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ATTORNEY'S FEES IN JUDICIAL PROCEEDINGS INVOLVING TRUSTS, ESTATES, AND PROTECTED PERSONS: WHEN IS AN AWARD JUST AND EQUITABLE?

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I. INTRODUCTION

Effective January 1, 2006, the South Carolina General Assembly enacted the South Carolina Trust Code (SCTC), which includes a section authorizing a court to award attorney's fees and costs to any party in a judicial proceeding involving the administration of a trust "as justice and equity may require."[1] Similarly, effective January 1, 2014, the General Assembly revised the existing South Carolina Probate Code (SCPC) to include a parallel provision authorizing courts to award attorney's fees and costs to any party in a formal proceeding commenced in the probate court "as justice and equity may require."[2] Lastly, effective January 1, 2019, the General Assembly added to and revised individual provisions of the SCPC that deal specifically with formal proceedings involving "protected persons," such as minors or incapacitated persons, so as to better authorize a court to award attorney's fees and costs "as justice and equity may require."[3]

These statutes provide little guidance in determining when "justice and equity may require" an award of fees and costs.[4] Although scant case law

1. S.C. CODE ANN. § 62-7-1004 (2009). The entire section provides: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." *Id.*

2. *Id.* § 62-1-111; *id.* rptr.'s cmt. (referring to § 62-7-1004 as a "similar provision"). Section 62-1-111 states: "In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy."

3. *Id.* § 62-5-105; *id.* rptr.'s cmt.; *id.* § 62-5-105(A) ("In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the assets of the ward or protected person who is the subject of the controversy."). The statute further mandates that certain court-appointed personnel (guardians ad litem and designated examiners), as well as counsel for the alleged incapacitated person or minor, "are entitled to reasonable compensation" unless "otherwise compensated for services rendered." *Id.* § 62-5-105(B). The statute also creates a default rule or presumption that "petitioners [in such proceedings] are responsible for their own attorney's fees and costs, as well as the other costs and expenses of the action[,]" unless "the court issues an order stating otherwise." *Id.* § 62-5-105(C). The Reporter's Comments to this section explicate that "[t]his section, consistent with South Carolina case law, clarifies that the petitioner is responsible for his own fees and costs in an action, unless there is a contractual agreement dictating who pays or there is a court order stating who is responsible for payment." *Id.* § 62-5-105 rptr.'s cmt.

4. *See id.* § 62-7-1004.

exists in South Carolina interpreting or applying these provisions, all three are patterned after § 1004 of the Uniform Trust Code (UTC).[5] UTC § 1004 is an exception to the well-known "American Rule," which provides that parties are generally responsible for payment of their own attorney's fees, regardless of the outcome of the litigation.[6] The Comment to § 1004 notes that the provision is based on Massachusetts General Laws Chapter 215, § 45 (§ 45), which traces back to 1783 and "codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity."[7]

The "justice and equity" standard clearly grants courts considerable discretion and flexibility in addressing the issue of attorney's fees and costs.[8] However, because the standard is amorphous, this Article observes that uncertainty and misapprehension exist among the South Carolina bench and bar regarding the circumstances in which courts may or should award attorney's fees and costs under these statutes.

Fortunately, numerous states outside of South Carolina have adopted UTC § 1004 either verbatim or with slight modifications. The SCPC and SCTC both mandate that courts shall construe these statutes to promote uniformity of the law among the various jurisdictions that have enacted the uniform provisions.[9] As a result, decisions from other states that have adopted UTC § 1004 are especially persuasive.[10] Because a considerable body of case

5. UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018) ("In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.").

6. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); *see* Dowaliby v. Chambless, 344 S.C. 558, 563, 544 S.E.2d 646, 648 (Ct. App. 2001).

7. UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018). Because the drafters' intent of a uniform law becomes the legislative intent upon enactment, courts may resort to the Reporter's Notes to aid in interpreting the state law. *See In re* Butler, 552 N.W.2d 226, 231 (Minn. 1996); Hodges v. Johnson, 177 A.3d 86, 93 (N.H. 2017); Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc., 320 S.C. 113, 120 n.7, 463 S.E.2d 600, 604 n.7 (1995); Lite House, Inc. v. J.C. Roy Co., Inc., 309 S.C. 50, 53, 419 S.E.2d 817, 819 (Ct. App. 1992).

8. *See* UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018).

9. S.C. CODE ANN. § 62-1-102(a), (b)(5) (2009); *id.* § 62-7-1101.

10. *See In re* Est. of Zimmerman, 633 N.W.2d 594, 599 (N.D. 2001) ("We interpret uniform laws in a uniform manner, and we may seek guidance from decisions in other states which have interpreted similar provisions in a uniform law. We also may look to the Editorial Board Comments of the Uniform Probate Code to interpret its provisions."); Savig v. First Nat'l Bank of Omaha, 781 N.W.2d 335, 346 (Minn. 2010) ("If possible, we should construe the Minnesota . . . [statute] consistently with courts from other jurisdictions that have faced the same issue under the Uniform Probate Code. . . . '[W]e give great weight to other states' interpretations of a uniform law.'" (quoting Johnson v. Murray, 648 N.W.2d 664, 670 (Minn. 2002))); *see also* Hoover v. Hoover, 271 S.C. 177, 182, 246 S.E.2d 179, 181 (1978) (finding "[i]n accord with the directive [in the Uniform Reciprocal Enforcement of Support Act that it]

law has developed in states with statutes nearly identical to South Carolina's provisions,[11] these decisions provide useful guidance to courts and practitioners grappling with requests for attorney's fees and costs under the SCTC and SCPC. Additionally, given the fact that UTC § 1004 is the offspring of § 45, nearly 250 years of judicial decisions interpreting the time-tested Massachusetts statute provide another source of guidance in applying the SCPC and SCTC provisions.[12]

II. NECESSITY OF A JUDICIAL PROCEEDING

As a threshold consideration, § 62-7-1004 of the South Carolina Code expressly applies to a "judicial proceeding involving the administration of a trust" and §§ 62-5-105 and 62-1-111 expressly apply to a "formal proceeding" commenced in the probate court.[13] Therefore, an application for attorney's fees and costs must originate in a judicial proceeding. As such, the terms "costs," "expenses," and "reasonable attorney's fees" must be incurred or generated in this context.[14]

The SCTC does not define a judicial proceeding "involving the administration of a trust."[15] A Utah district court in *In re Peeples* addressed this question while applying a Utah statute nearly identical to § 62-7-1004.[16] In the absence of a statutory definition of the phrase "trust administration," the court resorted to a dictionary definition stating: "'Administration' is variously defined as 'the management and disposal under court authority of

'be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it,'" the South Carolina Supreme Court "follow[ed] the courts of our sister states" in interpreting the statute).

11. *See, e.g.*, MO. ANN. STAT. § 456.10-1004 (West, Westlaw through 2020 1st Extraordinary Sess. of 100th General Assemb.); UTAH CODE ANN. § 75-7-1004(1) (West, Westlaw through 2020 5th Spec. Sess.); VA. CODE ANN. § 64.2-795 (West, Westlaw through end of 2020 Reg. Sess.).

12. *See* MASS. GEN. LAWS ANN. ch. 215, § 45 (West, Westlaw through ch. 129 of the 2020 2d Ann. Sess.); *see also* UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018).

13. A "formal proceeding" for purposes of the SCPC means an "action[] commenced by the filing of a summons and petition with the probate court and service of the summons and petition upon the interested persons." S.C. CODE ANN. § 62-1-201(17) (2009).

14. Atwood v. Atwood, 25 P.3d 936, 947 (Okla. Civ. App. 2001).

15. Section 62-7-1004 of the SCTC presupposes the existence of a "trust," thus its provisions do not apply if no trust is involved. *See* S.C. CODE ANN. § 62-7-1004; *In re* Lazarevic, No. 11-10585, 2013 WL 3934010, at *21 (Bankr. E.D. Tenn. July 29, 2013).

16. 566 B.R. 68, 78 (D. Utah 2017) (citing O'Keefe v. Utah State Ret. Bd., 956 P.2d 279, 281 (Utah 1998)), *aff'd in part, vacated in part, remanded sub nom.* 880 F.3d 1207 (10th Cir. 2018).

the estate of a deceased person,' 'the management of an estate,' and 'the management of assets held in a trust.'"[17]

In *Warren v. Yarborough*, the South Carolina Court of Appeals likewise held that the probate court properly ordered one party to personally pay the other parties' attorney's fees and costs pursuant to § 62-7-1004.[18] This determination was due to the first party's "breaches of trust" involving a testamentary trust created under a will, and thus such a proceeding was deemed a "judicial proceeding involving the administration of a trust."[19] However, judicial proceedings involving the administration of a trust are not limited to claims alleging a breach of trust.[20]

Courts have also held that a "judicial proceeding involving the administration of a trust" encompasses, among other claims: a trustee's action for instructions regarding any trust administration matter;[21] a suit seeking an order directing trustees to pay income from a trust;[22] an action to set aside trust amendments;[23] a petition to remove trustees and to obtain an accounting;[24] an action to approve trust accountings or to resolve beneficiary objections thereto;[25] a suit challenging the conveyance of real property to a beneficiary co-trustee;[26] a suit seeking the construction of a trust instrument;[27] trust beneficiaries' claims challenging a trustee's right to resign;[28] an action to determine whether a bank designated as successor trustee accepted the trusteeship and should be required to perform an accounting;[29] trust beneficiaries' claims against a trustee for breaches of its duty of loyalty and fiduciary duty;[30] a trust beneficiary's suit alleging violation of trust terms and

17. *Id.* at 78; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 271 cmt. a, 272 cmt. a (AM. L. INST. 1971) (discussing what are considered matters of trust administration).

18. No. 2012-UP-401, 2012 WL 10860503, at *2 (S.C. Ct. App. July 11, 2012).

19. *Id.*; *see also* Kutten v. Bank of Am., N.A., Civ Nos. 4:04-0244, 4:06-0927, 2008 WL 4838152, at *3 (E.D. Mo. Nov. 6, 2008) (alleging a corporate trustee's self-dealing involving the transfer of trust assets "clearly involve[ed] the administration of a trust").

20. Corr v. Smith, 178 P.3d 859, 865 (Okla. 2008), *abrogated by* Russell v. Chase Inv. Servs. Corp., 212 P.3d 1178 (Okla. 2009); *see* Margaret Blair Tr. v. Blair, 378 P.3d 65, 80 (Okla. Ct. App. 2016).

21. *See* Taylor v. Woods, 282 S.W.3d 285, 295 (Ark. Ct. App. 2008).

22. Garwood v. Garwood, 233 P.3d 977, 985 (Wyo. 2010).

23. *See Corr*, 178 P.3d at 863.

24. *In re* Rayola A. Banfield Irrevocable Tr., Nos. 321204, 325422, 325423, 2016 WL 3020798, at *15 (Mich. Ct. App. May 24, 2016).

25. Burns v. Burns Rhine, No. 15-CV-02329, 2016 WL 6679807, at *3 (N.D. Cal. Nov. 14, 2016); *In re* Thomas H. Gentry Revocable Tr., No. 29727, 2013 WL 376083, at *7 (Haw. Ct. App. Jan. 31, 2013).

26. Calvert v. Est. of Calvert, 259 S.W.3d 456, 458 (Ark. Ct. App. 2007).

27. Taylor v. Woods, 282 S.W.3d 285, 295 (Ark. Ct. App. 2008).

28. SunTrust Bank v. Little, No. 2015 LIT 000019, 2018 WL 9963694, at *4 (D.C. Super. Ct. Apr. 24, 2018).

29. *In re* Hamilton Living Tr., 471 S.W.3d 203, 209 (Ark. 2015).

30. *Little*, 2018 WL 9963694, at *4.

misappropriation of trust assets;[31] and a trust beneficiary's declaratory judgment action to determine the scope and effect of an *in terrorem* provision in a trust agreement and whether certain claims trigger or violate the provision.[32]

In holding that the former fiduciary of James Brown's estate and irrevocable trust was not entitled to attorney's fees and costs under § 62-7-1004, the trial judge in *Bauknight v. Pope* was "not persuaded" that the breach of fiduciary claims filed by alleged beneficiaries against the former fiduciary for her "alleged actions or inactions . . . during her period of administration" or the counterclaims filed by the former fiduciary constituted "a judicial proceeding involving the administration of a trust."[33] The trial judge held that "the action ha[d] nothing to do with the actual administration of a trust" and "[n]o decision in th[e] action [would] effect, change, or guide the administration of the Brown Trust and Estate."[34] Apparently, the judge based his ruling on the fee applicant's status.[35] The court previously removed the fiduciary from her positions for cause; thus, she was a former personal representative and former trustee.[36] In light of the fact that the litigation concerned the propriety of a former fiduciary's conduct during her period of administration, the *Bauknight* case took an unduly narrow view of when exactly judicial proceedings involve the administration of the trust.[37]

III. TRIPARTITE INQUIRY

Courts have observed that the "highly subjective phrase 'justice and equity' does not state specific guidelines or criteria for use by a trial court or for use by a reviewing court[,]" and the "phrase connotes fairness and invites

31. Reed v. Smith, 551 S.W.3d 407, 412 (Ark. 2018).

32. State *ex rel.* Bank of Am. N.A. v. Kanatzar, 413 S.W.3d 22, 27–28 (Mo. Ct. App. 2013).

33. No. 2010CP4004900, 2017 WL 4100144, at *8 (S.C. Ct. C.P. July 8, 2017).

34. *Id.*

35. *See id.* (noting Mrs. Pope's actions or inactions during her period of administration has nothing to do with the actual administration of a trust).

36. *Id.*

37. *See generally id.* Courts have held that a trustee can be entitled to reimbursement or indemnification from the trust for attorney's fees and expenses which the trustee incurred in defending their administration of the trust even though the trustee was no longer a trustee by the time the lawsuit was brought against them or the award was made. *See* Morrison v. Watkins, 889 P.2d 140, 150 (Kan. Ct. App. 1995) ("A trustee should be able to recover expenses regardless of whether the trustee was sitting at the time the suit was instigated as long as the reason for the suit was an action which occurred while the trustee was a trustee."); Ladd v. Stockham, 209 So. 3d 457, 474 (Ala. 2016); Kasperbauer v. Fairfield, 88 Cal. Rptr. 3d 494, 499 (Ct. App. 2009) (rejecting the argument that trust assets cannot be used to compensate a trustee's attorneys after the trustee is discharged).

flexibility in order to arrive at what is fair on a case by case basis."[38] The fee statutes based on UTC § 1004 are discretionary statutes—they involve a permissive rather than mandatory statutory right.[39] Therefore, the statutory right to payment or reimbursement of fees and costs is equitable in nature and not absolute; in exercising its discretion, a court "need not adhere to a rigid analysis."[40]

Many courts outline the "justice and equity" standard as encompassing two separate determinations: the initial determination of whether a party is entitled to recover fees and expenses and, if so, the secondary determination of the size of the award.[41] Thus, those courts typically employ a two-part inquiry.[42] First, the court must look to the statute itself to determine whether a party is entitled to an award of attorney's fees and costs.[43] Second, if an award of fees and costs is statutorily justified, the court must determine a reasonable amount.[44] The role of "justice and equity" in the first phase of the inquiry is distinct from its role in the second phase.[45]

Although courts have mostly described the "justice and equity" analysis as a two-step process, it is more accurate to say it includes a third step.[46] Specifically, if an award of fees and costs is statutorily justified and the amount is deemed reasonable, the court must also decide *who* or *what* should bear the burden of paying the attorney's fees and costs—one or more of the

38. Atwood v. Atwood, 25 P.3d 936, 947 (Okla. Civ. App. 2001); *see also In re* Est. of Philip Roseman, No. M2019-00218-COA-R3-CV, 2019 WL 5078722, at *4 (Tenn. Ct. App. Oct. 10, 2019) ("The determination of what constitutes justice and equity is a case-by-case determination, based on the facts and presentation of evidence.").

