"So Counselor, What Are the Chances of Getting My Litigation Fees and Costs Reimbursed from the Trust or Estate Corpus?"

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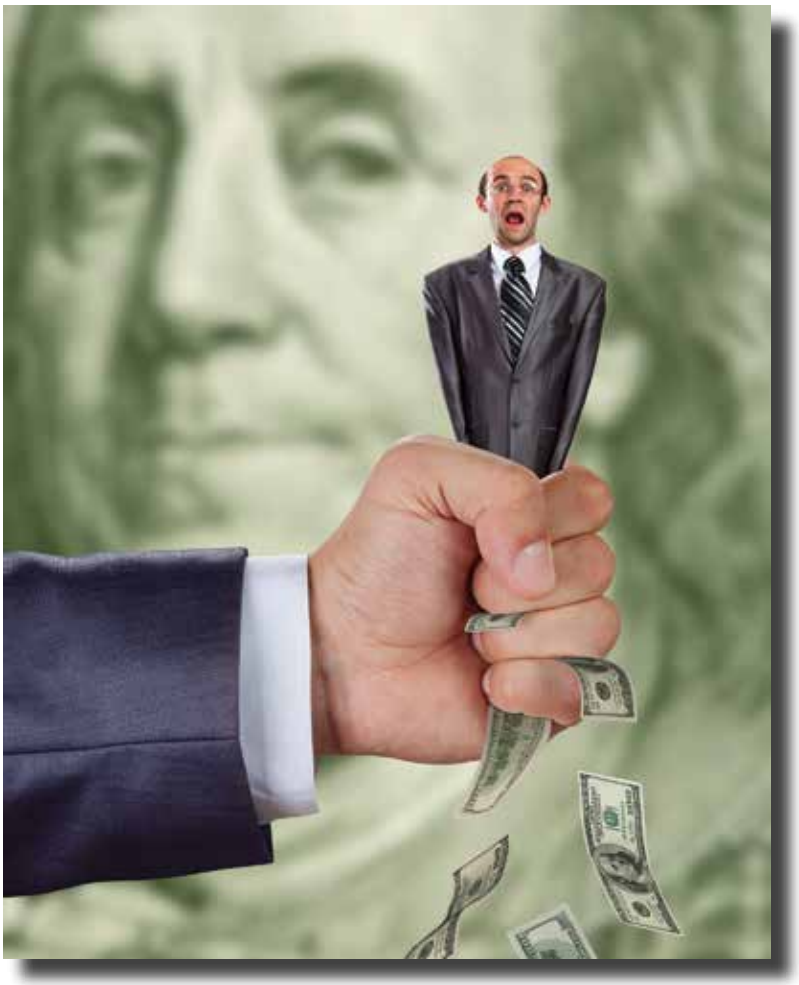

Trust and estate litigants often ask their attorneys whether they will be able to obtain reimbursement of their litigation fees and costs. The short answer is that it depends on the facts, nature, and result of the case. While that is quite true, it is also fair to say that trust and estate litigants generally have a better chance of reimbursement than do litigants in other areas of American litigation.[1]

The Three General Bases for Reimbursement of Counsel Fees and Costs Out of a Trust

The three alternate bases under which litigation fees and costs can be reimbursed from a trust corpus are: (1) Delaware common law, (2) 12 Del. C. § 3584, and (3) the bad faith exception to the American Rule. From the get-go, it is important to know that winning is not a necessary precondition to recovering attorneys' fees in trust litigation.[2]

The catch-all Delaware common law basis to award fees in trust litigation

If relying on the Delaware common law, the awarding of "fees out of the trust corpus has generally been proper in two circumstances: (i) where the attorney's services are necessary for the proper administration of the trust, or (ii) where the services otherwise result in a benefit to the trust."[3]

Section 3584 of Title 12 of the Delaware Code

Turning to the code, 12 *Del. C.* § 3584 provides that "[i]n a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

The exception to the American Rule

Delaware follows the American Rule and therefore Delaware litigants must generally pay their own attorneys' fees and costs. But an equitable exception to the American Rule permits Delaware courts to award attorneys' fees if they find that a party brought litigation in bad faith or acted in bad faith during the course of the litigation.[4] Delaware courts do not lightly award attorneys' fees under this exception, and have limited its application to situations in which a party acted vexatiously, wantonly, or for oppressive reasons.[5] A deciding court could look to both Section 3584 and the American Rule exception in order to perform a dual analysis. That is what happened in the *Gore* case. There, the court explained that while Section 3584 grants the court greater flexibility in exercising its discretion to shift attorneys' fees, the support which the parties seeking reimbursement cited for their application was partly based on the bad faith exception to the American Rule.[6] Thus, in performing its analysis, the *Gore* court looked at both Section 3584 and the criteria needed to justify exception to the American Rule.

