

NOTES

RELIEF FOR BENEFICIARIES SUING FOR BREACH OF FIDUCIARY DUTY: PAYMENT OF ACCOUNTING COSTS BEFORE TRIAL

"If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea."

-Professor Frederick W. Maitland¹

I. INTRODUCTION

A wealthy parent creates² an inter vivos trust³ for the benefit of her three young sons and names herself as trustee.⁴ The children never receive nor request an accounting from their mother detailing how she has been handling and distributing the trust property; they simply assume that their mother knows best how to handle the assets of the trust. When questions arise as to their mother's actions in her capacity as trustee, one son demands that his parent-trustee provide a complete accounting. The mother responds with an inadequate accounting report that reflects some questionable practices.

The sons then sue their parent-trustee for breach of fiduciary duty.⁵ They

1. 1 AUSTIN W. SCOTT & WILLIAM E. FRATCHER, SCOTT ON TRUSTS § 1, at 1 (4th ed. 1987) (quoting FREDERICK W. MAITLAND, EQUITY 23 (1936); SELECTED ESSAYS 129 (1936)). The late Professor Maitland was the Downing Professor of the Laws of England. See R.H. Helmholz, *Harold Bergman's Accomplishment as a Legal Historian*, 42 EMORY L.J. 475, 495 n.78 (1993).

2. A person who creates a trust, whether by will or by an inter vivos transaction, is called the "settlor" of the trust. See RESTATEMENT (SECOND) OF TRUSTS § 3 cmt. a (1959).

3. "An inter-vivos trust (based on the Latin word for 'life') is a trust established during lifetime. It can either be a revocable or irrevocable trust (although some people mean exclusively 'living trust' when they say 'inter-vivos trust')." Owen G. Fiore et al., *Probate Avoidance and Other Uses of Trusts*, in 2 ESTATE PLANNING FOR THE FAMILY BUSINESS OWNER 469, 475 (1992). For a discussion of various living trusts and their possible benefits, see Julia P. Wald, *Inter Vivos Transfers*, in 18TH ANNUAL ESTATE PLANNING INSTITUTE 393 (PLI Tax Law & Estate Planning Course Handbook Series No. 177, 1987).

4. A trustee is "the person who holds trust property. The settlor may serve as trustee, as may a beneficiary. A trust may have two or more trustees, who are commonly referred to as 'co-trustees.'" RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. c (Tentative Draft No. 1, 1996).

5. "A cause of action for breach of fiduciary duty must set forth allegations, supported by facts, that a fiduciary relationship existed between the parties, that the trustee owed certain, specific duties to the plaintiff, that the trustee breached those duties, and, that there were resulting damages." Chicago

also demand her removal as trustee and ask for sizable damages. Each son retains a separate small law firm on a contingent fee basis while the parent-trustee retains various large firms as defense counsel. She contends that a vigorous legal defense is in the best interest of the trust.

The beneficiaries hire accountants to conduct an extensive pretrial accounting detailing how the trustee spent and distributed the assets of the trust. They also ask the court to order the trustee to release funds from the trust to pay for these accounting costs. The beneficiaries' attorneys maintain that the cost of providing their own accounting is crippling their already limited financial resources. The parent-trustee argues that the beneficiaries retained attorneys under contingent fee arrangements, and therefore, their attorneys must shoulder these accounting costs in exchange for the possibility of a large verdict. The beneficiaries respond that accounting costs are routinely paid out of trust assets,⁶ and it is fundamentally unfair to force the beneficiaries to shoulder these costs as litigation expenses.

This hypothetical raises several important questions for beneficiaries,⁷ trustees, and attorneys practicing in trust litigation.⁸ Should beneficiaries

City Bank & Trust Co. v. Lesman, 542 N.E.2d 824, 826 (Ill. App. Ct. 1989); see also Jewett v. Capital Nat'l Bank, 618 S.W.2d 109, 112 (Tex. Ct. App. 1981) ("trustee can exercise his fiduciary duty in such a negligent manner that his lack of diligence will result in a breach of his fiduciary duty").

6. See *infra* Part II.B on paying the costs of trust accounting out of trust funds.

7. A beneficiary is frequently referred to as a "cestui que trust." RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. d. For purposes of consistency, however, this Note uses the term beneficiary to refer to the "cestui que trust."

8. Litigation is an expensive and time-consuming process. A good example of expensive trust dispute litigation is the trust dispute between a Dallas billionaire, Harold Simmons, and two of his four daughters. Mr. Simmons managed trusts for his four daughters worth in excess of \$1 billion. Two of the daughters sued Mr. Simmons for breach of fiduciary duty. The costs of this litigation were astronomical for both sides. See Jim Mitchell, *Court Battle Looms for Billionaire Family. Trial Set in Simmons v. Daughters Trust Case*, DALLAS MORNING NEWS, Oct. 20, 1997, at 1A.

For example, in the year prior to the trial, Mr. Simmons expended more than \$3 million on his defense while each of the plaintiffs retained separate counsel through contingent fee arrangements. A week long pretrial mediation was expected to cost about \$185,000. The courtroom for the trial was equipped with a big-screen monitor and numerous desktop monitors staffed by a full-time technician at a cost of \$10,000 per week. See *id.*

Despite the expense of an eight week jury trial, the judge declared a mistrial after the six person jury deadlocked over whether Mr. Simmons violated the trust agreement. See Jim Mitchell, *Judge Declares Mistrial in the Battle Over Control of Simmons Trusts. Billionaire, Daughters Told to Continue Settlement Talks*, DALLAS MORNING NEWS, Dec. 18, 1997, at 1A. For another example of a multimillion dollar trust dispute, see Jeff Testerman, *Culverhouse Widow, USF Win Big in Deal*, ST. PETERSBURG TIMES, Feb. 7, 1997, at 1A (reaching \$45 million settlement in trust dispute after two days of trial over administration of Hugh Culverhouse's \$381 million estate during which legal fees exceeded \$2.3 million).

Some scholars even advocate viewing litigation as an investment:

We have chosen to conceptualize the process as the investment of scarce resources in exchange for a future result. The resources to be invested include time and money; however, as it is frequently possible to translate the value of time expended on litigation into monetary terms, these

have the right to financial assistance from the trust to fund pretrial litigation against a trustee accused of breach of fiduciary duty?⁹ In contrast, should the trustee refuse to provide such assistance when she feels that doing so would not be in the best interest of the trust?¹⁰

The answers to these questions have far-reaching implications for attorneys and lay persons alike. Obviously, beneficiaries' attorneys retained on a contingent fee basis would prefer not to shoulder the entire cost of the litigation. More importantly, countless beneficiaries¹¹ and their attorneys are currently forced to cover the expensive cost of litigation over disputes concerning a trustee's mishandling of their assets.

When a beneficiary sues his trustee for breach of fiduciary duty, should the law force the beneficiary's attorneys, who are retained using contingent fee arrangements, to absorb the cost of litigation in exchange for the possibility of receiving a percentage of a verdict for the beneficiary? Does forcing firms to absorb these costs punish small firms who handle complicated trust dispute cases on a contingent fee basis?¹² The current state of the law provides no clear answers to these questions or solutions to the problems raised by them.

This Note proposes a model statute for use in state trust or probate codes that would relieve beneficiaries' attorneys from funding pretrial accounting costs for their clients under limited circumstances.¹³ Part II of this Note

may come to the same thing.

David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 76 (1983).