39. Lehmann v. Bank of Am., N.A., 427 S.W.3d 315, 324 (Mo. Ct. App. 2014); Peppers Cemetery Found. v. McKinney, 455 S.W.3d 465, 470 (Mo. Ct. App. 2015); Copeland v. Kramarck, No. 294-N, 2006 WL 3740617, at *4 (Del. Ch. Dec. 11, 2006); Berlinsky v. Berlinsky, Nos. 2019-CP-10-1235, 2013-GC-10-0150, 2019 WL 7212469, at *8 (S.C. Ct. C.P. Dec. 20, 2019); *see also* Barboza v. McLeod, 853 N.E.2d 192, 199 n.6 (Mass. 2006) (holding that an award of attorney's fees under MASS. GEN. LAWS ANN. ch. 215, § 45 (West, Westlaw through ch. 129 of the 2020 2d Ann. Sess.) is a matter of discretion, not a matter of right).

40. Jelletich v. Pawlaksi, No. 5:14-CV-00017, 2015 WL 1249673, at *4 (W.D. Ky. Mar. 18, 2015); Young v. Young, No. CA08-212, 2008 WL 5176763, at *8 (Ark. Ct. App. Dec. 10, 2008) (citing Meyer v. CDI Contractors, LLC, 284 S.W.3d 530 (Ark. Ct. App. 2008)); Fisher v. Fisher, 221 P.3d 845, 852 (Utah Ct. App. 2009).

41. *See, e.g.*, *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 491 (Iowa 2013) (citing *Atwood*, 25 P.3d at 940, 945–47); *see also Atwood*, 25 P.3d at 947; Cooper v. Jordan, No. 14-0157, 2015 WL 1815996, at *4 (Iowa Ct. App. Apr. 22, 2015) (citing *Trimble*, 826 N.W.2d at 491); Skyline Potato Co., Inc. v. Hi-Land Potato Co., 188 F. Supp. 3d 1097, 1152 (D.N.M. 2016).

42. *See, e.g.*, *Trimble*, 826 N.W.2d at 491 (citing *Atwood*, 25 P.3d at 940, 945–47).

43. *Id.*

44. *Id.*

45. *Atwood*, 25 P.3d at 947.

46. *See* Yerian v. Houska, No. 2016 CV 073, 2018 WL 3879071, at *4 (Ohio Ct. C.P. July 24, 2018).

parties to the litigation, the trust or estate that is the subject of the controversy, or some combination of both.[47] The source of the payment can often be a critical consideration because its resolution not only affects the immediate parties to the proceeding but also individuals who may not have participated in the litigation but who otherwise have interests in the trust or estate, such as current and future beneficiaries.[48]

These separate steps in the tripartite analysis—(1) entitlement, (2) amount, and (3) source of payment—are discussed in detail in the succeeding sections of this Article.

A. Determining Entitlement

Statutes based on UTC § 1004 grant the court "broad discretion"[49] to determine whether "any party" to the judicial proceeding is entitled to attorney's fees and costs.[50] These statutes do not provide "specific guidelines or criteria" for trial courts to use in making awards of fees and costs.[51]

In *Atwood v. Atwood*, the Oklahoma Court of Appeals applied an Oklahoma statute substantially similar to § 62-7-1004[52] and distilled general criteria from other cases to identify five non-exclusive or non-exhaustive

47. *See infra* Part III.C; *see also Yerian*, 2018 WL 3879071, at *3 ("The Court must first decide whether . . . an award of fees should be made to [the trust beneficiaries] pursuant to [Ohio's version of § 1004]. Next, if an award is to be made to [the beneficiaries], the amount of fees to be awarded, and finally whether fees should be assessed against [the trustee] or the trust."); Kevin M. Henry, *Attorney Fee Awards in Litigation Between Trustees and Beneficiaries*, 39 VT. BAR J. 19, 20 n.17 (Summer 2013) (noting that the justice and equity analysis also includes "the question of who pays—the trust or the parties").

48. *See* Cohen v. Minneapolis Jewish Fed'n, 346 F. Supp. 3d 1274, 1287 (W.D. Wis. 2018) ("The bigger dispute is over the source of the funds for paying the fees."), *aff'd*, 776 F. App'x 912 (7th Cir. 2019).

49. *See In re* Caswell Silver Family Tr., No. CV 10-934, 2012 WL 13013061, at *3 (D.N.M. Jan. 5, 2012).

50. S.C. CODE ANN. §§ 62-1-111, -5-105, -7-1004 (2009). The terms of the statutes make clear that the award is made to the party, not to their lawyer. *Id.*; *see also* Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997) ("The award of attorney's fees is made to the party, not his lawyer." (citing Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990))).

51. *See* Ragsdale v. Fishler, No. 20180993, 2020 WL 4519160, at *11 (Utah Aug. 5, 2020) (quoting Shurtleff v. United Effort Plan Tr., 289 P.3d 408, 415 (Utah 2012)).

52. OKLA. STAT. ANN. tit. 60, § 175.57(D) (West, Westlaw through Sept. 1, 2020 of the 2d Reg. Sess. of 57th Leg. (2020)) ("In a judicial proceeding involving a trust, the court may in its discretion, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust which is the subject of the controversy.").

factors that help resolve the first part of the tripartite inquiry.[53] These criteria, which case law often refers to as the "*Atwood* factors," include: (1) reasonableness of the parties' claims, contentions, or defenses; (2) unnecessarily prolonging litigation; (3) relative ability to bear the financial burden; (4) result obtained by the litigation and prevailing party concepts; and (5) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation.[54]

Following *Atwood*, numerous other courts have adopted these non-exclusive factors when applying fee statutes based on UTC § 1004.[55] In applying the last factor, at least one court has expanded the analysis to consider a party's "behavior both before and during the litigation."[56] These factors are used only in determining the first prong of the three-part analysis—i.e., the entitlement prong.[57]

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53. Atwood v. Atwood, 25 P.3d 936, 947 (Okla. Ct. App. 2001) ("In a judicial proceeding involving a trust, the court may in its discretion, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust which is the subject of the controversy.").

54. *Id.*

55. *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 491 (Iowa 2013) (adopting *Atwood* criteria); Skyline Potato Co., Inc. v. Hi-Land Potato Co., 188 F. Supp. 3d 1097, 1152 (D.N.M. 2016) (citing *Atwood*, 25 P.3d at 947); Cooper v. Jordan, No. 14-0157, 2015 WL 1815996, at *4 (Iowa Ct. App. Apr. 22, 2015) (citing *Atwood*, 25 P.3d at 947); Shriners Hosps. for Child. v. First N. Bank of Wyo., 373 P.3d 392, 418 (Wyo. 2016) (citing *Atwood*, 25 P.3d at 947); Garwood v. Garwood, 233 P.3d 977, 986 (Wyo. 2010) (citing *Atwood*, 25 P.3d at 947); Shurtleff v. United Effort Plan Tr., 289 P.3d 408, 415–16 (Utah 2012) (citing *Atwood*, 25 P.3d at 947); Kerr v. UMB Bank, N.A., No. CIV-06-95-C, 2008 WL 822055, at *1 (W.D. Okla. Mar. 26, 2008) (citing *Atwood*, 25 P.3d at 947); Busse v. Busse, No. LACV083022, 2017 WL 8314911, at *5 (Iowa Dist. Ct. Sept. 6, 2017) (citing *Atwood*, 25 P.3d at 947); Slezak v. Matherly, No. LACL138325, 2020 WL 1275561, at *22 (Iowa Dist. Ct. Feb. 7, 2020) (citing *Atwood*, 25 P.3d at 947); *In re* Est. of Blackburn v. Richards, 299 So. 3d 781, 792 (Miss. Aug. 13, 2020) (citing *Atwood*, 25 P.3d at 947); *see also Ragsdale*, 2020 WL 4519160 at *10–11 (holding *Atwood* factors should apply when evaluating fee requests under any statute that provides discretion to award fees but no guidance on how to do so). *See generally* Henry, *supra* note 47, at 20 (observing that the *Atwood* factors have been well received and appear to be the preferred criteria to apply in § 1004's justice and equity analysis). *But see* Hodges v. Johnson, No. 2019-0319, 2020 WL 5648573, at *11 (N.H. Sept. 23, 2020) (declining to adopt the *Atwood* factors in the absence of legislative direction to do so because the court did not want to "cabin the broad discretion the statute grants trial courts by requiring them to consider pre-determined factors to decide 'what is fair' in any particular case." (citations omitted)).

56. *See, e.g.*, *In re* Alice Stedman 1989 Tr. 2013 Restatement, No. 2017-0288, 2018 WL 3862925, at *3 (N.H. Aug. 15, 2018).

57. *See* W.A.K., II *ex rel.* Karo v. Wachovia Bank, N.A., No. 3:09CV575, 2010 WL 3074393, at *6 n.2 (E.D. Va. Aug. 5, 2010) ("W.A.K. argues that the amount of fees recoverable from the Trust can be set using equitable considerations, focusing on statute's use of the phrase 'as justice and equity may require.' The Court finds that under a plain reading of the statute, equity is only a factor as to whether fees are awarded from a trust. If awarded, the amount of fees recoverable is guided by a reasonableness determination."); *Shurtleff*, 289 P.3d at 416

In addition to the *Atwood* factors, courts have also considered whether an award of fees and costs would deter misconduct or minimize access to the courts.[58] The court in *In re Estate of Forgey*, for example, still ordered a prevailing trustee to pay the beneficiaries' fees and costs because he failed to timely report and inform the beneficiaries about the trust's administration until litigation was filed against him.[59] The court explained: "[I]f we do not impose a penalty such as attorney fees in the instant case, then future trustees may believe that the statutory requirement to report has no significance."[60] However, the fact that a party has violated some trust or estate obligation does not impose "strict liability" for the other party's attorney's fees.[61] The court's discretion in awarding fees is also not limited to instances where such a "penalty" or punishment is warranted.[62]

In *Hemphill v. Shore*, a trust beneficiary unsuccessfully sued the trustee for committing constructive fraud in liquidating a family trust and distributing the assets to himself.[63] In reversing an award of attorney's fees against the beneficiary under Kansas's version of UTC § 1004, the Kansas Court of Appeals noted that because the beneficiary's lawsuit was not frivolous, awarding fees under the circumstances of the case "would have a chilling effect on those persons seeking access to the courts to seek a legal remedy to

("[Non-exclusive factors] refer only to the analysis of what is considered just and equitable, as opposed to the separate analysis regarding the amount of fees awarded.").

58. *See, e.g.*, Hemphill v. Shore, 342 P.3d 2, 6 (Kan. Ct. App. 2015).

59. 906 N.W.2d 618, 640 (Neb. 2018).

60 *Id.* at 639; *see also In re* Rolf H. Brennemann Testamentary Tr., 849 N.W.2d 458, 468 (Neb. 2014) (remanding to trial court the issue of whether beneficiary was entitled to award of attorney's fees when for decades trustees had breached their duty to inform and report and were unable to properly account to beneficiary because they failed to properly maintain trust records; even though the trustees' conduct ultimately did not harm the beneficiary or the trust, that became clear only after litigation was made necessary by the trustees' breach of their duties); *In re* Hamilton Living Tr., 471 S.W.3d 203, 209 (Ark. 2015) (affirming award of attorney's fees and costs against a corporate trustee and observing that "[h]ad the [trustee] performed the accounting, no fees would be necessary"); Ughetta v. Cist, No. 7885-MA, 2015 WL 3430094, at *13 (Del. Ch. May 29, 2015), *adopted sub nom.* Ughetta v. Mary Harding Cist, No. 7885-MA, 2016 WL 4129059 (Del. Ch. Aug. 3, 2016) (declining to require trust beneficiary to pay trustee's attorney's fees and costs despite rejection of beneficiary's request for accounting and removal of the trustee when trustee had excluded the beneficiary from numerous meetings, discussions, and correspondence concerning the trust); *Kerr*, 2008 WL 822055, at *2 (repeating failure by corporate trustee to respond to plaintiffs' remainder beneficiaries' requests for information about distributions to income beneficiary, although justified, was reason to require trusts, rather than plaintiffs in unsuccessful lawsuit challenging distributions, to pay trustee's attorney's fees when failure to respond had "boxed Plaintiffs into the proverbial corner" and precipitated the lawsuit).

61. Fisher v. Fisher, 221 P.3d 845, 852 (Utah Ct. App. 2009).

62. Peppers Cemetery Found. v. McKinney, 455 S.W.3d 465, 470 (Mo. Ct. App. 2015) (quoting Rouner v. Wise, 446 S.W.3d 242, 260 (Mo. 2014)).

63. No. 110,166, 2015 WL 423795, at *1 (Kan. Ct. App. Jan. 23, 2015).

justifiable claims."[64] Similarly, in a Connecticut case, the trial court considered whether the refusal to award attorney's fees to the trust beneficiary would discourage other parties from defending or pursuing declaratory remedy actions adjudicating their rights.[65]

Strictly speaking, fee statutes based on UTC § 1004 are not "prevailing party" statutes.[66] In fact, South Carolina's statutes based on UTC § 1004 expressly grant courts the discretion to award or deny fees and costs "to *any* party."[67] The words "prevailing party" do not appear in the statutes.[68] The mere fact that a party prevailed in a judicial proceeding covered by the statutes does not per se entitle the party to an award of fees and costs.[69] Conversely, a party does not have to be a "prevailing party" in order to recover under these statutes.[70]

Nonetheless, in deciding whether to award fees, courts have given "considerable weight" to the outcome of the litigation.[71] The court's primary concern is determining which party, if any, prevailed on the merits of the case

64. *Id.* at *6; *see also* Ragsdale v. Fishler, No. 20180993, 2020 WL 4519160, at *11 (Utah Aug. 5, 2020) (stating that in making an award of statutory fees utilizing the *Atwood* factors courts "should pause before awarding a respondent fees when a petition has some merit" because "[t]his may chill future petitions—an outcome that strikes us as contrary to the statute's purpose").

65. Ferri v. Powell-Ferri, No. MMXCV116006351, 2014 WL 3397927, at *5 (Conn. Super. Ct. June 5, 2014).

66. *See* S.C. CODE ANN. §§ 62-1-111, -5-105, -7-1004 (2009).

67. *Id.* (emphasis added).

68. *Id.*

69. Skyline Potato Co., Inc. v. Hi-Land Potato Co., 188 F. Supp. 3d 1097, 1161 (D.N.M. 2016) ("[Claimants'] status as prevailing parties does not, alone, entitle them to the award of attorney's fees."). In affirming the denial of a trustee's request for an award of attorney's fees and costs incurred against the trust settlor's estate's suit to terminate or modify the trust and to set aside a transfer of real estate from the settlor to the trust, the Tennessee Court of Appeals emphasized the trial court's discretion under a statute identical to § 62-7-1004. *In re* Est. of Philip Roseman, No. M2019-00218-COA-R3-CV, 2019 WL 5078722, at *5 (Tenn. Ct. App. Oct. 10, 2019). The court further rejected the trustee's arguments that the trust should not be diminished in value because the trustee was required to defend against the estate's lawsuits "that yielded the same results that would have occurred had the lawsuits not be[en] filed," despite the trustee's assertion that "it would be an injustice to the beneficiaries of the Trust to assess the fees to the Trust." *Id.*

70. *See In re* Gene Wild Revocable Tr., 299 S.W.3d 767, 783 (Mo. Ct. App. 2009); *see also* Hachar v. Hachar, 153 S.W.3d 138, 142 (Tex. Ct. App. 2004) (holding that recovery of attorney's fees and costs based on a provision in Texas Trust Code similar to UTC § 1004, which allows for "attorney's fees as may seem equitable and just," is not dependent on a finding that a party "substantially prevailed" in the action); GEORGE G. BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 970 (June 2020) (observing that UTC § 1004 grants the court discretion to award attorney's fees to trust beneficiary even when the beneficiary did not prevail in the proceeding).