The reimbursement standard for validity challenges offers another opportunity for fees

It is well-established that when a beneficiary successfully challenges the validity of a will or trust, Delaware courts generally award that prevailing contestant her attorney fees.[7] But even when the challenge is unsuccessful the court can still award fees and costs from the corpus to the losing party. In validity challenges in which the contestant is unsuccessful, Delaware courts apply a two-part test: (1) did the unsuccessful contestant demonstrate that she had probable cause for bringing the challenge and (2) did she demonstrate that there were exceptional circumstances.[8]

A party presents probable cause when she produces evidence sufficient to establish a prima facie case and has also overcome the presumption that always exists in favor of a will or trust's validity.[9] In other words, if the court evaluates only the contestant's evidence, and not the evidence presented by the estate or trust, did the contestant present a prima facie case that the challenged will or trust was invalid?[10]

The second part of the test—exceptional circumstances—is a bit more complicated. It is somewhat unclear what constitutes exceptional circumstances. And in many cases, the "exceptional circumstances" could overlap with what would otherwise be evidence of probable cause. Two examples of exceptional circumstances are (i) where the court deems that there was a benefit to the estate and (ii) where the challenging party loses on appeal after winning her initial challenge.[11]

But the existence of exceptional circumstances isn't always so clear.[12] For example, as the court in *Kittila* explained:"[o]ther circumstances that may qualify as exceptional, depending on the facts of the case, include occasions when a testatrix disinherits a blood relative in favor of a stranger, materially alters a prior testamentary scheme, or relies on legal advice from an interested party."[13]

The *Kittila* court further explained that "clarifying the proper beneficiaries of the estate" is not necessarily a benefit to the estate because that "could be said of every challenge to a will."[14] According to that court, the estate is however benefitted when an action clarifies an "ambiguous testamentary scheme."[15] Also, the *Kittila* court found that there were a number of unusual circumstances, unique to that case, that made the court's decision "neither easy nor readily apparent at the outset of [the] case . . . ."[16] Those factors were the combination of: (1) the decedent's unexplained and abrupt termination of a decades-long loving relationship with the only "family" with whom she maintained any ties; (2) her material alteration to her previous testamentary scheme shortly after a guardianship was imposed over her person and property; (3) her bequests to her guardians, a charity suggested by her guardians, and another couple with whom the guardians were close; (4) the guardians' failure to alert the Kittila family to the decedent's failing health and ultimate death; and (5) the guardian's false statements to the family regarding her estate and his knowledge of her will.[17]

In sum, the authors of this article believe that exceptional circumstances exist where there is a true benefit to the estate or trust or where the case was an extremely close call.

Even when awarded, fees and costs will still likely undergo an analysis for reasonableness

In *IMO the Hawk Mountain Trust*, Vice Chancellor Parsons awarded about 94% of the amounts sought in the co-trustees' fee applications.[18] The co-trustee sought approximately $1.1 million in total fees and the court awarded $1,033,800.[19] The reductions came for various reasons. The court agreed with some of the respondents' objections, finding that certain work done did not benefit the trust and, thus, was not properly reimbursable.[20] That work included the filing of a dismissed Pennsylvania case (for which the court awarded reimbursement for only some of the related fees) as well as the unnecessary cancellation of an LLC.[21] The court also made a small deduction for work done that benefitted a trust other than the trust that was the subject of the case.[22] And the court ordered a partial deduction for fees incurred to obtain, and

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then prepare for, a deposition that was never taken due to the co-trustees' own strategic choice not to take that deposition.[23]

The *Hawk Mountain* court also took a small deduction off of one fee application on the basis that the full fees were not adequately justified. In that regard, the court noted that the petitioners presented no detailed evidence on the following factors of DLRPC Rule 1.5: "the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;" "the fee customarily charged in the locality for similar legal services;" and "the experience, reputation, and ability of the lawyer or lawyers performing the services."[24] The court explained that in this case only one of the firms billed more than $500 per hour for their services.[25] Approximately 11.7% of the hours billed by that firm was by lawyers charging more than $500 per hour, with the highest rate being $645.[26] The court then found that—"based on the limited record before me"—the reasonable hourly fee in the matter was no more than $500 per hour.[27] The court therefore capped the reimbursable billing rates at $500 per hour.[28] It does appear, however, that if all of the factors of DLRPC Rule 1.5 were covered in the application at issue to the court's satisfaction, the court would have allowed reimbursement for hourly rates in excess of $500.00.

