

## Attorneys' Fees and Success in Trust Disputes

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One of the inevitable, but regrettable, realities of **trust and estate law** is disputes. Ideally, these can be resolved by discussion and compromise. When they can't, they often wind up in court, which means engaging counsel, litigation, and ultimately, legal fees.

Who pays those fees?

Consider the not-uncommon scenario in which one trustee decides to go to court to compel another trustee to take action – or not to take it. Frequently this relates to the management of the trust's assets which, after all, is a trustee's job. Are there rules relating to the circumstances under which the trust can pay for the legal fees that arise from this undertaking? The answer is a classic "Yes, but..."

South Carolina law deals with this situation in a broad, one-sentence provision of the South Carolina Trust Code – specifically, **Section 62-7-1004**, which reads as follows:

*In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.*

Obviously, and intentionally, this leaves a lot of latitude for the courts to decide, case by case, what justice and equity require – and do not require. And interestingly, in a recent case, a critical point that arose was whether the litigation needed to "benefit the trust" in order to be paid for by the trust.

Before Section 62-7-1004 came along, South Carolina case law had followed the "common fund" doctrine. Under this judge-made law, a party to a trust can have his or her attorney's fees and expenses paid directly from the trust if he or she shows the lawsuit was brought at his or her own expense for the improvement or benefit of the trust as a whole, rather than for the particular party's own benefit.

In the recent case, the court held that Section 62-7-1004 is not limited by the old rule, thus it allowed the trustee to recover attorney's fees and costs even without requiring him to show his actions benefitted the trust as a whole, which can be a daunting task. In effect, the statute supplements—but does not get rid of—the old judge-made rule.

This new rule embraced by the statute may seem counterintuitive. But a closer look reveals the wisdom of this change in the law. In the recent case, one trustee felt that the estate was not

properly managing assets, specifically, real estate. The portfolio was not, he believed, adequately diversified, and the trust was exposed to too much risk. In the trustee's view, the trust was being managed to the advantage of some beneficiaries and to the disadvantage of others. So he filed a lawsuit to compel the trust to take action. Ultimately, he did not succeed, at least not completely.

And yet, regardless of the outcome of the case itself, the court said he was still entitled to attorney's fees for his efforts. These efforts, the trustee argued, did in fact benefit the trust by raising the issue and having it decided. Regardless, his efforts in seeking the court's intervention in the matter were reasonable and a good faith exercise of his official duties. Few trustees would ever take such steps if they risked personally bearing the legal costs necessary to do so. Even if the trustee's actions did not end up benefitting the trust in that particular instance ... and here is the important part, from the brief to the court:

*At a quick glance, judging by the length of Respondents' argument on this point, one would assume that whether the action "benefitted the trust" is a sine qua non to recover fees and costs from trust assets. **There is no such requirement.** This purported requirement is not found in any South Carolina opinion and is certainly not in the Trust Code or the Will.*

As the trustee pointed out, Section 62-7-1004 is not limited to the old common-law rule. This seemingly straightforward question of whether a trustee's attorney's fees and costs may be paid from the trust is hedged with complexities, case law, circumstances and other factors. But interestingly, one of them is that the outcome of the litigation by itself is not determinative. Again, it matters not whether you win or lose, the court may still award your attorney's fees if "justice and equity" requires such an award.