71. *E.g.*, Kerr v. UMB Bank, N.A., No. CIV-06-95-C, 2008 WL 822055, at *2 (W.D. Okla. Mar. 26, 2008) ("The Court understands *Atwood* as affording considerable weight on the outcome of the litigation in deciding whether to award fees.").

as a whole.[72] It should be uncommon for a court to find that justice and equity require an award in favor of a party who did not achieve at least some degree of success on the merits, even though the same set of facts may not compel an award of fees and costs against such a party.[73] Rather than completely hinging on prevailing party concepts, the dispositive inquiry is whether there is a reason grounded in equity that justifies an award of fees.[74] This analysis extends beyond simply tallying which party won or lost on the merits.[75]

The decision in *In re Gene Wild Revocable Trust* is illustrative.[76] There, two colleges were beneficiaries of a trust that filed competing petitions to determine (1) whether certain amendments to the trust documents made by the grantor were proper and (2) whether the grantor had sufficient mental capacity to execute the amendments.[77] One of the colleges argued that the grantor's amendments were invalid because they purported to amend a version of the trust which had since been restated and revoked or, alternatively, because the grantor lacked capacity.[78] After a trial, the probate court found the amendments valid and entered judgment in favor of the other college.[79] Pursuant to a Missouri statute identical to § 62-7-1004, the probate court further ordered that both the prevailing college's attorney's fees in the amount of $316,497.67 and the losing college's attorney's fees in the amount of $381,680.20 be paid from the trust assets.[80] The Missouri Court of Appeals later rejected the prevailing college's argument that the probate court erred by ordering the losing college's fees be paid from the trust.[81] The court concluded: "The probate court here reasoned that this litigation was brought and defended in good faith and there were issues raised which could only have

72. Taylor v. Woods, 282 S.W.3d 285, 295–96 (Ark. Ct. App. 2008) (citing Perry v. Baptist Health, 243 S.W.3d 310 (2006)).

73. *See* Evans v. Moyer, 282 P.3d 1203, 1214 (Wyo. 2012); *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 493–94 (Iowa 2013); *In re* Est. of Frye, No. 13-1170, 2014 WL 3511827, at *14 (Iowa Ct. App. July 16, 2014); *cf.* Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 255 (2010) (interpreting a federal statute granting discretion to courts to award reasonable attorney's fees and costs to either party, rejecting the argument that the statute limits the availability of attorney's fees to a prevailing party, and holding that a party seeking such an award must show some degree of success on the merits).

74. Shelton v. Tamposi, 62 A.3d 741, 751 (N.H. 2013).

75. *See In re* Caswell Silver Family Tr., Civ. No. 10-934, 2012 WL 13013061, at *3 (D.N.M. Jan. 5, 2012) ("[I]t appears [§ 46A-10-1004 of the New Mexico Statutes Annotated] would grant the Court authority to award attorney's fees to any party, payable by any party or by the trust, as might be just and equitable, and the Court will not be limited by a simple determination as to who should prevail on the merits.").

76. *See* 299 S.W.3d 767 (Mo. Ct. App. 2009).

77. *Id.* at 770.

78. *Id.* at 781.

79. *Id.* at 773.

80. *Id.* at 782.

81. *Id.* at 784.

been settled via judicial determination. . . . The probate court did not abuse its discretion in making such an award."[82] Under the statute, "the probate court could[,] within its discretion[,] award attorney's fees 'to any party' regardless of whether that party prevailed in the lawsuit."[83]

In view of the *Atwood* factors, courts have generally been averse to holding that "justice and equity" require trustees acting in the exercise of their official duties to personally pay the attorney's fees of beneficiaries incurred in litigation relating to the administration of the trust.[84] Courts have also been reluctant to subject beneficiaries to the burden of personally paying the trustees' legal fees under statutes based on UTC § 1004. This is true even when the court rejects the beneficiaries' claims outright or otherwise has to strain to find their merit.[85] Instead, courts are more receptive to mandating that trust assets be used to reimburse the attorney's fees of trustees or beneficiaries who prevailed in the litigation.[86] For example, the Kansas Court of Appeals recently ruled in *Schmitendorf v. Taylor* that a trial judge did not abuse his discretion by ordering that a trustee's attorney's fees and costs be paid directly from the trust assets, rather than by the unsuccessful beneficiary.[87] This was held despite the trial judge "express[ing] doubt" as to the truthfulness of the beneficiary's assertions.[88]

In *Kutten v. Bank of America, N.A.*, however, a Missouri court applied an identical statute to find that justice and equity required the beneficiaries to pay

82. *Id.* at 783 (citing Scott v. Blue Springs Ford Sales, Inc., 215 S.W.3d 145, 170 (Mo. Ct. App. 2006)).

83. *Id.* Likewise, § 45 has been applied to support an award of attorney's fees against parties "regardless of the outcome." Hurley v. Noone, 196 N.E.2d 905, 910 (Mass. 1964); *see also* Conley v. Fenelon, 165 N.E. 382, 384 (Mass. 1929) ("Under [§ 45,] the probate court has jurisdiction to award expenses and counsel fees incurred by those named as executors who have been defeated in their petition to establish the will."); Greene v. Cronin, 50 N.E.2d 36, 40–41 (Mass. 1943) (award of fees to unsuccessful will contestant was upheld).

84. *See, e.g.*, Klinkerfuss v. Cronin, 289 S.W.3d 607, 617–18 (Mo. Ct. App. 2009); Shurtleff v. United Effort Plan Tr., 289 P.3d 408, 416 (Utah 2012); Shelton v. Tamposi, 62 A.3d 741, 751 (N.H. 2013); Evans v. Moyer, 282 P.3d 1203, 1214 (Wyo. 2012); *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 493 (Iowa 2013); Damas v. Damas, No. L-10-1125, 2011 WL 6153123, at *8 (Ohio Ct. App. Dec. 9, 2011).

85. *See, e.g.*, Morrow v. SunTrust Bank, No. W2010-01547-COA-R3CV, 2011 WL 334507, at *8 (Tenn. Ct. App. Jan. 31, 2011); *In re* Est. of Philip Roseman, No. M201900218COAR3CV, 2019 WL 5078722, at *4–6 (Tenn. Ct. App. Oct. 10, 2019). *But see In re* Conservatorship of Annette H. Cross, No. W201801179COAR3CV, 2020 WL 6018759, at *13–14 (Tenn. Ct. App. Oct. 9, 2020) (requiring the trust remainder beneficiary, instead of the trust, to reimburse a trustee's legal fees incurred in successfully defending against the remainder beneficiary's claim for breach of fiduciary duty against the trustee).

86. *See, e.g.*, *Damas*, 2011 WL 6153123, at *8; Diallo v. Suntrust Bank Found. & Endowments, No. CV 16-1312, 2017 WL 2840038, at *5 (D. Md. June 29, 2017).

87. No. 120,865, 2020 WL 3393526 at *1–2 (Kan. Ct. App. June 19, 2020).

88. *Id.*

the trustee's attorney's fees after they engaged in persistent forum shopping.[89] Additionally, in *Shurtleff v. United Effort Plan Trust*, which involved a charitable trust, a Utah court held that justice and equity mandated the State to pay the attorney's fees and costs of a special fiduciary appointed by the state attorney general when the attorney general "substantially altered" his position with respect to the trust and later took positions to undermine the special fiduciary in the litigation.[90] Another court similarly ruled that justice and equity required one beneficiary to pay another beneficiary's fees and costs because the express language of the testamentary trust and applicable law "directly refuted" the losing beneficiary's position.[91]

1. Bad Faith or Egregious Conduct Not Necessary

The Reporter's Comments to UTC § 1004 and § 62-7-1004 allude to the old common law rule allowing for the recovery of attorney's fees in cases of egregious conduct, such as bad faith or fraud.[92] This cryptic reference has led some courts to mistakenly conclude that a showing of bad faith or egregious conduct is a prerequisite to the recovery of attorney's fees.[93] However, the Comments do not indicate the uniform provision was intended to limit recovery to the same standard applied under the common law rule.[94] Instead, the uniform provision departs from the common law rule and implements a more liberal, expansive standard for the recovery of attorney's fees.[95]

89. No. CIV. 4:04-0244, 2008 WL 4838152, at *3 (E.D. Mo. 2008).

90. 289 P.3d 408, 416 (Utah 2012).

91. *In re* Edwin Meissner Testamentary Tr., 497 S.W.3d 860, 865 (Mo. Ct. App. 2016).

92. UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018) ("Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud."); S.C. CODE ANN. § 62-7-1004 rptr.'s cmt. (2009). The "bad faith exception" is not restricted to cases where the action is filed in bad faith, but may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. Roadway Exp., Inc. v. Piper, 447 U.S. 752, 766 (1980) (citing Hall v. Cole, 412 U.S. 1, 15 (1973)); *see also* Leon v. IDX Sys. Corp., 464 F.3d 951, 961 (9th Cir. 2006) (discussing a court's "inherent powers" to award sanctions in the form of attorney's fees against a party or counsel who acts in bad faith).

93. *See, e.g.*, *Roadway Exp.*, 447 U.S. at 766; Copeland v. Kramarck, No. CIV.A. 294-N, 2006 WL 3740617, at *1 (Del. Ch. Dec. 11, 2006).

94. Kutten v. Bank of Am., N.A., No. CIV. 4:04-0244, 2008 WL 4838152, at *3 (E.D. Mo. 2008) ("Plaintiffs contend that the [C]omment to [UTC § 1004] on which [the Missouri statute] is based makes clear that this section applies only in the case of bad faith or egregious conduct. They cite no Missouri case (or case from any other jurisdiction) so restricting the reading of this section, however, and the Court finds no reason to interpret the section restrictively.").

95. This was the observation of law professor David M. English, the Reporter to and principal drafter of the UTC. *See* DAVID M. ENGLISH ET AL., CASE LAW UNDER THE UNIFORM TRUST CODE THROUGH 2014, at 1 (Jan. 23, 2016), https://www.actec.org/assets/1/

The vast majority of courts applying state statutes based on UTC § 1004 have specifically rejected the argument that attorney's fees and costs can be awarded only if bad faith, egregious conduct, or intentional misconduct is shown.[96] Although the presence or absence of this conduct is a factor to be considered, it is not necessary to justify an award of attorney's fees and costs under the uniform provision.[97] Rather, the provision merely requires a reason, grounded in equity, as to why fees should be awarded.[98]

The Massachusetts Supreme Judicial Court reached the same result in *In re Estate of King* by applying § 45.[99] In this case, some of the decedent's heirs filed an action in the probate court challenging the validity of his will.[100] After

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6/UTC_Case_Summaries_Through_2014.pdf [https://perma.cc/8QNR-W5A3] ("Another significant change [to traditional trust law] is a result of UTC [§] 1004 . . . .This will in some states expand the power of the court, sitting in equity, to award attorney fees outside of the traditional exceptions to the American rule in trust cases for vexatious conduct and common benefit."); *see also* Henry, *supra* note 47, at 23–24 ("[T]he Trust Code is departing from common law and setting a lower bar to justify a fee award from one party to another. Thus, while it codifies the common law with respect to the authority to award fees, it seems to contemplate a different standard for doing so."); Cohen v. Minneapolis Jewish Fed'n, 346 F. Supp. 3d 1274, 1287 (W.D. Wis. 2018), *aff'd*, 776 F. App'x 912 (7th Cir. 2019) (citation omitted) ("The Trustees start off on the wrong foot by contending that an award of fees is appropriate only if the court finds bad faith. But that is the standard under *common law*, not [Wisconsin's version of UTC § 1004], which took effect in 2014.").

96. *See, e.g.*, *Kutten*, 2008 WL 4838152, at *3; Shelton v. Tamposi, 62 A.3d 741, 751–52 (N.H. 2013); *In re* Alice Stedman 1989 Tr. 2013 Restatement, No. 2017-0288, 2018 WL 3862925, at *2 (N.H. Aug. 15, 2018); O'Riley v. U.S. Bank, N.A., 412 S.W.3d 400, 419 (Mo. Ct. App. 2013); Klinkerfuss v. Cronin, 289 S.W.3d 607, 617 (Mo. Ct. App. 2009); *In re* Osorio Irrevocable Tr., 337 P.3d 87, 90 (Mont. 2014); Yerian v. Houska, No. 2016 CV 073, 2018 WL 3879071, at *3 (Ohio Ct. C.P. July 24, 2018); Kerr v. UMB Bank, N.A., No. CIV-06-95-C, 2008 WL 822055, at *2 (W.D. Okla. Mar. 26, 2008); Warner v. Warner, 319 P.3d 711, 727 n.18 (Utah 2014); Garwood v. Garwood, 233 P.3d 977, 986 (Wyo. 2010); *see also In re* Mayette E. Hoffman Living Tr. U/A Dated Aug. 4, 1997, 812 S.E.2d 401, 403–04 (N.C. Ct. App. 2018) (rejecting the claim that North Carolina statute, which deviates from uniform provision in significant respects, constrains the court's discretion to award attorney's fees and costs to those instances where there is egregious conduct, such as bad faith or fraud); Busse v. Busse, No. LACV083022, 2017 WL 8314911, at *6 (Iowa Dist. Ct. Sept. 6, 2017) (affirming award of attorney's fees against trust beneficiaries under Iowa's version of UTC § 1004 even though they did not act in bad faith and applying § 633A.4507 of the Code of Iowa).

97. *See infra* note 103 and accompanying text.

98. *Shelton*, 62 A.3d at 751.

99. 920 N.E.2d 820 (Mass. 2010). Section 45 provides that "[i]n contested cases before a probate court or before the supreme judicial court on appeal, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other, or may be awarded to either or both parties to be paid out of the estate which is the subject of the controversy, as justice and equity may require." MASS. GEN. LAWS ANN. ch. 215, § 45 (West, Westlaw through 2018 2d Ann. Sess.). Courts in Massachusetts have long construed the term "expenses" in this statute as including "counsel fees as well as other obligations incurred outside strictly taxable costs." Conley v. Fenelon, 165 N.E. 382, 384 (Mass. 1929); *see* Coles v. Goldie, 167 N.E.2d 761, 764 (Mass. 1960).

100. *King*, 920 N.E.2d at 821–22.

the executor prevailed, she moved under the statute for an award of attorney's fees against the will contestants.[101] The contestants argued the fees could not be awarded because there was no finding of bad faith or egregious litigation conduct.[102] However, in rejecting this assertion, the court held that § 45's language allowing for an award of attorney's fees and costs "as justice and equity may require" establishes "a broad standard, one that certainly reaches *beyond* bad faith or wrongful conduct."[103] Instead, the statute simply "require[s] a reason, grounded in equity, why an award shifting fees should be made."[104]

In *Deborah Dereede Living Trust dated December 18, 2013 v. Karp*, the South Carolina Court of Appeals upheld an award of attorney's fees and costs in favor of trust beneficiaries under § 62-7-1004.[105] This award was ordered subsequent to a finding that the trustee breached her fiduciary duties by failing to make timely trust distributions, even though "[t]here [was] no evidence [the trustee] acted in bad faith.[106] It does not appear the trustee argued an award of fees and costs under the statute would be improper absent a showing of bad faith, and thus the court did not directly address that question in affirming the fee award.[107]

Delaware and Vermont are notable outlier states in construing—although sometimes not consistently—their versions of UTC § 1004 to require a

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101. *Id.* at 822.

102. *Id.* at 825.