9. An exhaustive search of both case law and statutory law failed to reveal any instance in which such recovery could be made prior to trial. Beneficiaries would need statutory authority to receive a pretrial recovery, and this Note proposes a model statute that would meet their needs. See *infra* Part III.

10. Keep in mind that the trustee has a duty of loyalty and must act in the beneficiaries' best interest. See *infra* note 20 and accompanying text.

11. See Daniel Golden, *Family Fortunes, Family Feuds*, BOSTON GLOBE, Dec. 14, 1997, at A1 (discussing growth of wealth in country and rapidly growing need for estate planning services). The amount of wealth in this country is not confined to the upper class:

No longer is inherited wealth limited to the upper crust. It ranges from old money, like Crane & Co. stock, to new wealth accumulated by middle-class members of the World War II generation.

Raised during a Depression that erased their own inheritance, they profited from the boom in real estate values and stocks—and kept every penny. According to the most recent census data, people over 65 head only one-fifth of the nation's households, but they own one-third of its assets.

Id.

12. This Note does not discuss the viability or utility of using contingent fee arrangements to pay attorney's fees. For a discussion of the issues surrounding these controversial but frequently used fee arrangements, see Richard M. Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949 (1990); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995).

13. The focus on recovery of accounting costs stems from the fundamental right of beneficiaries

provides background on the trustee's common-law fiduciary duty to account. Part III discusses recovery of attorney's fees in trust disputes following the completion of trial or upon settlement of the trust dispute. Part IV analyzes the inequities created by current law and proposes a statute that alleviates some of those inequities even when the beneficiaries retain attorneys on a contingent fee basis. Part V provides some concluding remarks regarding the impact of the proposed statute on the dilemma beneficiaries currently face.

II. THE TRUSTEE'S DUTY¹⁴ TO ACCOUNT

A trustee maintains a fiduciary¹⁵ obligation¹⁶ to deal impartially with all of the beneficiaries¹⁷ and to faithfully administer the trust¹⁸ for their benefit.¹⁹

to receive a complete and accurate accounting from their trustee. The model statute does not cover any other pretrial expenses. For the text of the statute, see *infra* Part IV.

14. The duties of a trustee are determined by terms of the trust, by statute, and by common law. See *In re Estate of Ehlers*, 911 P.2d 1017, 1021 (Wash. Ct. App. 1996). See also *Branch v. White*, 239 A.2d 665 (N.J. Super. Ct. App. Div. 1968), in which the court stated:

The extent of the duties of a trustee depends primarily upon the terms of the trust. Where there is no provision, express or implied, in the terms of the trust, the duties of a trustee are determined by principles and rules which have been evolved by courts of equity for the governing of the conduct of trustees.

Id. at 671.

15. See SCOTT & FRATCHER, *supra* note 1, § 2.5, at 43 (stating that fiduciary relationship exists between trustee and beneficiary). Justice Cardozo summarized the fiduciary nature of the trustee-beneficiary relationship and the trustee's responsibilities that come with that relationship by stating:

The implication of a trust is the implication of every duty proper to a trust. Equity has its distinctive standards of fidelity and honor, higher at times than the standards of the market place.

Whoever is a fiduciary or in conscience chargeable as a fiduciary is expected to live up to them.

Buffum v. Peter Barceloux Co., 289 U.S. 227, 237 (1933) (footnotes omitted).

16. For a discussion of the relaxation of the law concerning the responsibilities and duties of trustees, see Jerome J. Curtis, Jr., *The Transmogrification of the American Trust*, 31 REAL PROP., PROB. & TR. J. 251 (1996) (stating that current trust law has relaxed such that trustees are often held only to standards applied to simple agents and sometimes trustees are judged more leniently than agents).

17. See *Jones v. Heritage Pullman Bank & Trust Co.*, 518 N.E.2d 178, 182-83 (Ill. App. Ct. 1987) (finding that trustee breached fiduciary duty even though some but not all of beneficiaries consented to trustee's breaching conduct).

18. The *Restatement of Trusts* defines a trust as "a fiduciary relationship with respect to property that subjects person who holds title to property to equitable duties to deal with property for benefit of another person. The fiduciary relationship must arise from a manifestation of intention to create it." RESTATEMENT (THIRD) OF TRUSTS § 2 (1990). For an overview of the different types of trusts, see Fiore, *supra* note 3.

19. See *White v. MacQueen*, 195 N.E. 832, 837 (Ill. 1935) (stating that trustee must treat fairly all parties to trust instrument); *Fortune v. First Union Nat'l Bank*, 371 S.E.2d 483, 489 (N.C. 1988) (Meyer, J., dissenting) (stating that "it is the trustee's duty to preserve and administer the trusts"); *Estate of Pew*, 655 A.2d 521, 542 (Pa. Super. Ct. 1994) (stating that trustee's primary duty is to preserve trust assets and ensure safety of trust principal); *Willers v. Wettstad*, 510 N.W.2d 676, 680 (S.D. 1994) ("A trustee's duty to preserve the trust assets is in accord with the fundamental duty of loyalty and fidelity owed by every trustee to his beneficiary.").

The common law also imposes a duty of loyalty on a trustee toward the beneficiaries.²⁰ The trustee must keep the beneficiaries completely informed of all material facts that might affect their rights under the trust.²¹ Moreover, the trustee has a common-law fiduciary duty to act in good faith while administering the estate.²² As such, the trustee maintains a fiduciary duty to make the trust property productive.²³ A trustee is entitled to reasonable compensation for her work in administering the trust.²⁴ If a trustee fails to perform her duties, a beneficiary can petition the appropriate court to compel

20. See *Riegler v. Riegler*, 553 S.W.2d 37, 40 (Ark. 1977) (stating that trustee must act for beneficiaries' benefit and not in trustee's self-interest); *Law v. Law*, No. 14352, 1997 WL 633293, at *2 (Del. Ch. Oct. 2, 1997) ("Trustees owe a duty of loyalty to all classes of beneficiaries."); *Smith v. First Nat'l Bank*, 624 N.E.2d 899, 907 (Ill. App. Ct. 1993) (stating that trustee's duty of loyalty to beneficiaries is more intense than in any other fiduciary relationship); *Schildberg v. Schildberg*, 461 N.W.2d 186, 191-92 (Iowa 1990) (stating that trustee owes duty of loyalty to trust and its beneficiaries); *Madden v. Mercantile-Safe Deposit & Trust Co.*, 339 A.2d 340, 348 (Md. Ct. Spec. App. 1975) (finding that trustee's most fundamental duty to beneficiaries is duty of loyalty); *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 95 (N.Y. 1990) (finding that trustee owes undivided duty of loyalty to beneficiaries); *Strickland v. Arnold Thomas Seed Serv., Inc.*, 560 P.2d 597, 601 (Or. 1977) (stating that all courts recognize trustee's fundamental duty of loyalty to beneficiaries (citing *Walterbury v. Nicol*, 296 P.2d 487, 492 (Or. 1956))); *Willers v. Wettstad*, 510 N.W.2d 676, 680 (S.D. 1994) (finding that trustee owes beneficiary duty of loyalty).

21. See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). The court in *Huie* stated that the duty of disclosure "exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and beneficiaries." *Id.*

22. See *Harvey v. Leonard*, 268 N.W.2d 504, 512 (Iowa 1978) (finding that a trustee's duty to act in good faith in all actions affecting the trust is not "obviated by testator's limitation on the liability of the trustees to actions which were done in bad faith"). But see *Thompson v. Trustees of Phillips Exeter Academy*, 196 A.2d 42, 45 (N.H. 1963) (finding that trustee is not relieved of duty to administer trust according to terms of trust instrument even if he acts in good faith).

