

Payment of Attorney Fees in Fiduciary Litigation- When and From What?

Take-Away: In Michigan, the ability to recover attorney fees in probate litigation is at the end of the litigation and with the permission of the probate court.

Background: A few weeks ago, a missive described a new Florida statute that allows a trustee, with court approval, to pay its attorney fees incurred in defending a claim of breach of fiduciary duty from the trust estate, *while that litigation is pending*. The Florida statute further provides that if the trustee loses that breach of fiduciary duty/ trustee removal action, the trustee will have to repay the trust estate the attorney fees previously withdrawn. That Florida statute is a major departure from what Michigan's Trust Code (MTC) and its common law currently allows. To my surprise, that missive on Florida's statute prompted several comments from attorneys. [You can imagine to my surprise the interest attorneys have in the payment of attorney fees!]

This missive digs a bit deeper into Michigan's authorization for the payment of attorney fees from a probate or trust estate.

Michigan Trust Code: The Michigan Trust Code, based on the Uniform Trust Code (UTC), provides:

(1) In a proceeding involving the administration of a trust, the court, as justice and equity require, may award costs and expenses, including reasonable attorney fees, to any party who enhances, preserves, or protects trust property, to be paid from the trust that is the subject of the proceeding.

(2) Subject to subsection (3), if a trustee participates in a civil action or proceeding in good faith, whether successful or not, the trustee is entitled to receive from trust property all expenses and disbursements including reasonable attorney fees that the trustee incurs in connection with its participation.

(3) A court may reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust. [MCL 700.7904.]

While subsection (2) does not use the word *reimburse*, that timing of payment seems to be implied by subsection (3), since a probate judge can disallow the trustee's *claim* to receive trust property for the trustee's incurred attorney fees. Accordingly, the statute provides an after-the-litigation-is-concluded reimbursement authorization, not a consume-trust-assets-while-the-litigation-is pending 'remedy.'

Common Law: The topic of the payment of a fiduciary's attorney fees often arises in probate court proceedings for breach of fiduciary duty or to remove an acting fiduciary. It is no surprise the Michigan has long followed the 'American Rule' that no attorney fees are recoverable unless specifically authorized by statute, court rule, or common law exception.

Wills: In *In re Baldwin's Estate*, 311 Mich 288 (1945) the Michigan Supreme Court addressed a situation where the executor incurred attorney fees to defend a challenge to his administration of the estate. The Supreme Court held that because the fees were not for the direct, or indirect benefit of the estate, the trial court had erred by not charging the fees to the executor. However, the Court 'left the door open' when it noted that "had the executor been exonerated of *all wrongdoing* a different conclusion might have been reached."

Again, a Personal Representative who incurs attorney fees to defend a petition for his/her removal are only chargeable against the estate 'where no wrongdoing is proven.' *In re Hammond Estate*, 215 Mich App 379 (1996).

In *Estate of Karl F. Geiger, Jr*, 2000 WL 33522360 (March 14, 2000) the Court stated that attorney fees allowed for a fiduciary's defense to challenges to the performance of his fiduciary duties depends on 'whether the defense is successful.' (In *Geiger*, a former Personal Representative was not found by the Court to have breached a fiduciary duty, but the Court also found that there was 'no authority to allow costs and fees to a former fiduciary.')

Trusts: A Michigan trustee may recover attorney fees from a trust estate as an expense of estate administration, but only after successfully defending a removal action against the trustee on the theory that stability of trust administration benefits the estate. The word

‘recover’ implies ‘get paid back’ what had been previously paid in attorney’s fees by the trustee, presumably from the trustee’s own funds.

The Michigan Court of Appeals observed in *In re Valentino Estate*, 128 Mich App 87 (1983):

“A fiduciary must have fully prevailed and not contributed to the underlying cause of the litigation to recover attorney’s fees from the estate: Because the orderly administration of an estate requires that fiduciaries not be changed unnecessarily, we hold that attorney fees for defending the fiduciary may be chargeable to the estate. However, Baldwin’s Estate (citation omitted) show(s) that, where the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary rather than the estate should be responsible for the fiduciary’s attorney fees. Baldwin, pages 90-96.”

With regard to assigning *blame* to the trustee that causes, or contributes to, the probate litigation, a more recent example of this principle is *In re Edward and Elaine Jaye Trust*, Michigan Court of Appeals, 2024 WL 2868680 (June 6, 2024.) There, in a guardianship proceeding, where the appointment of a conservator was sought, the parties agreed, by stipulation, that the ward’s trust would pay the attorney fees, apparently for all parties involved in that litigation, i.e., the trustee and the ward’s daughter. The probate court entered an order that implemented that attorney fee stipulation. Yet the probate court litigation continued to drag on for several more years, at one point prompting the probate judge to remark in frustration that the litigation “seemed to be about nothing.” Five years after the entry of the stipulated order to pay attorney fees, the ward’s daughter’s law firm finally sought payment from the ward’s trust. The successor trustee recommended to the probate court that the earlier stipulated order be vacated, and the payment of the daughter’s attorney’s fees be denied. Relying on that recommendation, the probate court concluded that it possessed discretion under MCL 700.7904(3) to refuse the requested payment of attorney fees from the ward’s trust. That decision was affirmed, with the Court of Appeals reasoning, in part, that both the parties *and their respective attorneys had unnecessarily prolonged the litigation*, which prompted the probate court to revisit the previous stipulated order and revise it to prevent trust assets from being depleted “as equity and justice required.”