103. *Id.* at 827 (emphasis added); *see also* Shelton v. Tamposi, 62 A.3d 741, 751–52 (N.H. 2013) ("We agree with the Supreme Judicial Court of Massachusetts [in *King*] that the words 'as justice and equity may require . . . establish a broad standard, one that certainly reaches beyond bad faith or wrongful conduct.'" (quoting *King*, 920 N.E.2d at 827)); *In re* Alice Stedman 1989 Tr. 2013 Restatement, No. 2017-0288, 2018 WL 3862925, at *2 (N.H. Aug. 15, 2018) ("Given our holding in *Shelton* that the statutory standard reaches beyond bad faith and wrongful conduct, we conclude that the trial court did not err in awarding attorney's fees—even in the absence of a finding that [a trustee] acted in bad faith or that she engaged in oppressive conduct."); Miller-Gray v. Charette, No. 12-P-1799, 2014 WL 775002, at *3 n.1 (Mass. App. Ct. 2014) ("Charette contends a fee award must be based on a finding of bad faith. Bad faith, however, is not a prerequisite of an attorney fee award pursuant to [§ 45]."); Ferri v. Powell-Ferri, 165 A.3d 1137, 1146 (Conn. 2017) ("[T]he probate court has discretion . . . to shift fees and costs . . . even if the claims and defenses of the losing party were not wholly insubstantial and frivolous").

104. *King*, 920 N.E.2d at 827; *see* Brady v. Citizens Union Sav. Bank (*Brady I*), 38 N.E.3d 301, 307 (Mass. App. Ct. 2015) (citing *King*, 920 N.E.2d at 830).

105. 427 S.C. 336, 346–47, 831 S.E.2d 435, 441–42 (Ct. App. 2019).

106. *Id.* at 344, 831 S.E.2d at 439. Similarly, a Utah district court awarded attorney's fees and costs in favor of a trust beneficiary against the trustee under a Utah statute nearly identical to § 62-7-1004 even though the court found the trustee's "defenses were brought in good faith" and the trustee "appropriately attempted to defend her management of the trust funds based on her understanding and the advice of professionals." Counsell v. Colfack, No. 040400326, 2007 WL 3237069 (Utah Dist. Ct. June 22, 2007).

107. *See Dereede*, 427 S.C. at 336, 831 S.E.2d at 435.

showing of bad faith or other egregious conduct.[108] Additionally, despite contrary rulings from both a Missouri state appellate court and a Missouri federal trial court, a state trial court therein held that an award of fees and costs is improper under the state's version of § 1004 "without a showing of egregious or vexatious conduct."[109]

B. Determining Amount

Once the court determines that justice and equity require an award of attorney's fees and costs, the next step is to determine the specific amount of

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108. The Delaware Court of Chancery has applied Delaware's version of UTC § 1004 and requires a showing of "bad faith" for the recovery of fees under the statute. Copeland v. Kramarck, No. CIV.A. 294-N, 2006 WL 3740617, at *3 (Del. Ch. Dec. 11, 2006); *see also In re* Olympic Mills Corp. Coachman Inc., No. 01-13021, 2010 WL 3810784, at *6 (Bankr. D.P.R. Sept. 27, 2010), *aff'd sub nom. In re* Olympic Mills Corp., No. CIV. 11-1064CCC, 2012 WL 4667598 (D.P.R. Sept. 28, 2012) (applying Delaware law and following *Copeland*). As support for its holding, the *Copeland* court cited to *Rice v. Herrigan-Ferro*, No. 401-S, 2004 WL 1587563, at *1 (Del. Ch. July 12, 2004), which applied the common law rule that an exception exists to the American Rule when "a party, or its counsel, has proceeded in bad faith, has acted vexatiously, or has relied on misrepresentations of fact or law in connection with advancing a claim in litigation." *Id.*

Delaware case law is not consistent on this question. *See In re* The Hawk Mountain Tr., No. CV 7334, 2015 WL 5243328, at *6 (Del. Ch. Sept. 8, 2015) (construing § 3584 as not requiring a showing of bad faith as generally would be necessary under the American Rule); Merrill Lynch Tr. Co., FSB v. Campbell, C.A. No. 1803, 2009 WL 2913893, at *14 n.95 (Del. Ch. Sept. 2, 2009) (holding that § 3584 sets a standard that is "more relaxed" than that of the American Rule, "but its application, nonetheless, should be informed by the precepts underlying the American Rule" and noting that the court "has the discretion to shift fees in circumstances where the exacting requirements of the American Rule might not otherwise allow").

The Vermont Supreme Court has held that "[t]he question of whether attorney's fees should be awarded under [Vermont's version of UTC § 1004] 'as justice and equity may require' is 'largely indistinguishable' from the question of whether attorney's fees should be awarded for 'reasons of justice' under the common law." Pawlick v. Apgar, No. 2018-195, 2019 WL 2005780, at *4 (Vt. May 6, 2019). The *Pawlick* court cited to its prior decision in *Curran v. Building Fund of United Church of Ludlow*, 88 A.3d 1204, 1211 (Vt. 2013), where the court ruled that the analysis under title 14A, § 1004 of the Vermont Statutes Annotated is "largely indistinguishable" from the analysis under the common law rule.

109. Morriss v. Wells Fargo Bank, N.A., No. 12SL-PR03035, 2016 WL 7732583, at *22 (Mo. Cir. Ct. Jan. 26, 2016). The *Morriss* court inexplicably failed to acknowledge the holdings in *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 419 (Mo. Ct. App. 2013), and *Kutten v. Bank of America, N.A.*, No. CIV. 4:04-0244, 2008 WL 4838152, at *3 (E.D. Mo. 2008), in which those courts expressly rejected the argument that attorney's fees and costs can be awarded under the Missouri statute only if bad faith, egregious conduct, or intentional misconduct is shown. *Morriss*, 2016 WL 7732583, at *22; *see also* Klinkerfuss v. Cronin, 289 S.W.3d 607, 617 (Mo. Ct. App. 2009) (noting that § 456.10-1004 is not limited to cases of bad faith or egregious conduct).

fees and costs to be awarded.[110] This determination is guided by a reasonableness standard.[111] South Carolina's appellate courts have utilized the "lodestar" approach in determining what constitutes a "reasonable fee" pursuant to fee-shifting statutes that were not based on UTC § 1004.[112] Likewise, courts in other jurisdictions have utilized the lodestar approach in reviewing awards of fees and costs under their versions of UTC § 1004.[113]

The lodestar figure "is designed to reflect the reasonable time and effort involved in litigating a case[] and is calculated by multiplying a reasonable hourly rate by the reasonable time expended."[114] Using the lodestar figure "as a starting point for reasonableness, a court may consider other factors justifying an enhancement [or reduction] of the lodestar figure with a 'multiplier' before arriving at a final amount."[115]

In *Dereede*, although the South Carolina Court of Appeals applied the first part of the lodestar approach, the court did not apply the entire approach.[116] Rather, the court calculated the base lodestar figure and subsequently omitted consideration of whether a multiplier should enhance or reduce the base figure to reflect any exceptional circumstances of the case.[117] Thus, uncertainty persists as to whether South Carolina courts should apply the entire lodestar approach or simply the first part of the analysis when deciding fee requests made under the statutes derived from UTC § 1004.[118]

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110. *See Klinkerfuss*, 289 S.W.3d at 615; SunTrust Bank v. Little, No. 2015 LIT 000019, 2018 WL 9963694, at *7 (D.C. Super. Ct. Apr. 24, 2018).

111. *Little*, 2018 WL 9963694, at *7; *see Klinkerfuss*, 289 S.W.3d at 615.

112. Layman v. State, 376 S.C. 434, 452, 658 S.E.2d 320, 329–30 (2008); Maybank v. BB&T Corp., 416 S.C. 541, 580–81, 787 S.E.2d 498, 518–19 (2016); Dick Dyer & Assocs., Inc. v. Moore's Cars, LLC, No. 2016-002466, 2017 WL 6032650, at *1 (S.C. Ct. App. Dec. 6, 2017).

113. *See, e.g.*, Vander Boegh v. Bank of Okla., N.A., No. 2016-CA-001307-MR, 2019 WL 1495712, at *10 (Ky. Ct. App. Apr. 5, 2019); Shriners Hosps. for Children v. First N. Bank of Wyo., No. CV-2012-0071, 2015 WL 10323195, at *1 (D. Wyo. Sept. 10, 2015); Yerian v. Houska, No. 2016 CV 073, 2018 WL 3879071, at *2 (Ohio Ct. C.P. July 24, 2018); W.A.K., II *ex rel.* Karo v. Wachovia Bank, N.A., No. 3:09CV575, 2010 WL 3074393, at *1 (E.D. Va. Aug. 5, 2010); *cf.* Jo Ann Howard & Assocs., P.C. v. Cassity, No. 4:09-CV-01252, 2020 WL 870987, at *4 (E.D. Mo. Feb. 21, 2020) (holding that the lodestar approach applies to state versions of UTC § 1004, but the statute did not apply to the case before the court based on retroactivity grounds).

114. *Layman*, 376 S.C. at 457, 658 S.E.2d at 332.

115. *Id.* In deeming the formulaic two-level approach of lodestar and adjustments to be "unnecessarily complex," courts in Massachusetts streamline the analysis as follows: "[F]air market rates for time reasonably spent should be the basic measure of reasonable fees, and should govern unless there are special reasons to depart from them." Stratos v. Dep't of Pub. Welfare, 439 N.E.2d 778, 786 (Mass. 1982).

116. 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019); *see also infra* notes 183–184 and accompanying text.

117. *Dereede*, 427 S.C. at 336, 831 S.E.2d at 441.

118. *But see Layman*, 376 S.C. at 434, 658 S.E.2d at 332 (applying the entire lodestar approach to decide the fee request).

1. Base Lodestar Amount

When determining the reasonable time and hourly rate for attorney's fees (the base lodestar figure), South Carolina courts historically look to six common law factors.[119] These factors include: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services."[120] In comparison, Fourth Circuit courts look to twelve factors to calculate the figure.[121] These factors are: "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases."[122]

The fee claimant bears the burden of providing sufficient evidence of the reasonable hours worked and the reasonable hourly rate—i.e., the base lodestar figure.[123] If fee claimants seek an enhancement, they must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award.[124] Conversely, if fee opponents seek a reduction of the lodestar figure, they bear the burden of providing specific evidence to overcome the presumptive reasonableness of the base lodestar figure.[125]

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119. Maybank v. BB&T Corp., 416 S.C. 541, 581, 787 S.E.2d 498, 518–19 (2016).

120. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997); *Layman*, 376 S.C. at 458, 658 S.E.2d at 333; Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989); Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993); CT & T EV Sales, Inc. v. 2AM Grp., LLC, No. CA 7:11-1532, 2012 WL 3010911, at *2 (D.S.C. July 13, 2012).

121. *See, e.g.*, Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978) (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)); Reed v. Big Water Resort, LLC, No. 2:14-CV-01583, 2016 WL 7438449, at *9 (D.S.C. May 26, 2016).

122. *Barber*, 577 F.2d at 226 n.28; *see* Sonoco Prod. Co. v. Guven, No. 4:12-CV-00790, 2015 WL 127990, at *12 (D.S.C. Jan. 8, 2015).

123. *See* Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984); Plyler v. Evatt, 902 F.2d 273, 277 (4th Cir. 1990); Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 484 (Tex. 2019).

124. *Rohrmoos*, 578 S.W.3d at 501.

125. *Id.*

A reasonable hourly rate should reflect the "prevailing market rates in the relevant community."[126] What constitutes a reasonable hourly rate varies according to geographic area and the attorney's experience, reputation, practice, qualifications, and customary charge.[127] In addition to the attorney's billings, charges for the services of paralegals or other legal assistants are also recoverable as "attorney's fees."[128]

In determining a reasonable fee, "the contract between the client and his counsel does not control the determination of a reasonable hourly rate."[129] However, when an attorney has performed work for a client in the past and when the client has previously paid the same customary rates charged by the attorney, this evidence weighs in favor of a finding that the fees sought are reasonable.[130]

The fact that an attorney was hired on a contingency fee basis is also not controlling of a reasonable fee but instead "constitute[s] one factor in a constellation of factors for the court's consideration."[131] In setting a reasonable fee, courts should account for the greater risk of nonpayment for attorneys who take contingency fee cases, in comparison to attorneys who bill and are paid on an hourly basis, as they normally obtain assurances they will receive payment.[132] In *Global Protection Corp. v. Halbersberg*, for example, which involved an award of attorney's fees to a successful plaintiff under a fee-shifting statute, the court considered that the plaintiff had a modified contingency contract with its attorneys providing for a $5,000 retainer and forty percent of any recovery obtained against the defendant.[133] The trial court

126. *Blum*, 465 U.S. at 895.

127. *See* Liberty Mut. Ins. Co. v. Emp. Res. Mgmt., Inc., 176 F. Supp. 2d 510, 532–33 (D.S.C. 2001) (citing Alexander S. *ex rel.* Bowers v. Boyd, 929 F. Supp. 925, 936 (D.S.C. 1995)) (explaining that a reasonable hourly rate is determined by assessing the experience and skill of the prevailing parties' attorneys and comparing their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation).

128. Missouri v. Jenkins, 491 U.S. 274, 288–89 (1989); Alaya v. Quinn's 1776, LLC, No. 1:19-CV-0888-TSE, 2020 WL 1949621, at *5 (E.D. Va. Mar. 3, 2020).

129. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 759 (1997).

130. *Liberty Mut.*, 176 F. Supp. 2d at 538; Sonoco Prod. Co. v. Guven, No. 4:12-CV-00790-BHH, 2015 WL 127990, at *14 (D.S.C. Jan. 8, 2015).

131. S.C. Dep't of Transp. v. Revels, 411 S.C. 1, 11, 766 S.E.2d 700, 705 (2014). "[A] contingency fee agreement is part of the determination of reasonableness as it reflects the 'basis' for the fee charged; however, it is neither the sole basis for the award nor the controlling factor in the determination." *Id.* at 14, 766 S.E.2d at 706; *see also* Sauders v. S.C. Pub. Serv. Auth., No. C.A. 2:03-0934-23, 2011 WL 1236163, at *5 (D.S.C. Mar. 30, 2011).

132. O'Connell v. Wynn Las Vegas, LLC, 429 P.3d 664, 671 (Nev. Ct. App. 2018).

133. 332 S.C. 149, 160, 503 S.E.2d 483, 489 (Ct. App. 1998).

considered the lodestar factors and awarded the plaintiff an attorney's fee equaling one-third of the total damages awarded against the defendant.[134]

Neither the time spent nor any other single factor is necessarily decisive of what is a fair and reasonable charge for such services.[135] Although no one factor is controlling, the "most critical factor" or lucida in the constellation of factors to be considered is the "results obtained."[136] Nonetheless, South Carolina courts have traditionally upheld awards of attorney's fees exceeding the monetary judgment obtained.[137] There is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment.[138]

Other courts applying versions of UTC § 1004 have reached similar holdings.[139] In rejecting the argument that an amount of attorney's fees must be proportionate to the amount of compensatory damages awarded, the Ohio Court of Appeals explained that "a rule of proportionality in trust cases would make it difficult for beneficiaries with meritorious claims against the trustee, but with relatively small potential damage claims, to seek redress in court."[140]

In applying § 45, Massachusetts courts have also identified other factors to consider, including, *inter alia*: (1) the extent to which duplicate or redundant effort was involved or the case was otherwise "over-lawyered;"[141] (2) the amount of money or the value of the property affected by the controversy;[142] (3) the requested fee in relation to the size of the trust or

134. *Id.* at 160–61, 503 S.E.2d at 489 (affirming actual damages of $311,819.19 that were trebled to $935,457.57; to this amount was added $2,174.62 in costs and $311,819.19 in attorney's fees).

135. Cummings v. Nat'l Shawmut Bank of Bos., 188 N.E. 489, 492 (Mass. 1934).

136. Hensley v. Eckerhart, 461 U.S. 424, 436 (1983).

137. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383–85, 377 S.E.2d 296, 296–98 (1989) (awarding damages of $16,161; $26,000 in attorney's fees; and $3,252 in costs); Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 333, 676 S.E.2d 139, 143 (Ct. App. 2009) (issuing a verdict of $36,795 in damages and $86,923.87 in attorney's fees and costs).