23. "The trustee is under a duty to the beneficiaries to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality." RESTATEMENT (THIRD) OF TRUSTS § 181 (1990). The "Prudent Investor Rule" has recently received a great deal of attention from the legal community. While this fiduciary duty is beyond the scope of this Note, for a discussion of the issues surrounding the rule, see Robert J. Aalberts & Percy S. Poon, *The New Prudent Investor Rule and the Modern Portfolio Theory: A New Direction for Fiduciaries*, 34 AM. BUS. L.J. 39 (1996); Jerold I. Horn, *Prudent Investor Rule—Impact on Drafting and Administration of Trusts*, in ADVANCED ESTATE PLANNING TECHNIQUES 235 (1994); Pamela J. Keeler, *Administration of Estates: Trusts—Prudent Investor Rule*, 27 PAC. L.J. 375 (1996); Susan Porter, *Prudent Investor Rule—Legal and Investment Perspectives*, in NONPROFIT ORGANIZATIONS OVERVIEW & UPDATE: 1995, at 49 (PLI Tax Law & Estate Planning Course Handbook Series No. 369, 1995).

24. The Supreme Court of Florida describes the trustee's right to reasonable compensation as follows:

A trustee carries on a fiduciary service requiring faithful and efficient administration of the trust and a conservation of its assets. For such services a trustee is entitled to be paid reasonable compensation. When not agreed upon or fixed in the trust indenture or other instrument, the amount of said award is a matter resting largely in the sound discretion of the chancellor under whose jurisdiction the trust falls.

West Coast Hosp. Ass'n v. Florida Nat'l Bank, 100 So.2d 807, 810-11 (Fla. 1958).

the trustee to comply with the terms of the trust.²⁵

A. Scope of Trustee's Duty to Account

A trustee has a common-law fiduciary duty to keep clear and accurate accounts²⁶ and adequate records of her transactions.²⁷ Nevertheless, courts sometimes allow parent-trustees more flexibility in complying with their accounting duties. For example, in the case of *In re Trust of Grover*,²⁸ the trustee held an 1800 acre tract of land in trust for his children.²⁹ During the life of the trust, the trustee used sloppy accounting practices.³⁰ When the

25. See *Davis v. United States*, 495 U.S. 472, 483 (1990) ("A defining characteristic of a trust arrangement is that the beneficiary has the legal power to enforce the trustee's duty to comply with the terms of the trust.").

26. See *In re McCabe's Estate*, 220 P.2d 614, 616 (Cal. Ct. App. 1950) (stating that trustee is obligated to provide beneficiaries with "full account of all their dealings with the trust property"); *Rearden v. Riggs Nat'l Bank*, 677 A.2d 1032, 1035 (D.C. 1996) (finding that trustee has duty to beneficiary to keep clear and accurate accounts regarding administration of trust); *Wylie v. Bushnell*, 115 N.E. 618, 622 (Ill. 1917) (finding that duty to keep regular and accurate accounts extends through entire trusteeship); *Morrison v. Asher*, 361 S.W.2d 844, 852 (Mo. Ct. App. 1962) (stating that beneficiary is "entitled to a full and accurate record and accounting of the trustees' stewardship"); *Wood v. Honeyman*, 169 P.2d 131, 162 (Or. 1946) (stating that trustee "must maintain records of his transactions so complete and accurate that he can show by them his faithfulness to his trust"); *Fletcher v. Fletcher*, 480 S.E.2d 488, 491 (Va. 1997) (finding that trustee has duty to provide complete and accurate information about trust accounts); RESTATEMENT (SECOND) OF TRUSTS § 173 (1957) (stating that trustee is under duty to provide complete and accurate information on trust accounts).

27. See *Barnett v. Hitching Post Lodge Inc.*, 421 P.2d 507, 511 (Ariz. 1966) ("There is no question that the burden is upon the trustees of funds adequately to account for them."); *Blackmon v. Hale*, 463 P.2d 418, 425 (Cal. 1970) ("where there has been a negligent failure to keep true accounts all presumptions are against [the trustees] upon a settlement" (citing *In re McCabe's Estate*, 220 P.2d at 616)); *In re Trust of Grover*, 710 P.2d 597, 600 (Idaho 1985) ("Case law is legion in declaring that a trustee has a duty to keep adequate records of his transactions."); *Burford v. Stuart*, 422 P.2d 428, 431 (Okla. 1967) (stating that trustee is "held to the strictest accountability" to fulfill duty to account to beneficiaries); *Walker v. Walker*, 404 P.2d 253, 258 (Utah 1965) (stating that trustee has duty "to keep full, accurate and orderly records").

Despite the burdens of accounting, the duty to render accounts can also have substantial benefits for a trustee:

A formal accounting can serve to protect the fiduciary while providing needed information to the beneficiaries. For example, court approval of transactions fully set forth in the accounting can release the fiduciary from personal liability. Further, even an informal final accounting (or receipt and release) submitted to the beneficiaries may serve to limit suits based on breach of fiduciary responsibility.

Robert J. Nagoda II, *Careful Fulfillment of the Duty to Account Protects Fiduciary as Well as Beneficiaries*, 13 EST. PLAN. 206 (1986).

28. 710 P.2d 597 (Idaho 1985).

29. See *id.* at 598. The property was given by the trustee's father, and the trust was created to last until the youngest of the trustee's children reached the age of twenty-one. When the trust terminated, the property was to be given to the children as tenants in common. The trust instrument made no provision for the compensation for the trustee. See *id.*

30. See *id.* For example, the trustee used one checking account for all trust business, and he received no legal or bookkeeping assistance. He never rendered an accounting. See *id.*

trustee petitioned the court to terminate the trust, distribute the assets, and discharge him as trustee, the beneficiaries demanded an accounting.³¹ Despite the trustee's faulty accounting practices, the Supreme Court of Idaho held that he could receive compensation even though he "miserably performed his duty as a trustee in being unable to render an accounting."³² The court reasoned that a parent-trustee may be less proficient in keeping detailed accounting records than a stranger.³³

While a parent-trustee may have some flexibility as to the specificity of an accounting, the trustee must fulfill her fiduciary duty to keep "full, accurate and orderly" accountings.³⁴ In *Jimenez v. Lee*,³⁵ a court imposed a constructive trust between a father and his daughter when the father invested money in common stock registered to him as custodian for his minor daughter.³⁶ When the daughter discovered the existence of the funds,³⁷ she sued her father as trustee to compel him to provide a complete accounting.³⁸

On appeal, the Supreme Court of Oregon imposed a constructive trust and required the father to provide an accounting.³⁹ The court found that the father failed to keep separate records of trust income and expenditures. Further, a letter sent to the beneficiary on her birthday did not constitute a trust accounting.⁴⁰

A trustee must render an accounting⁴¹ when any beneficiary⁴² requests it

31. *See id.* at 599.

32. *Id.* at 600.

33. *See id.* at 601.

34. *See Jimenez v. Lee*, 547 P.2d 126, 130 (Or. 1976).

35. 547 P.2d 126 (Or. 1976).