Proportionality matters

In *Kittila*, then-Master LeGrow (now Superior Court Judge LeGrow) ultimately reduced the petitioners' fee reimbursement because the dollar value of the sought fees was disproportionate to the size of the estate in dispute.[29] In *Kittila*, the petitioners filed a fee petition, and an accompanying affidavit of fees, whereby they sought the reimbursement of $224,565.46 in attorneys' fees and costs that petitioners had incurred in unsuccessfully challenging the validity of two wills. The estate opposed the petitioners' request and argued the requested amount was disproportionate to the total value of the estate (which was then only $351,330.27 after deducting the estate's attorneys' fees and costs incurred defending the petitioners' challenges).[30]

The Master recognized that an award of the amount requested by the petitioners would reduce the estate to only about half of its original size and, as a result, somewhat foil the testator's intent. Consequently, the Master recommended that the court order the estate to pay only petitioners' attorneys' fees and costs in the reduced amount of $88,032.65 (which amount represents approximately twenty percent of the value of the estate at the time of testator's death).[31] Simply said, the Master recognized "the importance of ensuring that an award of attorneys' fees does not eviscerate the testator's intent."[32] Notably, the petitioners in *Kittila* were unsuccessful. Had they succeeded, the authors of this article believe that that success would have increased the odds of them receiving full reimbursement of their fees as the grantor's intent would have not have been at the same risk of being undermined.

But of course if the financial stakes are much higher it is logical to expect that much larger amounts of fees and costs will be reimbursed. And the *Gore* court confirmed as much. After awarding reimbursement for the full amount of the sought fees and costs (including to losing parties), the *Gore* court explained that "[t]he fees were, indisputably, large, but, then again, so was the [t]rust corpus about which the parties were arguing."[33]

Conclusion

While some uncertainty will remain in any prediction of whether a trust or estate litigant will ultimately be awarded their fees, the Delaware courts and the General Assembly have provided quite informative general parameters. As a result, it can confidently be said that the odds of a fee award from the corpus, even for losing parties, are rather higher in Delaware trust and estate litigation than in other areas of litigation.

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Notes

1- We do not endeavor to examine in this article the issues of advancement and indemnification of corporate trustees' litigation expenses, which is a bit of a different animal and is most often covered by the express terms of the trust instrument.
2- See, e.g., IMO Trust for Grandchildren of Wilbert L. and Genevieve W. Gore, C.A. No. 1165-VCN, 2013 WL 771900, at *4 (Del. Ch. Feb. 27, 2013).
3- Merrill Lynch Trust Co., FSB v. Campbell, 2009 WL 2913893, at *11 (Del. Ch. Sept. 2, 2009). *See also Gore,* 2013 WL 771900, at *1; *Chavin v. PNC Bank, Delaware,* 873 A.2d 287, 289 (Del. 2005)).
4- Postorivo v. AG Paintball Hldgs., Inc., 2008 WL 3876199, at *24 (Del Ch. Aug. 20, 2008).
5- Id.
6- Gore, 2013 WL 771900, at *1.
7- See In re Melson, 1999 WL 160136, at *8 (Del. Ch. March 10, 1999).
8- In re Last Will of Szewzcyk, 2001 WL 456448, at *9 (Del. Ch. April 6, 2001).
9- IMO Last Will & Testament of Kittila, 2015 WL 3899572, *2 (Del Ch. June 24, 2015) (citing *Ableman v. Katz,* 481 A.2d at 1114, 1120-21 (Del. 1984).
10- Kittila, 2015 WL 3899572, at *2.
11- Id.; Ableman, 481 A.2d at 1120.
12- See Kittila, 2015 WL 3899572, at *3; *see also Ableman,* 481 A.2d at 1120 ("Further muddling of the issue arose because in those situations where fees have been awarded, the Courts have failed to expressly clarify the rule . . . .").
13- Kittila, 2015 WL 3899572 at *3 (citing *Ableman*, 481 A.2d 1120-21).
14- Id.
*15- Id. (*citing *Scholl v. Murphy,* 2002 WL 31112203, at *3 (Del. Ch. Sept. 4, 2002)).
16- Kittila, 2015 WL 3899572, at *3.
17- See id. at *3.
18- IMO The Hawk Mountain Trust Dated Dec. 12, 2002, 2015 WL 5243328, at *7 (Del. Ch. Sept. 8, 2015.
19- Id.
20- Id. at *5.
21- Id.
22- Id.
23- Id. at *5-6.
24- 2015 WL 5243328, at *7.
25- Id.
26- Id.
27- Id.
28- Id.
29- IMO the Last Will & Testament of Kittila, No. CV 8024-ML, 2015 WL 5897877, at *1 (Del. Ch. Oct. 9, 2015).
30- Id.
31- Id. at *2.
32- Id.
33- Gore, 2013 WL 771900, at *3.