138. Liberty Mut. Ins. Co. v. Emp. Res. Mgmt., Inc., 176 F. Supp. 2d 510, 531 (D.S.C. 2001) (quoting Taylor v. Medenica, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998)).

139. *See, e.g.*, *infra* note 140.

140. McHenry v. McHenry, 88 N.E.3d 1222, 1232 (Ohio Ct. App. 2017); *see also* Yerian v. Houska, No. 2016 CV 073, 2018 WL 3879071, at *4 (Ohio Ct. C.P. July 24, 2018) ("The award of fees need not be proportional to the judgment obtained. A simple ratio of successful claims to unsuccessful claims is not to be the sole basis for determining the amount of fees."); Isle v. Brady, 288 P.3d 259, 266 (Okla. Ct. App. 2012) (affirming award of attorney's fees to court-appointed trustee even though the amount was not proportionate to the value of trust estate when the trustee had been required to spend substantial time to accomplish the tasks for which she was appointed).

141. *In re* Est. of King, 920 N.E.2d 820, 829 (Mass. 2010); Munroe v. Nystedt, No. 07-P-944, 2008 WL 4778297, at *3 (Mass. App. Ct. 2008); *see also* Drisko v. Drisko, No. 104,177, 2011 WL 4716348, at *9 (Kan. Ct. App. 2011).

142. Cummings v. Nat'l Shawmut Bank of Bos., 188 N.E. 489, 492 (Mass. 1934); *see* Clymer v. Mayo, 473 N.E.2d 1084, 1096 (Mass. 1985) ("An important factor in assessing the

probate estate;[143] (4) whether the refusal to shift the fees and costs of the prevailing party to the other side would end up distorting the decedent's estate plan;[144] (5) whether the conduct of the party requesting the fees contributed to higher fees;[145] and (6) the availability of collateral sources (such as insurance coverage) that paid or could pay for the fees and costs.[146] Courts applying versions of UTC § 1004 have also considered the financial impact that the award will have on the overall trust or estate plan and the ability to carry out the purposes of that trust or estate plan.[147]

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reasonableness of fees awarded in probate cases is the size of the estate. . . . An excessive fee award may itself defeat the decedent's intent by depleting her estate.").

143. Brady v. Citizens Union Sav. Bank (*Brady II*), 71 N.E.3d 925, 928 (Mass. App. Ct. 2017) ("[W]e see no reason why a particular set percentage of trust assets should serve as an absolute cap on the amount of a reasonable fee incurred in defense of litigation. [Instead], a comparison of the amount of the fee award to the value of trust assets is but one factor to be weighed by the judge in evaluating the reasonableness of the fee."); *cf. In re* Osorio Irrevocable Tr., 337 P.3d 87, 90 (Mont. 2014) (awarding attorney's fees to trustee in appeal filed by trust beneficiary when the trust was without adequate corpus and the award would serve to protect trust assets from being depleted by the litigation); *In re* IMO the Last Will & Testament of Kittila, No. CV 8024–ML, 2015 WL 5897877, at *2 (Del. Ch. Oct. 9, 2015) (reducing petitioners' fee reimbursement because the dollar value of the fees sought was disproportionate to the size of the estate in dispute).

144. *King*, 920 N.E.2d at 827.

145. *See* Alves v. Snow, 40 N.E.3d 1056, at *2, *3 n.7 (Mass. App. Ct. 2015) (upholding partial reduction of requested legal fees when parties' conduct in the litigation—specifically, the parties' failure to respond to the other party's repeated settlement attempts over an eighteen-month period—had significantly contributed to the high legal fees that resulted).

146. Brady v. Citizens Union Sav. Bank (*Brady I*), 38 N.E.3d 301, 305 (Mass. App. Ct. 2015) ("We do not agree that the trustees' insurance coverage bars the plaintiffs from recovering for the expenses incurred in the trustees' defense of the prior action. However, the insurance coverage is yet another factor the judge should consider on remand in awarding fees and costs 'in [her] discretion as justice and equity may require.'"); *Brady II*, 71 N.E.3d at 929. The decisions in *Brady I* and *Brady II* necessarily imply the "collateral source rule" does not bar consideration of available insurance coverage to reduce or defeat an award of attorney's fees and costs, but by the same token the availability of insurance does not necessarily bar recovery of fees and costs. *See Brady I*, 38 N.E.3d at 420; *Brady II*, 71 N.E.3d at 929. In *Brady I*, the court noted that "[o]ther jurisdictions also hold that when a party entitled to recover attorney's fees has insurance coverage for those fees, this fact does not bar recovery." 38 N.E.3d at 421 (first citing Ed A. Wilson, Inc. v. Gen. Servs. Admin., 126 F.3d 1406, 1408 (Fed. Cir. 1997); and then citing Worsham v. Greenfield, 78 A.3d 358, 371 (Md. 2013)).

147. Drisko v. Drisko, No. 104,177, 2011 WL 4716348, at *8–10 (Kan. Ct. App. Oct. 7, 2011) (affirming attorney's fee award of $50,000 to trust beneficiary who originally sought fees and expenses of over $1.3 million from an estate worth from $4 million to $5.9 million and in which the beneficiary had a 1/5 interest because the court noted honoring the request would unreasonably diminish the estate's value for the beneficiaries); *Osorio*, 337 P.3d at 90 (awarding attorney's fees to a party in her capacity as trustee when the award served to protect trust assets from being depleted by the litigation and evidence showed the trust would run out of funds to support the co-settlor within two to three months without liquidation of real estate owned by the trust).

A trial court may not simply "rubber stamp" a request for attorney's fees.[148] After the court has ascertained an entitlement to attorney's fees, it then should determine a reasonable fee award.[149] The court must scrutinize the fees to ensure the hourly rates are reasonable and that all claimed hours, costs, and expenses were reasonably incurred.[150] It is essential for the court to evaluate these pertinent factors in the context of the attorney's description of the services actually provided, the hours spent, and the hourly rate charged.[151]

To enable the court to perform this task, a party seeking an award of fees must detail its attorneys' work and time spent on the matter, which is typically accomplished by submitting affidavits from the attorneys involved with copies of their invoices, timesheets, or billing records attached as exhibits.[152] A party risks the non-recovery of attorney's fees if its counsel fails to keep contemporaneous time records.[153] When a party contests the reasonableness of the attorney's fees sought by an adversary, the court can order "reciprocal discovery" under which the contesting party must produce its own billing records; this can be a useful indicator of what reasonable rates are and what activities were reasonable in the proceeding.[154]

To avoid the disclosure of potentially privileged information to the opposing party or parties, some courts allow the party seeking an award to file redacted copies of the attorney's invoices and to submit unredacted copies of

148. Donahue v. Donahue, 105 Cal. Rptr. 3d 723, 731 (Ct. App. 2010).

149. SunTrust Bank v. Little, No. 2015 LIT 000019, 2018 WL 9963694, at *7 (D.C. Super. Ct. Apr. 24, 2018); *see* Monster Daddy v. Monster Cable Prod., Inc., No. CIV.A. 6:10-1170, 2014 WL 2780331, at *10 (D.S.C. June 19, 2014) ("In making this determination, 'the court should not simply accept as reasonable the number of hours reported by counsel.'" (quoting Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. 5, No. 8:04–1866, 2007 WL 1302692, at *2 (D.S.C. May 2, 2007))).

150. *Little*, 2018 WL 9963694, at *7.

151. *In re* Est. of King, 920 N.E.2d 820, 829 (Mass. 2010).

152. *See* Vander Boegh v. Bank of Okla., N.A., No. 2016-CA-001307-MR, 2019 WL 1495712, at *10 (Ky. Ct. App. Apr. 5, 2019); *see also* Berlinsky v. Berlinsky, No. 2013-GC-10-0150, 2019 WL 7212469, at *5 (S.C. Ct. C.P. Dec. 20, 2019) (denying party's request for attorney's fees under § 62-5-105 and noting the party had failed to file any sworn affidavit from her attorneys, but had simply submitted her attorneys' billing invoices). In *In re Estate of Ashlock*, No. F076941, 2019 WL 1975342, at *13 (Cal. Ct. App. May 3, 2019), the court held that law firms' billing records submitted in support of a motion for attorney's fees were admissible under the business records exception to the hearsay rule. *Id.*

153. In *Cutaia v. Wells Fargo Bank N.M.*, the court declined to penalize the plaintiffs for their attorney's error in failing to keep concurrent time records, but ultimately tempered its award by granting fees for only seventy-five of the four hundred total attorney's hours that were requested. No. CIV-06-326 BB/WPL, 2008 WL 11335127, at *2 (D.N.M. Sept. 3, 2008).

154. Avaya Inc. v. Telecom Labs, Inc., 178 F. Supp. 3d 231, 231–32 (D.N.J. 2016); *see In re* Home Depot Inc., 931 F.3d 1065, 1090 n.22 (11th Cir. 2019) ("[C]ourts can take into account the opposing party's billing to determine reasonable fees.").

the invoices for in camera review.[155] However, other courts have emphatically rejected this approach, holding it is impermissible for the court to award fees based on an in camera review of timesheets and billing records because the information is not available to the opposing party for an opportunity to respond.[156] Based on the principle that privileges cannot be used as both sword and shield, courts have also held that a party puts its attorney's billing records "at issue" by moving for an award of fees and necessarily waives any privileges relating to the billing records.[157] It is presently unclear whether South Carolina follows this waiver rule.[158]

Courts have found fee submissions unreasonable when they evidence redundant billing or duplicative efforts or involve fees for multiple counsel to attend depositions or hearings.[159] The court may award fees and costs for work that contributes to the prosecution of the action, even if such fees were incurred prior to the filing date of the action, such as time spent on conferences with clients, drafting the complaint or petition, and other "reasonable efforts directed toward the filing of the litigation."[160]

The fact that specific activities did not result in the production of evidence that was ultimately presented during trial does not mean those activities were

155. *Boegh*, 2019 WL 1495712 at *12; Tacke v. Energy W., Inc., 227 P.3d 601, 610 (Mont. 2010); *see also* Monster Daddy v. Monster Cable Prod., Inc., No. CIV.A. 6:10-1170-MGL, 2014 WL 2780331, at *11 (D.S.C. June 19, 2014) (noting that the court reviewed law firms' detailed invoices and summary charts which were submitted in camera to aid in the determination of the reasonable amount of attorney's fees and costs). In *224 Westlake, LLC v. Engstrom Props., LLC*, in remanding the fee request to the trial court for creation of a publicly available record supported by a more detailed summary of the law firm's billings, the appellate court stated the trial court could review the fee records *in camera* if necessary, but it was "a practice we do not encourage." 281 P.3d 693, 715 (Wash. Ct. App. 2012).

156. Concepcion v. Amscan Holdings, Inc., 168 Cal. Rptr. 3d 40, 53 (Ct. App. 2014).

157. *See Avaya, Inc.*, 2016 WL 223696, at *6; Dulcich, Inc. v. USI Ins. Servs. Nat'l, Inc., No. 3:18-cv-01089-YY, 2019 WL 1500701, at *3, *5 n.3 (D. Or. Apr. 5, 2019).

158. *Compare* First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 570, 511 S.E.2d 372, 380 (Ct. App. 1998) (rejecting party's argument that she was entitled to the "work product" of the trustee's counsel so she might scrutinize the time that counsel necessarily expended on the issues in the litigation and holding that production of a detailed attorney's fee statement was sufficient), *with* Carden v. Mason L. Firm, P.A., No. 02-CP-10-1363, 2003 WL 25460538 (S.C. Ct. C.P. Sept. 24, 2003) (reserving ruling as to whether plaintiffs waived attorney-client privilege and ordering production of unredacted copies of plaintiffs' legal bills in legal malpractice lawsuit seeking as damages plaintiffs' attorney's fees paid to other law firms).

159. *See* Donahue v. Donahue, 105 Cal. Rptr. 3d 723, 732 (Ct. App. 2010); Shula v. Bank of Am., N.A., No. 4:07-CV-00922, 2010 WL 348256, at *2 (E.D. Ark. Jan. 22, 2010).

160. Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974, 987–88 (9th Cir. 2001); *see* Hedley-Whyte v. UNUM Life Ins. Co. of Am., No. CIV. A. 94-11731, 1996 WL 208492, at *4, *7 n.5 (D. Mass. Mar. 6, 1996); Watkins v. M Class Mining Health Prot. Plan, No. 5-18-0138, 2020 WL 2216744, at *17 (Ill. App. Ct. May 7, 2020).

unreasonable or that reimbursement for them should be disallowed.[161] In ascertaining whether a party's expenditures on its defense were reasonable, the court must be mindful of the exposure that the party faced as it was conducting its defense.[162] The examining court must consider whether a reasonable and zealous advocate would have conducted the activities to either search for relevant evidence or be prepared to adequately respond to any piece of evidence the opposing side may present at trial.[163] A specific activity is reasonable if a reasonable attorney might have also done the same thing in the course of representing the client.[164]

Some courts applying statutes based on UTC § 1004 have required fee claimants to apportion fees and costs to allow for their subtraction in two situations: (1) to reflect effort spent on unsuccessful claims unrelated to successful ones[165] and (2) when claims covered by the fee statute are joined with claims that were not covered by the statute.[166] However, the unpublished decision of at least one court has held that a New Mexico statute based on UTC § 1004 does not require segregation of fees by claim.[167]

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161. *See* Regions Bank v. Lowrey, 154 So. 3d 101, 111 (Ala. 2014) ("[T]he reasonableness of an attorney's preparation for a case cannot be determined solely by whether a specific activity produced evidence that was ultimately presented during a trial.").

162. *Id.*

163. *Id.*

164. *Id.*

165. *See, e.g.*, Patrick v. BOKF, N.A., No. 117,539, 2018 WL 1353286, at *6 (Kan. Ct. App. 2018); SunTrust Bank v. Little, No. 2015 LIT 000019, 2018 WL 9963694, at *7 (D.C. Super. Ct. Apr. 24, 2018); *see also* Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 232–33, 647 S.E.2d 488, 496 (Ct. App. 2007) (overturning the portion of the trial court's award of attorney's fees related to an unsuccessful motion for sanctions pursued in the trial court); *cf.* Charleston Lumber Co. v. Miller Hous. Corp., 318 S.C. 471, 483–84, 458 S.E.2d 431, 438–39 (Ct. App. 1995) (holding that trial court's award of attorney's fees in suit on promissory note was not erroneous even though it included some fees that were attributable to defending counterclaims and not collection on the note because the facts and issues surrounding the note were intertwined with those of the counterclaims).

166. *See, e.g.*, *In re* Olympic Mills Corp. Coachman Inc., No. 01-13021, 2010 WL 3810784, at *3 (Bankr. D.P.R. Sept. 27, 2010), *aff'd sub nom*, *In re* Olympic Mills Corp., No. CIV. 11-1064CCC, 2012 WL 4667598, at *1 (D.P.R. Sept. 28, 2012) (finding that only the fees directly related to trustee's breach of trust should be reimbursed under Delaware statute based on UTC § 1004); *see also* Brown v. Pope, No. 3:08CV00014, 2014 WL 12622445, at *7–8 (D.S.C. Mar. 28, 2014) (denying special administrators' requests for attorney's fees under § 62-7-1004 when most of the time and expense related to separate state court proceedings involving the estate, rather than the present lawsuit).

167. Martinez v. Preciliana Martinez Revocable Tr., No. A-1-CA-36009, 2018 WL 6584144, at *6 (N.M. Ct. App. Nov. 20, 2018) (holding that fee statute and the equitable principles underlying it do not require the segregation of fees by claim).