36. *See id.* at 128. The father paid for the stock by cashing a savings bond given to him and his children fifteen years earlier by their paternal grandmother shortly after the beneficiary was born and by closing a savings account containing money given by one of the father's clients four years earlier for the benefit of the beneficiary and her two siblings. *See id.*

37. The defendant sent the beneficiary a letter for her twenty-first birthday revealing the existence of the money in trust for her education, informing her of the increase in its value, and suggesting ways for her to use the remainder of the funds. *See id.* at 130.

38. *See id.* at 128.

39. *See id.* at 130.

40. *See id.* Not all courts, however, have held parent-trustees to the same standard. *See In re Trust of Grover*, 710 P.2d 597, 601 (Idaho 1985) (stating that parent-trustee might be justified in not maintaining records as complete as those accounting records required when dealing with nonfamily trust).

41. At the very least, a trustee must meet a minimum standard of detail and quality in fulfilling her accounting duties:

A proper accounting, at a minimum, should state in clear and concise terms the nature and value of the corpus of the trust when received by the trustee, any realized increases or decreases on principal or income, any income generated by the trust, any disbursements or distributions to beneficiaries, any commissions, charges, or fees paid, including those paid to the trustee in the management and administration of the trust, and the amount and location of any balance or remainder.

within a reasonable time.⁴³ Additionally, any person with an interest in the trust can petition the court for an accounting by the trustee, and courts routinely require trustees to respond affirmatively to these demands.⁴⁴ Most states have codified a trustee's fiduciary duty to maintain a clear and accurate accounting of trust assets.⁴⁵

Zuch v. Connecticut Bank & Trust Co., 500 A.2d 565, 568 (Conn. App. Ct. 1985); *see also Kelly v. Sassower*, 382 N.Y.S.2d 88, 89 (N.Y. App. Div. 1976). Professor Scott provides an informative explanation as to what a proper accounting should contain:

His accounts should show what he has received and what he has expended. They should show what gains have accrued and what losses have been incurred on changes of investments. If the trust is created for beneficiaries in succession, the accounts should show what receipts and what expenditures are allocated to principal and what are allocated to income.

AUSTIN W. SCOTT, 2 SCOTT ON TRUSTS § 172, at 1399 (3d ed. 1967).

42. Any beneficiary may request an accounting. *See SCOTT, supra* note 41, § 172, at 1400-01.

43. *See SCOTT, supra* note 41, §§ 172-173. *See also Ingram v. Lewis*, 37 F.2d 259 (10th Cir. 1930), in which the court stated that "[w]hile a primary obligation of a trustee is to account to his beneficiary, that accounting need not be in court. If he fully and fairly discloses his stewardship, and his beneficiary, understandingly and voluntarily, agrees to its correctness and releases his trustees, the courts will not interfere." *Id.* at 263; *see also In re Hershel*, 336 P.2d 571, 573 (Cal. Ct. App. 1959) (finding that accounting is reasonable when trustee provides all records but beneficiaries and their counsel refuse to "undergo the labor" of inspecting documents); *Feldan v. Goodman*, 460 So.2d 515 (Fla. Dist. Ct. App. 1984); *McCormick v. McCormick*, 455 N.E.2d 103, 109 (Ill. App. Ct. 1983) (A beneficiary has the right to know "what property came into [trustee's] hands, what has passed out, and what remains therein, including all receipts and disbursements in cash, and the sources from which they came, to whom paid and for what purpose paid.").

44. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939); *Clews v. Jamieson*, 182 U.S. 461 (1901); *Cox v. Cox*, 357 N.W.2d 304 (Iowa 1984); *Lichtenfels v. North Carolina Nat'l Bank*, 132 S.E.2d 360 (N.C. 1963).

45. For example, Florida law describes the trustee's duty to account and keep her beneficiaries informed as follows:

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. The trustee's duty to inform and account includes, but is not limited to, the following:

(1) Within 30 days after acceptance of the trust, the trustee shall inform the beneficiaries in writing of the acceptance of the trust and the full name and address of the trustee.

(2) Upon reasonable request, the trustee shall provide a beneficiary with a complete copy of the trust instrument, including amendments.

(3) Upon reasonable request, the trustee shall provide a beneficiary with relevant information about the assets of the trust and the particulars relating to administration.

(4)(a) A beneficiary is entitled to a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee except as provided under paragraph (c).

FLA. STAT. ANN. § 737.303 (West Supp. 1998).

Other state statutes use similar language to describe the trustee's duty to make an annual accounting to the beneficiaries. *See CAL. PROB. CODE* § 16062 (West Supp. 1998) (stating that trustee has general duty to account annually to beneficiaries); *COLO. REV. STAT. ANN.* § 15-16-303(4) (West 1997) (stating that upon reasonable request, beneficiaries are entitled to annual statement of accounts of trusts); *HAW. REV. STAT. ANN.* § 560:7-303(3) (Michie 1997) (same); *IDAHO CODE* § 15-7-303(c) (1979) (same).

Indiana limits the trustee's duty to make an accounting to beneficiaries to reasonable requests by the beneficiaries. The Indiana Code states:

Sec. 6. (a) The trustee has a duty to administer a trust according to its terms.

B. Costs of Providing an Accounting Paid by Trust

The cost of providing a complete accounting is routinely paid from the trust assets. Some jurisdictions deduct these costs from the income⁴⁶ of the

(b) Unless the terms of the trust provide otherwise, the trustee also has a duty to do the following:

....

(7) Maintain clear and accurate accounts with respect to the trust estate.

(8) Upon reasonable request, give the beneficiary complete and accurate information concerning any matter related to the administration of the trust and permit the beneficiary or the beneficiary's agent to inspect the trust property, the trustee's accounts, and any other documents concerning the administration of the trust.

IND. CODE ANN. § 30-4-3-6 (West Supp. 1998); *see also* LA. REV. STAT. ANN. § 9:2088(A)-(B) (West 1991) (assigning duty to keep and render clear and accurate accounts and to render account to beneficiary annually); MICH. COMP. LAWS ANN. § 700.814 (West 1995) (assigning duty to trustees to provide annual accounting to beneficiaries); S.C. CODE ANN. § 62-7-303 (Law Co-op. Supp. 1997) (stating that trustees have duty to keep beneficiary reasonably informed and to provide annual accounting to beneficiary when reasonably requested); UTAH CODE ANN. § 75-7-303 (1993) (providing that trustee has duty to keep beneficiary reasonably informed and to provide annual accounting when reasonably requested).

46. Deciding which assets are considered principal and which are considered income is a complex endeavor. Texas law provides a good example of which assets constitute income and which constitute the principal:

(a) Income is the return derived from the use of principal, including:

(1) rent on real or personal property, including sums received for cancellation or renewal of a lease;

(2) interest on money lent, including sums received as consideration for the privilege of prepayment of principal except as provided in Section 113.105 of this Act on bond premium and bond discount;

(3) corporate distributions as provided in Section 113.104 of this Act;

(4) accrued increments on bonds or other obligations issued at discount as provided in Section 113.105 of this Act;

(5) receipts from business and farming operations as provided in Section 113.106 of this Act;

(6) receipts from disposition of natural resources or timber as provided in Sections 113.107 and 113.108 of this Act;

(7) receipts from other principal subject to depletion as provided in Section 113.109 of this Act; and

(8) receipts from disposition of underproductive property as provided in Section 113.110 of this Act.

