fund available at the end of the litigation to pay fees and costs.

The economics of trust and estate litigation can be greatly impacted if all parties, including the losing party, end up recovering fees. For example, if both the plaintiffs and the defendants in a will contest case recover their fees under Section 243, the value of the estate may be substantially decreased leaving little for distribution to the beneficiaries, which is a factor that should be considered if settlement becomes a possibility.

- <u>3.</u> <u>Discovery.</u> The level of discovery will have a substantial impact of fees and costs. The number of fact witnesses will dictate the number of depositions, and the costs and fees incurred for each deposition will be substantial. Each discovery skirmish will result in a hearing, which in turn will increase fees and costs.
- <u>4.</u> <u>Experts</u>. Trust and estate litigation matters often involve multiple experts. Each expert will have charges for their time, including their deposition time, further increasing fees and costs.
- <u>5.</u> <u>Attorney's Fee Contract</u>. Whether an attorney is on an hourly basis or a contingent fee basis can impact one's estimate of fees and costs to be incurred. A party on a contingent fee has no incentive to limit the number of hours spent by their attorneys.
- **6. Number of Mediations.** Pre-Trial Hearings, Length of Trial, and Appeals. A litigant should be given some idea of the fees and costs to be incurred in fully contested litigation through trial and appeals. A mediation often results in thousands of dollars of fees. The fees and costs for trial can be huge depending on the number of attorneys, paralegals, and technology service personnel involved. Jury consultants and mock trials only add to the substantial expense that will be incurred in fully contested litigation.
- <u>7.</u> <u>Example</u>. Fully contested trust and estate litigation matters often result in millions of dollars of fees and costs. The following example involves a relatively simple trust or estate dispute with very few fact witnesses and limited discovery skirmishes. Even so, each party will incur substantial fees and costs under the example.

	Action	<u>Plaintiff</u>	<u>Defendant</u>	Total
1.	Begin case; review documents; research	5,000		5,000
2.	Begin case; review documents; research	2,222	5,000	5,000
3.	Prepare Petition	4,000	,	4,000
4.	Prepare Answer	,	2,000	2,000
5.	Discovery		,	,
	A. Requests for Disclosure/Responses	700	2,000	2,700
	B. Interrogatories	4,000	7,000	11,000
	C. Depositions (6) @\$5,000/deposition Expense \$1K – \$1,500	15,000	15,000	30,000
	D. Deposition Experts (3 per side)	15,000	15,000	30,000
	E. Subpoenas of non-parties	4,000	4,000	8,000
	F. Discovery hearings – 2 hearings	4,000	4,000	8,000
6.	Motions for Summary Judgment	5,000	5,000	10,000
7.	Experts – 3 per side	30,000	30,000	60,000
8.	Mediation – Get client informed regarding fees, etc.	5,000	5,000	10,000
9.	Pre-trial Motions	7,500	7,500	15,000
10.	Trial – 5 days (2 attorneys per side plus expenses)	50,000	50,000	100,000
11.	Appeals	<u>15,000</u>	<u>15,000</u>	30,000
	Totals:	<u>164,200</u>	<u>166,500</u>	330,700

# IX. CONCLUSION

It is critical to determine potential grounds for recovery of fees at the initiation of litigation. Claims for attorneys' fees must be property plead and proved at trial. The economics of continued fully contested litigation should be evaluated at every stage of litigation. Counsel should inform their clients of the potential fees and costs to be incurred prior to commencement of litigation and as the case progresses to enable the client to make informed business decisions regarding settlement.