2. Lodestar Multiplier

The lodestar fee may be unreasonably high or unreasonably low, thus an upward or downward adjustment may be appropriate.[168] For example, by using the lodestar calculation as the "starting point" for a reasonable fee, a court may enhance the lodestar figure with a "multiplier" before arriving at a final amount to reflect any "exceptional circumstances" of the case.[169]

In the context of applying federal fee-shifting statutes, the United States Supreme Court held not only that a "strong presumption" exists that the base lodestar figure is reasonable but also "that [the] presumption may be overcome [only] in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee."[170] These adjustments can account for various factors, including: (1) when the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value; (2) if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; or (3) there is an exceptional delay in the payment of fees.[171]

The Supreme Court also cautioned that an enhancement must not be based on the consideration of a factor that is already "subsumed" in the lodestar calculation.[172] In *Blum v. Stenson*, for example, the Supreme Court specifically held that the "novelty and complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumptively reflected in the lodestar amount and thus cannot serve as an independent basis for an upward adjustment to the basic fee award.[173] A few years later, in *City of Burlington v. Dague*, the Supreme Court disapproved a contingency enhancement to reflect the risk of nonpayment because such an enhancement would duplicate factors already subsumed in the lodestar.[174] Writing for the majority, Justice Scalia argued that "[t]aking account of [risk of loss] again through lodestar enhancement amounts to double counting."[175]

168. *See* Atwood v. Atwood, 25 P.3d 936, 951 (Okla. Ct. App. 2001).

169. Layman v. State, 376 S.C. 434, 460–61, 658 S.E.2d 320, 334 (2008) (applying multiplier of 1.25 to the lodestar calculation to reflect the exceptional circumstances of the case); *see also* Maybank v. BB&T Corp., 416 S.C. 541, 581, 787 S.E.2d 498, 518–19 (2016) (holding a 1.5 multiplier was justified because of the exceptional success in the case).

170. Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 554 (2010).

171. *Id.* at 554–56.

172. *Id.* at 553.

173. 465 U.S. 886, 898–900 (1984).

174. 505 U.S. 557, 562–63 (1992).

175. *Id.*

Some state courts adhere to the Supreme Court's rationale in applying their own state fee-shifting statutes.[176] Because South Carolina's historical lodestar factors take into account the difficulty of the case, beneficial results obtained, and contingency of compensation,[177] it would seem that an enhancement based on any of these factors is improper if the Supreme Court cases are followed. However, other state courts applying their iterations of the lodestar methodology have explicitly rejected the Supreme Court's rationale in favor of retaining the trial court's discretion regarding the award of attorney's fees.[178] Notwithstanding the Supreme Court's contrary conclusions, several state courts have allowed upward adjustments to the lodestar amount to reflect the actual risk that the attorney will receive no payment at all if the suit fails.[179]

South Carolina's appellate courts have not yet addressed this issue directly.[180] Prior state decisions have upheld multipliers or enhancements to the lodestar figure based on considerations that were, arguably, subsumed in the lodestar calculation, including the results obtained and the complexity or difficulty of the litigation.[181] These cases reflect at least a tacit departure from the rationale of the Supreme Court.[182]

In *Dereede*, the South Carolina Court of Appeals upheld the trial court's order requiring the trustee to personally pay the trust beneficiaries' attorney's

176. *See, e.g.*, State by Comm'r of Transp. v. Krause, 925 N.W.2d 30, 34 (Minn. 2019); Phoenix Lighting Grp., L.L.C. v. Genlyte Thomas Grp., L.L.C., No. 2018-1076, 2020 WL 1445428, at *6 (Ohio Mar. 25, 2020); Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 493–502 (Tex. 2019).

177. Glob. Prot. Corp. v. Halbersberg, 332 S.C. 149, 160, 503 S.E.2d 483, 489 (Ct. App. 1998).

178. *See* Adkins v. Collens, 444 P.3d 187, 200 (Alaska 2019); Berry v. Volkswagen Grp. of Am., Inc., 397 S.W.3d 425, 432 n.6 (Mo. 2013); Pennaco Energy, Inc. v. Sorenson, 371 P.3d 120, 132 (Wyo. 2016).

179. *See, e.g.*, *Adkins*, 444 P.3d at 200; Joyce v. Federated Nat'l Ins. Co., 228 So. 3d 1122, 1132–33 (Fla. 2017); Schefke v. Reliable Collection Agency, Ltd., 32 P.3d 52, 96 (Haw. 2001); Rendine v. Pantzer, 661 A.2d 1202, 1228 (N.J. 1995); *see also* Kaleikini v. Yoshioka, 304 P.3d 252, 272 (Haw. 2013) (noting that courts should be given discretion to enhance the lodestar fee when an attorney has been retained on a contingent fee basis).

180. *See, e.g.*, Glob. Prot. Corp. v. Halbersberg, 332 S.C. 149, 160–62, 503 S.E.2d 483, 489 (Ct. App. 1998) (not addressing adjustments to the lodestar amount).

181. *See, e.g.*, Layman v. State, 376 S.C. 434, 461, 658 S.E.2d 320, 334–35 (2008) (holding that enhancement was justified based on several considerations, including the wholly successful recovery in the case and the extraordinary sum of money returned to the class members); Maybank v. BB&T Corp., 416 S.C. 541, 581, 787 S.E.2d 498, 519 (2016) (affirming an enhancement to the lodestar figure, the court cited to the difficulty, complexity, and protracted nature of the litigation as well as the beneficial results obtained); *see also* Sauders v. S.C. Pub. Serv. Auth., No. C.A. 2:03-0934-23, 2011 WL 1236163, at *11 (D.S.C. Mar. 30, 2011) (enhancing the lodestar fee through a multiplier of 1.25 given that the litigation lasted over 17 years, there were several appeals, and in light of the successful result in the case).

182. City of Burlington v. Dague, 505 U.S. 557, 562–64 (1992).

fees and costs, totaling $67,944.39.[183] This calculation was based only on the trial court's application of the six common law factors.[184] Stated differently, the court upheld the calculation of the base lodestar figure.[185] However, neither the appellate court nor the trial court discussed whether a multiplier should enhance or reduce the base lodestar figure to reflect any exceptional circumstances of the case.[186] It appears this was because the beneficiaries did not seek an enhancement and the trustee did not seek a reduction or dispute the reasonableness of the fees sought but merely argued that fees should not have been awarded at all.[187]

3. Massachusetts's Strictly Conservative Principles

As a final consideration, it must be noted that Massachusetts courts have added another peculiar twist to the determination of a "reasonable fee" when deciding fee requests under § 45. Specifically, according to these cases:

> Where payments are to be made out of the property of litigants to or for the benefit of counsel who may not have been employed by those whose estates are thus diminished, the standard is not the same as that applied in an action by an attorney against a client with whom he has voluntary contractual relations.[188]

Instead, when the situation involves a "non-voluntary" or "forced relationship" in which fees are to be paid by the losing party or out of a common fund (such as an estate or a trust), the courts apply "strictly conservative principles."[189] In such cases, "[c]onservative criteria are in

183. 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019) (first citing Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993); and then citing Baron Data Sys. v. Loter, 297 S.C. 382, 384–85, 377 S.E.2d 296, 297 (1989)), *aff'g* Dereede v. Feeley-Karp, No. 2015CP4601409, 2016 WL 11620551, at *1 (S.C. Ct. C.P. Nov. 8, 2016).

184. *Id.*

185. *Id.*

186. *See id.*; *Feeley-Karp*, 2016 WL 11620551, at *2.

187. *Feeley-Karp*, 2016 WL 11620551, at *2.

188. Hayden v. Hayden, 96 N.E.2d 136, 142 (Mass. 1950); *see also* MIF Realty, L.P. v. Fineberg, 989 F. Supp. 400, 401 (D. Mass. 1998) (explaining that there are two lines of cases in Massachusetts law concerning awards of attorney's fees and different standards apply to each: the first line of cases is when the dispute is between an attorney and the client who hired that attorney, and the second involves the situation where there is a nonvoluntary relationship between the attorney and the party from whom fees are sought).

189. *In re* Est. of Rosen, 23 N.E.3d 116, 123 (Mass. App. Ct. 2014); Lewis v. Nat'l Shawmut Bank, 21 N.E.2d 254, 256–57 (Mass. 1939). In *Estate of King*, discussed *supra* notes 99–104 and accompanying text, even though the trial judge's "decision expressly recognize[d] that 'conservative principles' are to govern where the fees being awarded are to be paid by the

order[—]in fairness to beneficiaries who have not hired the lawyer and to avoid an erosion of public respect for the administration of justice."[190]

Under these "strictly conservative principles," courts "are not so generous as they would be in suits by attorneys against clients"[191] and "the full amount charged by counsel to his client is not necessarily . . . allowed."[192] The standard referred to in such cases "as a general guide is the compensation paid to public officers for services of a similar character."[193] "This reference . . . leaves room for the exercise of discretion as to each case, a discretion which shall take into consideration, among other things, the amount in controversy[] and which will prevent the fund from being either entirely or in great part absorbed by counsel fees."[194] The court must consider the size of

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adversary," the appellate court still held the judge "did not actually follow a conservative approach" and remanded the case for the judge to "undertake a more specific and searching analysis of the actual requests for fees and costs submitted than the record suggests took place, keeping in mind the need to examine the requests through a conservative lens." 920 N.E.2d 820, 830 (Mass. 2010).

190. Grimes v. Perkins Sch. for the Blind, 494 N.E.2d 406, 407 (Mass. App. Ct. 1986). As expressed in *Grimes*, "[w]hen fee awards appear excessive and the public hears what has been called the soft thud of mutual backpatting, respect for the administration of justice must suffer." *Id.* (quoting Robbins v. Robbins, 476 N.E.2d 230, 234 (Mass. App. Ct. 1985)); *see also Lewis*, 21 N.E.2d at 257 ("It is difficult to conceive of anything more likely to undermine public respect for the administration of justice than a wide spread suspicion that the courts are aligned in aiding the distribution among counsel of excessive proportions of the funds of those who are unfortunate enough to become involved in controversy.").

191. Hutchinson v. William C. Barry, Inc., 50 F. Supp. 292, 298 (D. Mass. 1943).

192. Boynton v. Tarbell, 172 N.E. 340, 341 (Mass. 1930). Because the conservative principles under the statute involve a different standard than that applied in an action by an attorney against a client with whom the attorney has voluntarily entered a contract, courts have held that the amount of reasonable attorney's fees assessed by the probate court against another party or the trust or estate under the statute does not preclude or limit on res judicata grounds the damages recoverable by the attorney in a contract action against a client for services rendered in accordance with their fee agreement. *See* Campbell v. Toner, No. 9808, 2003 WL 297588, at *2–3 (Mass. Dist. Ct. Feb. 6, 2003); Berke v. Gorgone, No. 9282, 1994 WL 593911, at *2–3 (Mass. Dist. Ct. Oct. 24, 1994).

193. Frost v. Inhabitants of Belmont, 88 Mass. (6 Allen) 152, 165 (1863); *see Hayden*, 96 N.E.2d at 142; *Lewis*, 21 N.E.2d at 257. *But see* PATRICIA M. ANNINO, 21 MASS. PRAC., PROBATE LAW AND PRACTICE § 18:3 (3d ed. 2020) ("If the '. . . compensation paid to public officers for services of a similar character' has not kept pace with what are reasonable fees trial and appellate court judges should say so and award fair compensation to counsel."); Hess v. Toledo, 744 N.E.2d 1236, 1241 (Ohio Ct. App. 2000) (rejecting the argument that attorney's fees should be paid based on the hourly pay rate because that amount did not include amounts paid for retirement, vacation leave, sick leave, medical or life insurance, and overhead costs for running the office).

194. *Frost*, 88 Mass. (6 Allen) at 165; Strand v. Hubbard, 576 N.E.2d 688, 690 (Mass. App. Ct. 1991) ("Nevertheless, it is altogether appropriate that the person who, in doubtful circumstances, unleashes the dogs of war should bear the heavier burden of legal costs.").

the estate in determining the reasonableness of the fee request to prevent the estate from being wiped out by counsel fees.[195]

Thus far, no court has explicitly engrafted these "strictly conservative principles" onto the criteria for analyzing fee requests under UTC § 1004.[196] However, given that UTC § 1004 is derived from § 45,[197] it does not seem an unreasonable leap that these principles may apply.

4. Recoverable Costs and Expenses

Courts have reached differing conclusions as to whether the "costs" or "expenses" under statutes based on UTC § 1004 are limited to those expenses normally taxable as court costs.[198] In *Cooper v. Jordan*, the Iowa Court of Appeals disallowed the recovery of deposition expenses where the depositions were not used at trial because such expenses are generally not taxable costs.[199] The *Cooper* court rejected the argument that the statutory fee provision allowing for reimbursement of costs and expenses is "broader than" what is ordinarily allowable as taxable costs under the court's rules.[200]

In contrast, in *Honsinger v. UMB Bank, N.A.*, a Missouri federal court held that the costs and expenses recoverable under Missouri's version of UTC § 1004 "permit[] recovery of other costs of litigation."[201] Similarly, in *Atwood v. Atwood*, the Oklahoma Court of Appeals interpreted the word "expenses" as used in the fee statute to include expert witness fees (which ordinarily cannot be recovered as costs in litigation), yet it disallowed recovery of Westlaw charges and certain reproduction costs on the grounds those expenses were part of the attorney's overhead rather than litigation "expenses."[202]

195. *See Hubbard*, 576 N.E.2d at 599–600.

196. *See e.g.*, Deborah Dereede Living Tr. Dated Dec. 18, 2013 v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019) (first citing Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993); and then citing Baron Data Systems v. Loter, 297 S.C. 382, 384–85, 377 S.E.2d 296, 297 (1989)).

197. UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018).

198. *See* S.C. R. CIV. P. 54(d)–(e) (describing taxable court costs).

199. No. 14-0157, 2015 WL 1815996, at *5 (Iowa Ct. App. Apr. 22, 2015).

200. *Id.* The court saw "no textual basis or other reason unique to [Iowa's version of UTC § 1004] to deviate from the [court's] past practice." *Id.*

201. No. 06-0018-CV-W, 2009 WL 10704888, at *3 (W.D. Mo. Aug. 31, 2009).

202. Atwood v. Atwood, 25 P.3d 936, 949 (Okla. Ct. App. 2001). In *Arnold Oil Properties, L.L.C. v. Schlumberger Technology Corp.*, the court rejected the *Atwood* court's conclusion that the expense for computer-assisted legal research cannot be recovered under the fee statute because it is part of the attorney's overhead. No. CIV-08-1361-D, 2011 WL 3652560, at *4 n.7 (W.D. Okla. Aug. 19, 2011), *aff'd*, 508 F. App'x 715 (10th Cir. 2013). The record reflected that attorneys in the local legal community routinely billed clients for this type of expense. *Id.* at *4.

In the context of applying fee statutes not based on UTC § 1004, the rule followed by most courts is that the recoverable "costs" or "expenses" are not limited to those items normally taxable as court costs.[203] Instead, they include reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee paying client in the course of providing legal services.[204] It appears South Carolina will follow this majority rule in applying its statutes based on UTC § 1004. In *Dereede*, which is discussed above, the South Carolina Court of Appeals affirmed a trial court order under § 62-7-1004, requiring a trustee to personally pay the trust beneficiaries' litigation costs totaling $21,129.89.[205] This fee included the beneficiaries' expert witness fees, incurred prior to and at trial, totaling $17,400.00.[206] The court necessarily construed § 62-7-1004 as not being limited to those expenses ordinarily taxable as court costs under Rule 54 of the South Carolina Rules of Civil Procedure because prior case law interpreted the rule as disallowing the recovery of expert witness fees.[207]

C. Determining the Source of Payment

As part of the three-pronged "justice and equity" analysis, the court must decide *who* or *what* should bear the burden of attorney's fees and costs. Sections 62-1-111, 62-5-105, and 62-7-1004 provide that the court may award a party its own fees and costs from the trust, estate, or assets of the ward or protected person, respectively.[208] Alternatively, or in combination with such an award, the court may also charge a party's costs and fees directly against another party to the litigation.[209] The court can further award attorney's fees and costs against a party to the proceeding even if the party has no beneficial interest in the trust or estate that is the subject of the controversy.[210] In addition

203. *See, e.g.*, Mota v. Univ. of Tex. Hous. Health Sci. Ctr., 261 F.3d 512, 529 (5th Cir. 2001); Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1036 (8th Cir. 2008); Grove v. Wells Fargo Fin. Cal., Inc., 606 F.3d 577, 580–81 (9th Cir. 2010).