(b) Principal includes:

(1) consideration received by the trustee on the sale or other transfer of principal, repayment of the principal of a loan, or a refund, replacement, or change in the form of principal;

(2) proceeds of property taken on eminent domain proceedings;

(3) proceeds of insurance on property forming part of the principal, except proceeds of insurance upon a separate interest of an income beneficiary;

(4) stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in Section 113.104 of this Act;

(5) receipts from the disposition of corporate securities as provided in Section 113.104 of this Act;

(6) royalties and other receipts from disposition of natural resources or timber as provided in Sections 113.107 and 113.108 of this Act;

(7) receipts from other principal subject to depletion as provided in Section 113.109 of this

trust⁴⁷ while others deduct the costs from the principal.⁴⁸ Still other jurisdictions divide the costs of an accounting between the income and the principal.⁴⁹ In some cases, if all of the beneficiaries do not agree as to the necessity of the accounting, one beneficiary must indemnify the estate for the expense of an accounting.⁵⁰ For example, in *Pollock v. Manufacturers' & Traders' Trust Co.*,⁵¹ a bondholder of real estate requested an accounting by the successor trustee of a trust mortgage that was secured by that real estate.⁵² The remaining bondholders disagreed with the necessity of ordering an accounting.⁵³ The court found that each of the numerous beneficiaries had an equal interest in avoiding wasteful and detrimental expenses from the trust.⁵⁴ Therefore, the court refused to grant the beneficiary's motion for an accounting unless the beneficiary provided a surety bond to indemnify the estate against the expenses of the accounting.⁵⁵

Act;

(8) profit resulting from any change in the form of principal, except as provided in Section 113.110 of this Act on underproductive property;

(9) receipts from disposition of underproductive property as provided in Section 113.110 of this Act; and

(10) allowances for depreciation established under Sections 113.106 and 113.111 of this Act.

TEX. PROP. CODE ANN. § 113.102 (West 1984)

47. See, e.g., *Perrine v. Newell*, 23 A. 492 (N.J. Ch. 1892); *In re Long Island Loan & Trust Co.*, 140 N.Y.S. 752 (N.Y. Surr. Ct. 1913).

In Alaska, a trustee charges accounting and related costs against the income. The statute provides:

(a) A trustee shall make the following charges against income:

....

(3) one-half of court costs, attorney's fees, and other fees on periodic judicial accounting, unless the court directs otherwise;

(4) court costs, attorney's fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise;

ALASKA STAT. § 13.38.120(a)(4) (Michie 1996). For other statutes following the same general statutory framework, see ARIZ. REV. STAT. ANN. § 14-7413(A)(4) (West 1995); CAL. PROB. CODE § 16312(b)(4) (West 1991); FLA. STAT. ANN. § 738.13(1)(d) (West 1995); LA. REV. STAT. ANN. § 9:2156(A)(4) (West 1991).

48. See, e.g., *Burgess v. Nail Am. Nat'l Bank*, 21 F. Supp. 385 (N.D. Okla. 1937), *aff'd*, 103 F.2d 37 (10th Cir. 1939).

49. See, e.g., *Holmes v. Hrobon*, 103 N.E.2d 845, 882 (Ohio Ct. App. 1951), *rev'd on other grounds*, 110 N.E.2d 574 (Ohio 1953).

50. See, e.g., *Bryan v. Seiffert*, 94 P.2d 526 (Okla. 1939).

51. 276 N.Y.S. 363 (N.Y. Sup. Ct. 1934).

52. See *id.* at 365. In *Pollock*, \$425,000 worth of bonds were issued on the security property for the mortgage. More than half of the bondholders, including the beneficiary, deposited their bonds with a bondholders' committee when the mortgage went into default. See *id.*

53. See *id.* at 366. The bondholders' committee opposed the request for an accounting because it was an unnecessary expense that would be paid by the trust. See *id.*

54. See *id.* at 366.

55. See *id.* at 367. The surety bond would cover fees for a referee to take the account, stenographer fees, and any extra expenses incurred by the trustees associated with the accounting. See *id.* The court noted that it would release the indemnity after the accounting if it was shown that the

Many state statutes⁵⁶ provide that payment from the trust corpus of attorney's fees and costs from an accounting dispute depends on the reasonableness of the dispute.⁵⁷ Others statutes⁵⁸ assess these fees against a trustee personally when a trustee breaches her fiduciary duty.⁵⁹

procedure had any practical benefit to the other bondholders. *See id.* at 367-68.

56. For example, California law provides:

(a) If a beneficiary contests the trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The amount awarded shall be a charge against any interest of the beneficiary in the trust. The contestant shall be personally liable for any amount that remains unsatisfied.

(b) If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded shall be a charge against the compensation or other interest of the trustee in the trust. The trustee shall be personally liable and on the bond, if any, for any amount that remains unsatisfied.

CAL. PROB. CODE § 17211 (West Supp. 1998).

57. For example, Alabama law provides:

(a) All ordinary expenses incurred in connection with the trust estate or with its administration and management, . . . compensation of assistants, and court costs and attorneys' and other fees on regular accountings, shall be paid out of income. But such expenses where incurred in disposing of, or as carrying charges on, unproductive estate as defined in Section 19-3-280 shall be paid out of principal, subject to the provisions of subdivision (2) of Section 19-3-280.

(b) All other expenses, including trustees' commissions directed to be paid out of principal, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and costs of, or assessments for, improvements to property forming part of the principal, shall be paid out of principal. . . .

ALA. CODE § 19-3-281 (1997).

58. Indiana law provides:

(a) The trustee is accountable to the beneficiary for the trust estate.

(b) If the trustee commits a breach of trust, he is liable to the beneficiary for:

(1) any loss or depreciation in the value of the trust property as a result of the breach;

(2) any profit made by the trustee through the breach;

(3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and

(4) reasonable attorney's fees incurred by the beneficiary in bringing an action on the breach.

IND. CODE ANN. §30-4-3-11 (West 1994).

Georgia law also provides:

(a) A trustee who commits a breach of trust is personally chargeable with any damages resulting from the breach of trust including but not limited to:

....

(4) In the discretion of the court, expenses of litigation, including reasonable attorney's fees incurred by the beneficiary in bringing an action on the breach or threat to commit a breach.

GA. CODE ANN. § 53-12-193 (1997).

59. For example, in *Adamson v. Norwest Bank Ind., N.A.*, 633 N.E.2d 293 (Ind. Ct. App. 1994), a widow sued the trustee of a testamentary trust under the husband's will. *See id.* at 294. The complaint alleged numerous causes of action, including breach of fiduciary duty, and the jury entered a general verdict for the beneficiary against the trustee. *See id.* at 294-95. The beneficiary was awarded legal

III. RECOVERY OF ATTORNEY'S FEES IN TRUST DISPUTES

The preceding analysis demonstrates that a trustee has a fiduciary duty to maintain clear and accurate accountings for the beneficiaries, and that these costs are usually paid for out of trust assets. In the context of litigation, however, accounting costs incurred by the beneficiaries in preparation for trial are often paid for by the beneficiaries' attorneys whose fee is based on a contingent fee arrangement. To be sure, any proposal that seeks to have pretrial accounting costs paid from trust assets must address the law governing when attorney's fees are awarded out of the trust.