Random Thoughts: With Michigan's statute [MCL 700.7904] it is unlikely that a probate court would authorize a fiduciary to pay its legal fees from the trust estate pending litigation that is based on breach of fiduciary duty/fiduciary removal claims. But questions remain despite this preliminary conclusion.

Override the MTC? MCL 700.7904 is one of the MTC provisions that can be overridden by the terms of the settlor's trust instrument. [MCL 700.7105.] If a settlor is legitimately worried about postmortem trust challenges from disgruntled family members or disappointed trust beneficiaries, prompting the ubiquitous 'no contest' provision that is now included in many trust instruments, could the settlor also authorize the trustee to pay his/her attorney fees from the trust estate during the course of probate litigation, as opposed to being reimbursed only after the litigation is concluded, i.e., paying its attorney fees from the trust estate without prior probate court authorization?

If the trust instrument is viewed as a 'contract' would the probate court have the ability to override the settlor's intent?

I wonder how a probate judge would react if the trust instrument provided full authority to the trustee to pay its ongoing attorney fees from the trust estate without the judge's approval?

If the trustee files periodic accountings while the probate litigation is pending, accounts that show the payment of the trustee's legal fees, would the beneficiaries be entitled to review the attorney billings that the trustee paid from the trust estate? Would the probate judge in an *in camera* review?

Such a provision might act as an additional deterrent to perceived frivolous probate litigation. Or, the right to be pay attorney fees from the trust estate during the litigation might be inserted in a trust instrument if the settlor wanted to forestall litigation because: (i) if an individual is named as successor trustee, and he/she does not have access to personal financial resources required to pay their own attorney fees from their own wealth during an extended period of probate litigation, they might decline to serve as trustee; (ii) the named inexperienced successor trustee could be opposed by some family members

who the settlor fears will file petitions to extort the removal for innocent negligence or omissions; or (iii) unsubstantiated claims of undue influence will be made against the named successor trustee that he/she is forced to defend. In these situations, might such a provision that authorizes payment of attorney fees from the trust estate be warranted, if the settlor provides these reasons in the body of the trust instrument?

Then again, most courts (and beneficiaries) want the litigation resolved as soon as possible. By forcing the trustee's legal counsel to wait for payment until the close of the litigation, that delay could provide a strong incentive to explore a resolution to the litigation at an early date.

Attorney Fees Paid from Income or Principal? In many court decisions that have dealt with the payment of attorney fees, or the reimbursement for attorney fees actually incurred, seldom mentioned is the source of the payment of attorney's fees. Is the payment of attorney fees to be made from trust income, trust principal, or a combination?

Under the Uniform Fiduciary Income and Principal Act, trustee fees and attorney fees are generally paid from both trust income and principal, usually within discretion given to the trustee to allocate these costs 'to ensure fair trust administration.' That could present a problem if the source of the probate litigation and legal fees incurred is attributed to the trustee.

Some regulations, though, dictate that while certain administrative costs are split between income and principal, others, like attorney fees, may be charged entirely to trust principal. For example, attorney fees incurred by the trustee that are related to the protection, preservation or defense of trust property are generally charged solely to trust principal. Michigan's Uniform Principal and Income Act (MUPIA) [MCL 555.901(b)] controls the payment of attorney fees. It, like much of the MTC, is a series of default rules that only apply if a trust instrument is silent on the question as to the source of payment of the fees. The MUPIA provides that a trustee is to make disbursements from trust income one-half for all expenses for accountings, judicial proceedings, or other matters that involve both trust income and principal. However, MCL 555.902(1)(d) states that the expenses of legal proceedings that concern primarily the principal of the trust, including proceedings to construe the trust or to protect its property, is to be paid from trust principal.

If a widow who is the beneficiary of a QTIP trust sues to remove the QTIP trustee claiming that the trustee breached its duty of impartiality in its investment decisions, and the trustee prevails in that litigation, is it fair, following the MUIPA, to pay the trustee's legal fees from the QTIP principal that is destined for the settlor's children from his prior marriage? This was the question before the Court of Appeals in *In re Allen R. Soble Revocable Trust, No. 164844, May 9, 2024*). There, the trial court ordered the widow's attorney fees to be paid from the QTIP trust principal, since the proceedings had been initiated to protect trust principal by removing the acting trustee; this was consistent with MCL 555.902. The Court noted that if those fees had been paid from trust income, in effect that would result in an income expense borne by the widow individually as the lifetime QTIP beneficiary.

However, as with MCL 700,7904, the Michigan Uniform Income and Principal Act is a default set of rules that a trust instrument can override in the trust instrument.

Conclusion: This missive poses lots of questions, but few answers. The answers might be clear enough if the trust instrument does not address the timing or source of payment for attorney fees. If the trust instrument departs either from the MTC or the MUIPA, all bets are off, and probate courts will have to deal with the fiduciary's payment and allocation of attorney fees pending litigation where the fiduciary's actions may have been the cause of that litigation.

If you would like to read additional missives, [click here](#).