204. *See, e.g.*, Wilson v. City of Kansas City, 598 S.W3d 888, 897 (Mo. 2020) (en banc); Maybank v. BB&T Corp., 416 S.C. 541, 581, 787 S.E.2d 498, 519 (2016).

205. 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019), *aff'g* Dereede v. Feeley-Karp, No. 2015CP4601409, 2016 WL 11620551, at *1 (S.C. Ct. C.P. Nov. 8, 2016).

206. *Id.*

207. *See* Black v. Roche Biomedical Labs., a Div. of Hoffman-LaRoche, Inc., 315 S.C. 223, 230, 433 S.E.2d 21, 25 (Ct. App. 1993).

208. S.C. CODE ANN. §§ 62-1-111, -5-105(A), -7-1004, -7-1004 cmt. (2009).

209. *Id.* § 7-1004 cmt.; *see* Feeley v. Feeley, No. 64896, 2016 WL 276452, at *5 (Nev. Ct. App. Jan. 20, 2016) ("[The statute is] rather broad, providing the court with discretion to award fees, either directly from a party or from the trust, 'as justice and equity may require.'").

210. *See* Rex v. Rex, No. 2016CA00088, 2016 WL 4732389, at *7 (Ohio Ct. App. Sept. 12, 2016).

to requiring payment directly to another party,[211] the court can satisfy its attorney's fee award by surcharging, reducing, or denying compensation or reimbursement to a fiduciary[212] and by surcharging, offsetting, or reducing a beneficiary's distributions from the trust or estate.[213]

These statutes afford the trial court ample room and elasticity to fashion creative orders for achieving a just and equitable result under the particular circumstances of the case. In a Virginia lawsuit, for instance, in which the trustees, life beneficiaries, and remainder beneficiaries of a testamentary trust sought advice and guidance from the court involving the trust's administration, the court agreed "with the principle that [the remainder beneficiary of the trust, who ultimately prevailed in the action,] should not be held indirectly responsible for payment of part of the award made in its favor."[214] To avoid such a result, the court allocated payment of one-half of the remainder beneficiary's attorney's fees and costs to be made from the income currently distributable to the life beneficiaries and the other one-half to be made from the trust assets payable to the other remainder beneficiary upon the death of the last remaining life beneficiary.[215]

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211. Nat'l Acad. of Scis. v. Cambridge Tr. Co., 329 N.E.2d 144, 148–49 (Mass. App. Ct. 1975) (requiring corporate trustee to use its own funds to pay counsel fees and expenses of trust beneficiary when the lawsuit was necessitated by trustee's own neglect in the administration of the trust).

212. S.C. CODE ANN. § 62-7-1001(b)(3), (8) (2009) (providing the remedies for trustee's breach of trust); *id.* § 62-7-1010(d) ("The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding."); *id.* § 62-3-808(d) ("Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding."). The Reporter's Comment to § 62-7-1001 states "[t]he reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge." *Id.* § 62-7-1001 rptr.'s cmt.; *see also In re* Elizabeth C. Massie Tr., Appeal No. 2015AP318, 2017 WL 218284, at *4 (Wis. Ct. App. 2017) (surcharging trustee-beneficiary's share of the trust in the amount of other beneficiaries' attorney's fees in suit against trustee-beneficiary for mishandling of trust assets).

213. S.C. CODE ANN. § 62-3-903 (2009) (allowing personal representative of the estate to withhold the amount of any debt of an heir or devisee from the interest to be distributed to such heir or devisee); Powers v. Prescott, No. 11-P-169, 2012 WL 4867394, at *1 (Mass. App. Ct. Oct. 16, 2012) (assessing legal fees against beneficiary's portion of the estate); Brown v. Brown-Thill, 543 S.W.3d 620, 636 (Mo. Ct. App. 2018) (satisfying an award of attorney's fees by offsetting the amount against the trust beneficiary's interest in assets distributed from trusts); O'Riley v. U.S. Bank, N.A., 412 S.W.3d 400, 419 (Mo. Ct. App. 2013) (charging trustee's attorney's fees and expenses against trust beneficiaries and their distributive share in trust); *In re* Gene Wild Revocable Tr., 299 S.W.3d 767, 784 (Mo. Ct. App. 2009) (ordering that attorney's fees of winning and losing parties in trust litigation be paid from trust assets prior to dividing and distributing the residue); *In re* Est. of Hohler, 915 N.W.2d 730, at *2–3 (Wis. Ct. App. 2018) (surcharging a trust beneficiary's interest).

214. Newlin v. Hart, No. 05-235, 2014 WL 12892858, at *4 (Va. Cir. Ct. Mar. 7, 2014).

215. *Id.* at *5.

Issues often arise in determining whether an award of fees and costs should be made to or against a person in their individual or representative capacities. For instance, in *Shelton v. Tamposi*, the New Hampshire Supreme Court decided whether the trustee of a family trust could be held personally liable for attorney's fees based on actions taken in her official capacity.[216] The Court observed that a trustee acting in the proper exercise of her official duties ordinarily should not be held personally liable under the uniform statute for attorney's fees incurred by any party.[217] However, because the statute's "use of the word 'any' conveys broad authority upon the trial court to award attorney's fees to *any* party 'to be paid by another party' 'as justice and equity may require,'" the court concluded the statute "may, under certain circumstances, authorize the award of attorney's fees against a trustee personally."[218] In *Shelton*, the court held that justice and equity required that the trustee, rather than the innocent beneficiaries of the trust, personally bear the burden of paying attorney's fees to the other parties based on a finding that the trustee's litigation constituted a breach of her fiduciary duties and bad faith.[219]

In *Dereede*, a South Carolina trial judge rejected the trustee-beneficiary's argument that she should not be held personally liable for damages or attorney's fees to the other beneficiaries "since her actions were taken in her [representative] role as trustee under the Trust."[220] The judge said that while he only found the trustee "liable for actions as trustee, that does not insulate her from personal liability [for damages], or limit recovery to whatever amount she may be entitled to as a trust beneficiary" and that "[t]his determination applies to the statutory provision for the award of attorney's fees and costs."[221] The Court of Appeals subsequently affirmed this ruling, although it focused on the statutory section making a trustee liable to the beneficiaries for a breach of trust and did not specifically address § 62-7-1004.[222]

In *Regions Bank v. Davis*, a corporate trustee of a trust (who was the sole beneficiary of a decedent's estate) sued the personal representative of the

216. 62 A.3d 741, 751 (N.H. 2013).

217. *Id.*

218. *Id.* at 751–52.

219. *Id.* at 752. Following the adverse decision in *Shelton*, the trustee in that case commenced a legal malpractice lawsuit against her former legal counsel and their law firm based on the claim they had failed to properly advise her of the risks of personal liability for the beneficiaries' attorney's fees in the initial litigation. *See* Tamposi v. Denby, 136 F. Supp. 3d 77 (D. Mass. 2015).

220. Dereede v. Feeley-Karp, No. 2015CP4601409, 2016 WL 11620552, at *3 (S.C. Ct. C.P. Sept. 13, 2016), *aff'd in part*, Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019).

221. *Feeley-Karp*, 2016 WL 11620552, at *3–4.

222. *Dereede*, 427 S.C. at 345–46, 831 S.E.2d at 440–41.

estate first for a judicial determination that certain annuity proceeds belonged to the trust and second to remove the personal representative from his position for wrongfully interfering with the administration of the trust.[223] While the personal representative was not a beneficiary of the trust or the decedent's will, the court held he was a "party" for purposes of a Missouri statute identical to § 62-7-1004 and ordered him, individually, to pay the trust's attorney's fees.[224]

In *Reineck v. Lemen*, however, the Virginia Supreme Court held the uniform statute did not authorize an award of attorney's fees against a curator of an estate personally when the curator appeared in the case only in his representative capacity.[225] The curator, Reineck, sued the co-trustees of the decedent's trust and the executors of the decedent's will, alleging breaches of their fiduciary duties.[226] The trial court granted summary judgment in favor of the defendants and awarded attorney's fees against the curator personally under a Virginia statute identical to § 62-7-1004.[227] The award of attorney's fees was later reversed on appeal.[228] Although the appellate court acknowledged that the statute permits an award of attorney's fees against a "party," the court held "[t]he party to the suit was Reineck as curator, not Reineck personally."[229] Thus, it was erroneous to award fees against him personally because he was not before the court in his personal capacity but appeared only in his representative capacity.[230]

In *Brown v. Brown*, the Missouri Court of Appeals rejected a trust beneficiary's argument that the trial court erred by awarding attorney's fees under that state's version of UTC § 1004 to a defending party in her capacity

223. *See* 521 S.W.3d 283 (Mo. Ct. App. 2017).

224. *Id.* at 287–88.

225. 792 S.E.2d 269, 276 (Va. 2016).

226. *Id.* at 272.

227. *Id.* at 274.

228. *Id.* at 276.

229. *Id.*

230. *Id.* The court dropped a footnote in which it "express[ed] no opinion concerning what other avenues may be available for sanctions and attorney's fees when a party in a representative capacity has filed a frivolous suit or one for vindictive or harassing purposes." *Id.* at 276 n.4. Notably, there was no claim in that case that the curator had breached his obligations in prosecuting the action against the co-trustees and executors. The lesson of *Reineck* is that when the opposing party to the judicial proceeding is a fiduciary appearing solely in their representative capacity, the prudent course of action is to also make or join him or her as a party to the proceeding in his or her personal or individual capacity and to include a claim or counterclaim for attorney's fees and costs against him or her in that capacity pursuant to the statute. *See id.*; *cf.* Wellin v. Wellin, 427 S.C. 15, 25, 828 S.E.2d 767, 772 (Ct. App. 2019) (reversing probate court's $50 million judgment against children who had filed a conservatorship action for their father in their individual capacities, while the probate court's order had granted relief against them in their capacities as trustees of a trust created by their father).

as trustee, even though the party filed her counterclaim for such fees solely in her individual capacity.[231] The beneficiary argued that any award of attorney's fees to the trustee in her individual capacity would be erroneous because the trustee already paid her fees, meaning she personally had no damages.[232] In rejecting this argument and affirming an award of fees against the beneficiary, the court pointed to the fact that the beneficiary sued the trustee in her capacity as a trustee—not just in her individual capacity—and she was therefore a "party" to the proceedings as a defendant-trustee and within the statute's coverage in that capacity.[233] Further, the court could not find any Missouri case law or other authority allowing a court to make an award of attorney's fees to a party in her capacity as a trustee unless she requested such an award specifically in that capacity.[234]

In *Rudd v. Branch Banking & Trust Co.*, a federal district court initially held it lacked jurisdiction to enter an order requiring that the assets of a trust be paid over to a *former* trustee under Alabama's version of UTC § 709 when the *current* trustees were not parties to the action.[235] The court initially found that all of the current trustees were indispensable parties.[236] However, following a motion for reconsideration, the court re-evaluated its position and ultimately held that the former trustee could recover fees and expenses from the trust property pursuant to the statute.[237]

IV. CONFLICT BETWEEN TRUST TERMS AND FEE STATUTE

Following the format of the UTC, the SCTC consists of "default" rules that apply only if the trust agreement fails to address or sufficiently cover a particular issue.[238] The settlor is generally free to override these rules in the trust agreement and to prescribe the conditions under which the trust is to be

231. *See* 530 S.W.3d 35 (Mo. Ct. App. 2017).

232. *Id.* at 47.

233. *Id.* at 48.

234. *Id.*

235. *See* No. 2:13-cv -02016, 2016 WL 7209727, at *3 (N.D. Ala. Aug. 8, 2016); *see also* French v. Wachovia Bank, N.A., No. 06-C-869, 2011 WL 5008337, at *3 (E.D. Wis. Oct. 20, 2011), *aff'd sub nom.* French v. Wachovia Bank, N.A., 722 F.3d 1079 (7th Cir. 2013) (recognizing that, while beneficiaries had unsuccessfully sued former trustee for breach of fiduciary duty, fees could not be awarded to the former trustee from out of the trust estate because the successor trustee was not a party to the action).

236. Rudd v. Branch Banking & Tr. Co., No. 2:13-CV-02016, 2019 WL 3082585, at *2 (N.D. Ala. July 15, 2019).

237. *Rudd*, 2016 WL 7209727, at *4.

238. *See* S.C. CODE ANN. § 62-7-105 rptr.'s cmt. (2009). The opening sentences of the General Comment to the UTC acknowledge that it "is primarily a default statute" and "[m]ost of [its] provisions can be overridden in the terms of the trust." UNIF. TR. CODE art. 1 general cmt. (UNIF. L. COMM'N 2018).

administered, including the duties and powers of a trustee and the rights and interests of the beneficiaries.[239] Freedom of disposition is fundamental in South Carolina law, and courts will generally honor and protect the settlor's intent.[240] However, the SCTC also enumerates twelve "mandatory" rules that apply regardless of a settlor's intent to the contrary.[241]

As one of these mandatory rules, the SCTC adopts § 105(b)(13) of the UTC, which provides that "[t]he terms of a trust prevail over any provision of [the SCTC] except . . . the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice."[242] This provision authorizes a court to review a trustee's decision "if the court believes it is in the best interest of justice."[243] The Reporter's Comments to the section give little guidance as to the particular circumstances under which a court is authorized to exercise this broad power.[244] They merely reiterate the mandatory rule itself and state that it requires a trustee to furnish a bond.[245] This provision may simply be a confirmation of the court's inherent power to exercise jurisdiction over trust estates, to supervise their administration, and to make all orders necessary to preserve the trust estate from waste or destruction.[246]

A question arises as to whether the SCTC authorizes the settlor to override the statutes involving recovery of attorney's fees by drafting contrary provisions in the trust instrument. In *Dereede v. Feeley-Karp*, the trial judge answered this question in the negative and expressly held that "[t]he award of fees under [§ 62-7-1004] is not limited by the terms or conditions of the Trust[] and can be made in favor of any party, not simply to the beneficiaries of the Trust, and against any party."[247] As support for this statement, the judge

239. S.C. CODE ANN. § 62-7-105(a) rptr.'s cmt.

240. *In re* Eleanor McCarthy Lenahan Tr. under agreement Dated July 12, 2001, 428 S.C. 598, 604–05, 836 S.E.2d 793, 797 (Ct. App. 2019).

241. S.C. CODE ANN. § 62-7-105(b)(1)–(12).

242. *Id.* § 62-7-105(b)(11) (adopting UNIF. TR. CODE § 105(b)(13) (UNIF. L. COMM'N 2018)).

243. Rafalko v. Georgiadis, 777 S.E.2d 870, 876 n.3 (Va. 2015).

244. *See* S.C. CODE ANN. § 62-7-105 rptr.'s cmt.

245. *See id.*; *In re* Reuter, 499 B.R. 655, 679 (Bankr. W.D. Mo. 2013) ("The only reference to [the section] in the UTC Comment is this: 'The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond.'").

246. *See* Wannamaker v. S.C. State Bank, 176 S.C. 133, 179 S.E. 896, 899 (1935); Floyd v. Floyd, 365 S.C. 56, 94, 615 S.E.2d 465, 485 (Ct. App. 2005); Frye v. Cmty. Chest of Birmingham & Jefferson Cnty., 4 So. 2d 140, 148 (Ala. 1941); First-Citizens Bank & Tr. Co. v. Rasberry, 39 S.E.2d 601, 603 (N.C. 1946); State *ex rel.* Pryor v. Paul, 104 P.2d 745, 746 (Wash. 1940).