As a general proposition, prevailing parties in civil litigation do not recover attorney's fees⁶⁰ from the opposing parties.⁶¹ In trust litigation, however, courts often award the prevailing party their attorney's fees. These fees are paid out of the trust estate or by the trustee individually. A trustee has a fiduciary duty to defend the trust against an unjust attack,⁶² and trial courts may assess attorney's fees against the trust for litigation that is necessary to the administration of the trust.⁶³ The trust estate usually funds

fees of \$11,136.05 under the Indiana statute, although she demanded over \$106,000. *See id.* The beneficiary appealed the amount of the award. The appellate court assumed that the general verdict amounted to a finding of breach of fiduciary duty which merited awarding attorney's fees. *See id.* at 295. The court refused, however, to reverse the jury's finding that \$11,136.05 was a reasonable sum for these fees. *See id.*

60. "Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee." *Rapp v. Rapp*, 562 N.W.2d 359, 362 (Neb. 1997). Courts will uphold an award or denial of fees absent an abuse of discretion. *See First Nationwide Sav. v. Perry*, 15 Cal. Rptr. 2d 173, 182 (Cal. Ct. App. 1992); *Palmer v. Horton*, 469 So.2d 903, 905 (Fla. Dist. Ct. App. 1985); *Allard v. Pacific Nat'l Bank*, 663 P.2d 104, 112 (Wash. 1983).

61. *See* Gilmore F. Diedmann, *Principles Governing the Award of Costs and Expenses under Attorney Fee Statutes*, in *COURTS AWARDS OF ATTORNEY'S FEES* 219 (PLI Litigation & Administrative Practice Course Handbook Series No. 324, 1987). The American Rule on Attorney Fee Allocation differs greatly from the system in England. In England, the winning party in the litigation collects attorney's fees from the losing party. For a discussion of the two competing methods of allocating attorney fees, see John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

62. In *Weidlich v. Comley*, 267 F.2d 133, 134 (2d Cir. 1959), Judge Learned Hand stated:

When the trustee's administration of the assets is unjustifiedly assailed it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement to his acceptance of the burden of his duties. This has been uniformly the ruling, so far as we have found.

Id.

63. The Supreme Court of Washington held that an award of attorney's fees is appropriate when "the litigation is indispensable to the proper administration of the trust; the issues presented are neither immaterial nor trifling; the conduct of the parties or counsel is not vexatious or litigious; and that there has been no unnecessary delay or expense." *Allard*, 663 P.2d at 112; *see also* *Peoples Nat'l Bank v. Jarvis*, 364 P.2d 436, 440 (Wash. 1961) (arguing that it is not abuse of discretion to allow attorney's

general administrative expenses surrounding the trust, such as necessary litigation.⁶⁴ A trustee can recover accounting costs and litigation expenses after successfully defending the trust against attack.⁶⁵

Nevertheless, the trial court's discretion to award attorney's fees against the trust estate⁶⁶ is not absolute. The dispositive question is whether the litigation and the moving party's participation in that litigation benefited the trust.⁶⁷ Thus, a trustee must pay expenses resulting from her reprehensible conduct.⁶⁸

A. When a Beneficiary Is Entitled to Payment of Attorney's Fees

Courts have held that beneficiaries are entitled to recover attorney's fees when litigation results from a trustee's breach of fiduciary duty.⁶⁹ In *Allard v.*

fees).

64. See *Allard*, 663 P.2d at 112; *Scully v. Scully*, 76 N.W.2d 239 (Neb. 1956); see also *Trustees v. Greenough*, 105 U.S. 527, 532 (1881) ("It is a general principle that a trust estate must bear the expenses of its administration."); *Northern Trust Co. v. Heuer*, 560 N.E.2d 961, 964 (Ill. App. Ct. 1990) (stating that costs of litigation are generally paid by trust estate in order to construe trust in which there are adverse claims); *Monroe v. Winn*, 142 P.2d 1022, 1024 (Wash. 1943) (stating that attorney's fees should be paid out of trust estate for litigation services if court finds that trustee acted in good faith).

65. See *Rapp*, 562 N.W.2d at 362 (Neb. 1997) (stating that trustee does not have to be 100% successful to be entitled to recover attorney's fees); *Cooper v. Brodie*, 480 S.E.2d 101, 104 (Va. 1997) (ruling that attorney's fees and costs should be charged to trust estate when trustee has good faith basis for defending suit).

66. See *Allard*, 663 P.2d at 112; *Peoples Nat'l Bank*, 364 P.2d at 439.

67. See *Estate of Baird v. Henigbaum*, 287 P.2d 372, 375-76 (Cal. Dist. Ct. App. 1955); *Kronzer v. First Nat'l Bank*, 235 N.W.2d 187, 196 (Minn. 1975); *Linn v. Linn*, 21 N.W.2d 283, 284 (Neb. 1946); *Allard*, 663 P.2d at 112. When a court finds the trustee breached her fiduciary duty, an award of attorney's fees for the trustee is not appropriate. See *Ellis v. King*, 83 N.E.2d 367, 371 (Ill. App. Ct. 1949); see also *Appeal of Chaplin*, 177 A. 191, 193 (Me. 1935) (finding that fiduciary is not entitled to award of attorney's fees when litigation was not for benefit of estate); *Bogle v. Bogle*, 188 P.2d 181, 183 (N.M. 1947) (stating that awarding fees to fiduciary is inappropriate when litigation results from fiduciary's misconduct); *Allard*, 663 P.2d at 112 (explaining that award is inappropriate when litigation resulted from trustee's misconduct).

68. See *Wilmington Trust Co. v. Coulter*, 208 A.2d 677, 679 (Del. Ch. 1965) (explaining that nature of breach must be considered in deciding whether to reimburse trustee for his attorney's fees); *Wiglesworth v. Taylor*, 391 S.E.2d 299, 303 (Va. 1990) (stating that even though the trustee is entitled to reasonable attorney's fees for defending the trust, she cannot recover those fees if her actions caused litigation); *Allard*, 663 P.2d at 112 (finding that trustee is not entitled to reimbursement when trustee's misconduct caused litigation). But see *Wolff v. Calla*, 288 F. Supp. 891, 894 (E.D. Pa. 1968) (stating that it is reasonable to assess fees against trustee individually in suit to remove trustee); *First Nat'l Bank v. Edgeworth*, 419 N.E.2d 372, 381 (Ill. App. Ct. 1981) (stating that generally attorney fees and costs should be paid by trust if there is honest difference of opinion surrounding language of trust document).

69. See *Allard*, 663 P.2d at 112; see also *Northern Trust Co.*, 560 N.E.2d at 964 ("where a trustee breaches its duty to administer the trust according to its terms and . . . favors one beneficiary over another, the trustee is not entitled to attorney fees and costs even though the breach is technical in nature, done in good faith, and causes no harm").

Pacific National Bank,⁷⁰ the beneficiaries sued the trustee for breaching its fiduciary duty when the trustee sold the sole trust asset without procuring an independent appraisal of the property or “testing the market” to determine the best available price.⁷¹ The Supreme Court of Washington found that the trustee’s inaction amounted to a breach of fiduciary duty in mismanaging the trusts.⁷² Furthermore, the court held that the beneficiaries were entitled to an award of attorney’s fees because the trustee breached its fiduciary duty.⁷³

Some courts have held that beneficiaries are entitled to attorney’s fees under statutory law⁷⁴ when the trustee breaches a fiduciary duty owed to the beneficiaries. In *Wadsworth v. Bank of California*,⁷⁵ the only trust asset was stock in the Bank of Oregon,⁷⁶ and the trustee contracted with a buyer to sell him the stock under a complex repayment agreement.⁷⁷ After having the stock issued in his name, the buyer gave the stock back to the trustee as collateral and received a portion of the stock for each repayment.⁷⁸ The bank stock was exchanged for another bank’s stock during a corporate reorganization, but the trustee continued to release stock to the buyer even though the buyer was not paying full price for it.⁷⁹

The Oregon Court of Appeals held that the beneficiaries were entitled to attorney’s fees under the statute as a matter of judicial discretion because the trustee caused the harm suffered by the beneficiaries.⁸⁰ Like the Oregon court in *Wadsworth*, other courts have allowed beneficiaries to recover attorney’s

70. 663 P.2d 104 (Wash. 1983).

71. *Id.* at 111. After a bench trial, the trial court dismissed the action against the trustee for breach of fiduciary duty. The court held that the defendant acted in good faith and that the defendant had no duty to inform the beneficiaries of other alternatives, to get an independent appraisal, or to put the property on the open market. *See id.* at 107-08.

72. *See id.* at 109.

73. *See id.* at 112. The court remanded the case to the trial court for a determination of damages and a calculation of the attorney’s fees owed from the trustee individually. *See id.*

74. For example, Oregon law provides, “If the beneficiary is successful, the court may tax the costs and disbursements of the proceeding, including any appeal therein, and reasonable attorney fees against the trust estate or the trustee individually.” OR. REV. STAT. § 128.155 (1997).

75. 777 P.2d 975 (Or. Ct. App. 1989).

76. *See id.* at 977.

77. The trustee made an agreement with a buyer to sell the stock under an arrangement where the buyer made a down payment and agreed to make monthly payments. *See id.*

78. *See id.*

79. The court found that the trustee breached its fiduciary duty to the beneficiaries every time the trustee released stock to the buyer when he had not paid the contract price for it. *See id.* at 978. But the court refused to grant the beneficiary attorney’s fees. *See id.* at 976. Moreover, it provided no explanation for this refusal. *See id.* at 980.

80. *See id.* The court also denied the trustee any compensation for managing the trust and ordered the trustee to repay any compensation that it received. *See id.* The court reasoned that the trustee acted negligently by squandering the primary assets of the trust. Therefore, his actions justified the court’s refusal to grant him compensation for his services. *See id.*

fees in suits against trustees for breach of fiduciary duty.⁸¹

Courts have also allowed recovery under statutes addressing attorney's fees for both statutory and common-law causes of action. For example, in *Republic National Bank v. Araujo*,⁸² the trustee appealed a jury finding that it breached its fiduciary duty for failing to monitor trust funds that the trustee invested in foreign investments.⁸³ While the court affirmed the jury's finding of liability, it held that the trial court's decision⁸⁴ to deny the beneficiary his attorney's fees under the Florida statute was erroneous.⁸⁵ The court reasoned that the statute allowed the beneficiary to recover attorney's fees for common-law actions as well as for statutory claims.

B. When Trustee Is Entitled to Payment of Attorney's Fees

At common law, a trustee can deduct attorney's fees from trust assets when the trustee must defend herself against an unjust attack. In *Jessup v. Smith*,⁸⁶ some of the trust beneficiaries attempted to remove the trustee.⁸⁷ The trustee retained an attorney in this action with the understanding that the trust estate would pay for the attorney's services.⁸⁸ The attorney successfully prevented the removal of the trustee and then sued the trust estate for payment of his legal fees.⁸⁹ The court of appeals granted the attorney payment of \$1750 for services rendered plus interest because the services

81. See *Levitt v. First Am. Title Ins. Co.*, 767 P.2d 707, 713 (Ariz. Ct. App. 1988) (upholding lower court's decision to award attorney's fees to beneficiaries under Arizona statute when trustee breached his fiduciary duty by causing value of trust property to depreciate); *In re Estate of Stowell*, 595 A.2d 1022, 1023 (Me. 1991) (holding that trustee breached his fiduciary duty by borrowing money from estate for himself and for family corporation and that beneficiaries were entitled to fees pursuant to Maine statute); *Cloud v. United States Nat'l Bank*, 570 P.2d 350, 356 (Or. 1977) (finding that beneficiaries were entitled to reasonable attorney's fees from trust corpus for litigation when trustee breached his fiduciary duty by allowing withdrawal from trust when trustee had reason to doubt settlor's competence to authorize withdrawal).

82. 697 So.2d 164 (Fla. Dist. Ct. App. 1997).

83. See *id.* at 166. The court affirmed the trial court's decision to deny the defendant's motion for summary judgment on whether these actions constituted a breach of fiduciary duty. See *id.* The court held that these issues were appropriately resolved by the trier of fact. See *id.*

84. See *id.* The trial court assumed that the statute only allowed recovery of attorney's fees for statutory causes of action. See *id.*

85. See *id.* The Florida statute provides for recovery of attorney's fees as follows: "In all actions challenging the proper exercise of a trustee's powers, the court shall award taxable costs as in chancery actions, including attorney's fees." FLA. STAT. ANN. § 737.627 (West 1995).

86. 119 N.E. 403 (N.Y. 1918).

87. See *id.* at 403.

88. See *id.*

89. See *id.* at 404. The trial court originally found that because the services were beneficial to the trustee, personally rather than to the estate, trust assets could not be used to reimburse the attorney. See *id.*

were needed to defend the trust against unjust attack.⁹⁰ The principle of *Jessup* has received wide support.⁹¹

IV. ANALYSIS/PROPOSAL

The law is clear that trustees have a fiduciary duty to render a clear and accurate accounting within a reasonable time if the beneficiaries request it.⁹² Moreover, accounting costs can be apportioned against the assets of the trust.⁹³ Similarly, most states allow for the recovery of attorney's fees and costs from trust litigation that benefited the trust property.⁹⁴ The law fails, however, to provide any relief from the overwhelming pretrial costs incurred by beneficiaries' attorneys in many trust disputes until the dispute is finally resolved by a verdict or a settlement. This failure imposes upon beneficiaries the burden of attempting to remove the trustee for improper behavior while not having access to trust funds to assist them in this litigation process.

A. Model Legislation

To remedy this injustice in the context of trust litigation, state legislatures should enact the Beneficiary Pretrial Relief Act (the "Act") as part of their state trust or probate codes.

Beneficiary Pretrial Relief Act

A. In a suit by a beneficiary against his trustee for breach of fiduciary duty, the beneficiary may, upon filing a timely motion before the court and upon providing the trustee or the trustee's agent with timely notice

90. Then-Judge Cardozo resolved the issue of attorney's fees as follows:

The question remains whether the services were beneficial in the preservation of the trust. We have no doubt that they were. Mr. Smith had been named in the will as a trustee. He owed a duty to the estate to stand his ground against unjust attack. He resisted an attempt to wrest the administration of the trust from one selected by the testator and to place it in strange hands.

Id.

91. See *Weidlich v. Comley*, 267 F.2d 133, 134 (2d Cir. 1959) (finding that trustee cannot be forced to personally fund litigation against unsuccessful and unjustified attack); *Saulsbury v. Denton Nat'l Bank*, 335 A.2d 199, 202 (Md. Ct. Spec. App. 1975) ("To compel [a trustee] to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement to his acceptance of the burden of his duties." (quoting *Weidlich*, 267 F.2d at 134)); see also *Gordon v. Guernsey*, 55 N.E.2d 27, 29 (Mass. 1944) ("[A] trustee is entitled to look to the trust fund for the reasonable cost of making a successful defense against charges of maladministration brought against him without fault on his part."); *In re Bishop's Will*, 95 N.E.2d 817 (N.Y. 1950) (upholding payment of attorney's fees incurred by trustee's in successfully defending action brought by beneficiaries).

92. See *supra* Part II.A.

93. See *supra* notes 46-50 and accompanying text.

94. See *supra* notes 55-56 and accompanying text.

of their motion, require the court of appropriate jurisdiction to order the trustee to release funds from the trust assets in dispute as a means of assisting the beneficiary in paying for pretrial accounting costs **if and only if:**

1. The court finds that the trustee has failed to provide an adequate accounting upon which the beneficiary could reasonably rely for litigation purposes;

2. The court finds that the cost of the beneficiary's accounting is reasonably related to the value and complexity of the trust;

3. The beneficiary demonstrates that all beneficiaries agree to the use of trust assets for any purpose under this statute; **AND**

4. The beneficiary presents a method of repayment for reimbursing the trust for these costs should the court later order the beneficiary to reimburse the trust.

B. If the beneficiary has retained counsel on a contingent fee basis, the beneficiary must satisfy the court that:

1. The contingent fee agreement expressly provides that the attorney reserves the right to petition the court for assistance with pretrial accounting costs; **AND**

2. That the attorney or attorneys for the beneficiary would face serious financial difficulty if forced to shoulder the costs of these pretrial accounting fees individually.

C. Nothing in this statute should be interpreted to negate or diminish the trustee's fundamental duty to keep clear and accurate accounts and to render an accounting within a reasonable time when any beneficiary requests such accounting.

D. This statute is meant to advance costs of conducting an accounting of the trust in anticipation of litigation. The language of the statute should in no way be interpreted to apply to any other pretrial expense outside of accounting costs.

B. Commentary on the Beneficiary Pretrial Relief Act

The Act assists beneficiaries by funding the expense of pretrial accounting costs. To prevent misuse of the Act, a beneficiary must satisfy several qualifications before a court will order pretrial disposition of trust funds to pay these costs. First, the beneficiary must prove to the court that the trustee has not provided an adequate accounting for use in litigation.⁹⁵ The

95. The purpose of the Act is to provide beneficiaries with the accounting to which they are

beneficiary must then demonstrate that the cost of accounting is reasonable in relation to the value and complexity of the trust.⁹⁶ If a beneficiary is represented by an attorney on a contingent fee basis, the beneficiary must show that the contingent fee agreement reserves the right to petition the court for assistance in paying pretrial accounting costs. In order for the court to release trust funds to pay for the pretrial accounting, all beneficiaries must consent. In addition, the beneficiary's attorneys must demonstrate their inability to shoulder the costs of the pretrial accounting. Finally, the beneficiary must present the court with a method of repayment of the costs should the litigation prove unsuccessful, unnecessary, or wasteful.⁹⁷

Numerous reasons support the proposition that recovery under the statute is limited to pretrial accounting costs. First, the trustee's duty to account for trust assets and the beneficiary's right to request such an accounting provides a basis for this limitation.⁹⁸ When a trustee fails to provide an adequate accounting, the law should allow the beneficiary to procure his own accounting at the expense of the trust.

Second, the Act preserves the validity of contingent fee agreements. Under this proposal, the beneficiary's attorney will not be entitled to double recovery: payment of all pretrial costs plus a large percentage of any

entitled by law. A needless expenditure of funds from the trust estate would result if the rule extended to cases where the court holds that the accounting provided by the trustee is sufficient. Of course, the beneficiary is not barred from securing an independent accounting of the trust prior to trial in those cases in which the trustee's accounting is sufficient, but the trust would not fund that sort of accounting under the statute.

96. The reasonableness of the accounting costs would rest within the sound discretion of the court. This deference to the trial court is similar to the award of attorney's fees for trust litigation at the conclusion of trial in most states. But the basis for this provision is to prevent beneficiaries from receiving trust funds that exceed the cost of a reasonable accounting. The excess money would likely go toward funding other aspects of the litigation. The Act provides financial assistance only for accounting costs because beneficiaries have a fundamental right to a complete accounting.

97. The reasonableness of the beneficiary's proposed plan for repayment should litigation prove unsuccessful rests with the court. Furthermore, the court's decision to award pretrial accounting costs under the Act is subject to reversal on appeal only if the appellate court finds a clear abuse of discretion. This element of the Act conforms with the court's reasoning in *Pollock v. Manufacturers' & Traders' Trust Co.*, 276 N.Y.S. 363 (N.Y. Sup. Ct. 1934), in which the court forbade a beneficiary from compelling an expensive accounting that the other beneficiaries did not desire unless the beneficiary indemnified the estate. See also *supra* notes 49-53 and accompanying text. The Beneficiaries Pretrial Relief Act attempts to provide the beneficiary with some flexibility as to how he would pay back the costs of an unnecessary accounting by allowing the beneficiary to present his own method of repayment. This element of the Act also serves to discourage use of the Act by a beneficiary who does not truly believe that his claim against the trustee is meritorious.

98. See *supra* Part II.A. While recovery of accounting costs will provide some relief to a beneficiary's attorney, it will not relieve the attorney of all of the financial pressures and incentives that are typically associated with contingent fee arrangements. Thus, the statute does not disturb the integrity of contingent fee arrangements in that an attorney representing a client under these fee arrangements will still be motivated to provide his client with ardent representation.

damages from a jury verdict. When a beneficiary retains an attorney on a contingent fee basis, the Act mandates that the language of the fee agreement specifically allow for the attorney to make a motion for pretrial relief under the Act. This provision limits the application of the Act and creates fewer opportunities for abuse. More importantly, these attorneys, particularly those working in small law firms, would receive much needed relief from shouldering the entire cost of expensive litigation.

Third, all beneficiaries must agree to the pretrial dispersal of trust funds. This provision increases the likelihood that the request for an accounting is legitimate. It also prevents the complications that could arise in apportioning the costs of the accounting among the beneficiaries that agree to the request for assistance in funding the pretrial accounting.

Finally, the Act provides an incentive for a trustee to fulfill her fiduciary duty to keep clear and accurate records. If a trustee knows that her failure to fulfill her fiduciary accounting duties could result in the use of trust assets to investigate the trustee's accounting practices for litigation purposes, it is likely that the trustee will attempt to meet her duties instead of subjecting herself to litigation.

V. CONCLUSION

Litigation between trustees and beneficiaries often pits family members against each other in contests over the most sensitive of issues: the control and disposition of money. A beneficiary has certain rights to the assets of the trust while the trustee must do whatever she perceives to be in the best interest of the trust. When a beneficiary believes that the trustee has breached her fiduciary duties, the beneficiary can seek relief from the courts if he is willing to pursue expensive and time-consuming litigation. Currently, the deck is stacked against the beneficiary in suits against the trustee for breach of fiduciary duty because the beneficiary often lacks funds, while the trustee can use the trust funds to finance her defense.

The Beneficiary Pretrial Relief Act would provide beneficiaries and their attorneys with much needed financial assistance for the limited purpose of conducting a thorough investigation of the accounting of the trust prior to trial. If enacted, this Act could increase the likelihood that a trustee will actively fulfill her fiduciary duties to the beneficiaries. The Beneficiary Pretrial Relief Act may provide much needed equity for litigation surrounding the most equitable of institutions: the trust.

Benjamin G. Carter