247. No. 2015CP4601409, 2016 WL 11620552, at *3 (S.C. Ct. C.P. Sep. 13, 2016), *aff'd in part*, Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019).

cited to § 62-7-1004, which nowhere addresses the question of whether the settlor may override the fee statute in the provisions of the trust agreement.[248] The trial judge did not mention § 62-7-105.[249] On appeal, the South Carolina Court of Appeals did not address this particular issue either.[250] As a result, it cannot be said that South Carolina's courts have definitively decided this question.[251]

The trustee argued in *In re Margarete Marthe Milliette 1997 Irrevocable Trust* that the court could not order him to reimburse the trust for attorney's fees which the trustee incurred in defending against the beneficiary's petition to remove him because of a provision in the trust document authorizing the trustee to "employ . . . legal counsel" and to "remunerate them and pay their expenses."[252] However, applying Wisconsin's versions of UTC §§ 105(b)(13) and 1004, the trial court rejected the trustee's argument and explicitly ruled that § 1004 "superseded any contrary language in the Trust."[253] The appellate court did not confront the question because the trustee failed to address it on appeal, which the appellate court considered a concession of the ruling's validity.[254]

In *Cohen v. Minneapolis Jewish Federation*, which involved a beneficiary's claims against the trustees of a charitable trust for breach of their duties, the beneficiary moved to prohibit payment of the trustees' litigation expenses and costs from the trust funds during the litigation pursuant to a Wisconsin statute permitting such a motion "[i]f a claim or defense based upon breach of trust is made against [the] trustee."[255] The trustees opposed the motion and argued that the trust agreement explicitly authorized them to use

248. S.C. CODE ANN. § 62-7-1004.

249. Dereede v. Feeley-Karp, No. 2015CP4601409, 2016 WL 11620552, at *3 (S.C. Ct. C.P. Sept. 13, 2016).

250. *See Dereede*, 427 S.C. at 346, 831 S.E.2d at 441.

251. In *Dereede*, there was no dispute that South Carolina law governed the claims in that case, thus the lower and appellate courts were not faced with any choice of law issues. *See Feeley-Karp*, 2016 WL 11620552, at *1; *Dereede*, 427 S.C. at 346–48, 831 S.E.2d at 441–42. As discussed below, a related question involves whether the settlor may render a fee statute such as § 62-7-1004 inapplicable by including a choice of law provision in the trust agreement adopting another state's laws, including its law concerning the recovery of attorney's fees. South Carolina's courts have not yet addressed or resolved that issue.

252. Appeal No. 2017AP2303, 2018 WL 2229366, at *7 (Wis. Ct. App. May 15, 2018).

253. *Id.*

254. *Id.*

255. Cohen v. Minneapolis Jewish Fed'n, No. 16-CV-325, 2017 WL 108087, at *1 (D. Wis. Jan. 11, 2017). This statute is discussed in a subsequent section of this Article. *See infra* notes 516–524 and accompanying text.

trust funds to pay their litigation expenses during the pendency of the litigation and, as a result, it superseded the statute.[256]

In resolving the motion, the *Cohen* court observed that Wisconsin has enacted a statute similar to UTC § 105(b)(13), which generally allows the settlor to override most statutory default rules in the trust agreement.[257] However, based on a narrow construction of the provisions in the trust agreement, the court held the trust only allowed the trustees to use trust funds to pay litigation expenses in "suits by or against the Trust itself."[258] It did not allow the trustees to use trust funds to defend against "a suit against [the] trustee" for breach of its duties to the trust.[259] The court "conclude[d] that there is no language in the Trust Agreement that conflicts with [Wisconsin's statutory version of UTC § 1004], so that statutory section controls."[260] It altogether avoided tackling the question of whether Wisconsin's statute, which is based on UTC § 105(b), permits the settlor to override Wisconsin's attorney's fees statute derived from UTC § 1004 by drafting contrary provisions in the trust instrument.[261]

V. CHOICE OF LAW IN TRUST INSTRUMENTS

It is now commonplace for trust agreements to include a choice of law provision stating that a particular jurisdiction's laws will govern some or all aspects of the trust including its validity, construction, or administration.[262] Choice of law clauses are generally honored in South Carolina in keeping with the fundamental policies of effectuating the settlor's intent and promoting freedom of disposition.[263]

256. *Cohen*, 2017 WL 108087, at *3. The trust agreement stated that the trustees have the power "[t]o pay all administration expenses of this trust . . . to commence or defend suits or legal proceedings, and to represent this trust in all suits or legal proceedings" and that "all expenses of this trust or of any Trustee acting hereunder shall be paid by the Trustees from the trust fund." *Id.*

257. *Id.* at *2. The Wisconsin statute provides that "[e]xcept as otherwise provided in the terms of the trust," the Wisconsin Trust Code governs the duties and powers of trustees and the rights and interests of beneficiaries and that "[t]he terms of a trust prevail over any provision of this chapter except . . . [t]he power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice." WIS. STAT. ANN. §§ 701.0105(1), 701.0105(2)(k) (West, Westlaw through 2019 Act 186).

258. *Cohen*, 2017 WL 108087, at *3.

259. *Id.*

260. *Id.*

261. *See id.* at *2.

262. Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213, 216 (2002).

263. *See* Team IA, Inc. v. Lucas, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011) (citing NuCor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007)); Carolina Cargo Inc. of

When a trust agreement includes a choice of law provision, issues may arise as to (1) which jurisdiction's law governs the question of a party's entitlement to attorney's fees in a judicial proceeding involving the administration of the trust and (2) whether a settlor may choose to avoid a forum jurisdiction's statute derived from UTC § 1004 by designating a foreign law that has not enacted the uniform provision or which does not provide for the recovery of attorney's fees.[264] Research has yet to reveal a case in which a court has ruled on these issues. Their resolution can encompass several complicated questions, including whether the fee statutes based on UTC § 1004 are part of the substantive law as determined by the choice of law provision or if they instead involve a procedural remedy resulting in the application of the forum's state law irrespective of such a provision and, if the former, whether the settlor's choice of a foreign jurisdiction's law as to the matter at issue should be disregarded on public policy grounds.

Under the UTC, the starting point for analyzing choice of law provisions in trusts is typically UTC § 107(1), which provides:

> [The] *meaning and effect* of the terms of a trust are determined by . . . the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.[265]

However, this provision does not expressly provide for choice of law regarding the *administration* of trusts.[266] As discussed above, § 62-7-1004

Rock Hill v. Countrywide Payroll & HR Sols., Inc., No. 0:16-CV-03249, 2018 WL 1443947, at *2 (D.S.C. Mar. 23, 2018) (citing *Nucor Corp*, 482 F. Supp. 2d at 714).

264. *See Lucas*, 395 S.C. at 249, 717 S.E.2d at 109.

265. UNIF. TR. CODE § 107(1) (UNIF. L. COMM'N 2018) (emphasis added). South Carolina has adopted this uniform provision, although in significantly modified form. S.C. CODE ANN. §§ 62-7-107(1), -7-107 cmt. (2009). Unlike the uniform provision, § 62-7-107(1) simply provides that the "meaning and effect of the terms of a trust are determined by . . . the law of the jurisdiction designated in the terms of the trust." *Id.* § 62-7-107(1). Importantly, the South Carolina statute eliminates the "unless" clause found in UTC § 107(1). *Id.*

266. *See In re* Thomas H. Gentry Revocable Tr., No. 29727, 2013 WL 376083, at *9 (Haw. Ct. App. Jan. 31, 2013); *see also* Foster v. Foster, No. 1180648, 2020 WL 1071331, at *3 (Ala. Mar. 6, 2020) (providing a choice of law provision stating that the trust is to be *construed* according to California law did not indicate settlor's intent regarding which state's law should apply to matters of trust *administration* (emphasis added)); Steiger v. Steiger, No. D068385, 2016 WL 4156689, at *2 (Cal. Ct. App. Aug. 5, 2016) (holding that a choice of law provision in a trust stating that the agreement will be construed for all purposes in accordance with the laws New Jersey expressly stated the settlor's intent with respect to the law to be applied in *construing* the trust, but it did not designate any particular law to govern trust *administration* (second emphasis added)); *In re* Peierls Family Inter Vivos Trs., 77 A.3d 249, 257 (Del. 2013)

applies to a "judicial proceeding involving the administration of a trust."[267] Consequently, the terms of UTC § 107(1) do not govern the enforceability of a choice of law provision designating a jurisdiction's law which conflicts with § 62-7-1004 because that statute concerns the administration of a trust, not the meaning or effect of that trust.[268]

In the absence of a relevant statute, the South Carolina Supreme Court has turned to the Restatement (Second) of Conflict of Laws (Restatement (Second)) to review the enforceability of a settlor's designation of law governing a trust.[269] In *Russell v. Wachovia Bank, N.A.*, the settlor created testamentary and living trusts that held personal property (or "movables" using the Restatement (Second)'s phraseology).[270] Both trust documents expressly provided that "the administration and construction of the trust, and the rights of the beneficiaries hereof, shall be governed by the laws of the State of North Carolina."[271]

To determine which state's law governed the question of the trusts' validity with regard to alleged undue influence, the *Russell* court applied §§ 268–270 of the Restatement (Second), which govern the choice of law applicable to the "construction" and "validity" of testamentary and living trusts holding personal property.[272] Pursuant to these sections, absent any strong public policy reason or lack of a substantial relation to the trust, the trust's validity is governed by the law designated by the settlor in the trust

("Matters concerning a trust's validity, effect, and interpretation are not generally matters of administration.").

267. S.C. CODE ANN. § 62-7-1004 (2009).

268. *Compare* UNIF. TR. CODE § 107(1) (UNIF. L. COMM'N 2018), *with* S.C. CODE ANN. § 62-7-1004.

269. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 221, 578 S.E.2d 329, 336 (2003) (adopting RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268–70 (AM. L. INST. 1971)). The Restatement (Second) provides specific principles for particular choice of law problems. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 267–282 (AM. L. INST. 1971). Chapter 10 of the Restatement is dedicated to trusts. *See generally id.* That chapter is bifurcated into two topics: movables (Topic 1) and land or real property (Topic 2). *See generally id.* The Restatement provides different guidance depending on (1) whether the trust is a testamentary, inter vivos, or charitable trust; (2) whether the trust holds real estate (described in the Restatement as "immovables") or personal property (described by the Restatement as "movables"); and (3) whether the choice of law issue concerns the validity, construction, or administration of the trust. *See id.* at introductory n.

270. 353 S.C. at 214–15, 578 S.E.2d at 331. The Restatement (Second) uses the terms "movables" and "immovables" rather than personal and real property and defines "immovables" to include land and fixtures, and "movables" to include "all things that are not immovables," including stocks, bonds, and tangibles such as chattels. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, topics 2–3, introductory n. (AM. L. INST. 1971).

271. *Russell*, 353 S.C. at 220–21, 578 S.E.2d at 335.

272. *Id.*

instrument.[273] The choice of law will be disregarded, however, if (1) the designated law does not have a substantial relation to the trust or (2) the application of the designated law would be contrary to South Carolina public policy.[274] Because the *Russell* court found that a substantial relationship existed between the trust and North Carolina and because no strong public policy reason was presented to deny application of North Carolina law, the court held that North Carolina law governed the question of whether the trusts were invalid due to alleged undue influence brought to bear upon the settlor.[275]

Whereas §§ 268–270 of the Restatement (Second) govern the choice of law applicable to the "construction" and "validity" of testamentary and living trusts involving personal property, §§ 271–272 specifically govern choice of law provisions applicable to the "administration" of such trusts.[276] Although the court's opinion in *Russell* did not cite to these specific sections involving trust administration,[277] South Carolina courts would presumably follow them because they are part of the Restatement (Second)'s overall scheme, specifically involving the choice of law principles applicable to trusts.[278]

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273. *Id.* at 221, 578 S.E.2d at 336. "A state has a substantial relation to the trust when it is the state, if any, which the settlor designated as that in which the trust is to be administered, or that of the place of business or domicile of the trustee at the time of the creation of the trust, or that of the location of the trust assets at that time, or that of the domicil of the settlor, at that time, or that of the domicil of beneficiaries." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. b (AM. L. INST. 1971). "There may be other contacts which will likewise suffice." *Id.*

274. *See Russell*, 353 S.C. at 221, 578 S.E.2d at 336.

275. *Id.* at 221–22, 578 S.E.2d at 336; *see also In re* Est. of Mullin, 155 A.3d 555, 560 (N.H. 2017) (holding that a trust's choice-of-law provision, which provided that California law governed validity, construction, and administration of a trust, controlled regarding the issue of validity of a settlor's inter vivos transfers of her property to trust); *In re* Zukerkorn, 484 B.R. 182, 191 (B.A.P. 9th Cir. 2012) ("Effect will be given to a provision in the trust instrument that the validity of the trust shall be governed by the local law of a particular state, provided that this state has a substantial relation to the trust and that the application of its local law does not violate a strong public policy of the state with which as to the matter at issue the trust has its most significant relationship.").

276. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 271–72 (AM. L. INST. 1971). The Comments to these sections provide that "[t]he term 'administration of a trust' . . . includes those matters which relate to the management of the trust." *Id.* §§ 271 cmt. a, 272 cmt. b. "Matters of administration" include "those relating to the duties owed by the trustee to the beneficiaries," "the powers of a trustee, such as the power to lease, to sell and to pledge, the exercise of discretionary powers, the requirement of unanimity of the trustees in the exercise of powers, and the survival of powers," the "liabilities which may be incurred by the trustee for breach of trust," the "questions as to what are proper trust investments," "the trustee's right to compensation," "the trustee's right to indemnity for expenses incurred by him in the administration of the trust," "the removal of the trustee and the appointment of successor trustees," and "the terminability of the trust." *Id.* § 271 cmt. a.

277. *Russell*, 353 S.C. at 221, 578 S.E.2d at 335.

278. *See* S.C. CODE ANN. § 62-7-107 (2009).

Sections 271 and 272 state that the "administration" of a testamentary or living trust holding personal property "is governed as to matters which can be controlled by the terms of the trust . . . by the local law of the state designated by the [testator or settlor] to govern the administration of the trust."[279] The Comments explain that the matters which the testator or settlor "cannot control" by any provision in the trust document include those matters that are prohibited by statute or that would violate public policy.[280] The Comments further clarify that "[a]s to those matters which are subject to [the testator's or settlor's] control, [they] may designate a state which has no relation to the trust[,]" and they "can freely regulate most matters of administration."[281] Thus, unlike the sections governing the choice of law applicable to the "construction" or "validity" of a trust, those governing the choice of law applicable to the "administration" of a trust do not require that the law chosen by the settlor have any relation to the trust itself.[282]

Based on §§ 271 and 272 of the Restatement (Second), courts have enforced choice of law provisions in trust documents that designate a foreign state's law to govern administration of the trust.[283] The overarching emphasis of the Restatement (Second) is on the settlor's intent and freedom of disposition, but this freedom is not unfettered.[284] Sections 271 and 272 and

279. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 271(a), 272(a) (AM. L. INST. 1971). Even as to the administration of a trust of an interest in land, the Comments to the Restatement (Second) provide that "if the testator or settlor provides that the local law of some other state shall be applied to govern the administration of the trust, or certain issues of administration, the courts of the situs would apply the designated law as to issues which can be controlled by the terms of the trust." *Id.* § 279 cmt. b. Therefore, the Restatement would still give effect to the choice of law provision absent a public policy reason to disregard it.

280. *Id.* §§ 271 cmt. c, 271 cmt. h, 272 cmt. c. The Restatement (Second) explains that "[c]ertain matters of administration may be such that the [testator or settlor] cannot regulate them by any provision in the terms of the trust." *Id.* §§ 271 cmt. h, 272 cmt. f.

281. *Id.* §§ 271 cmt. c, 272 cmt. c ("Thus, [the testator or settlor] can usually provide what compensation shall be paid to the trustee, what investments he may properly make, what powers are conferred and what duties are imposed upon the trustee. As to such matters, [the testator or settlor] can make his desires known by stating them explicitly in the will [or trust instrument]. As a shorthand device, he may incorporate by reference provisions of the local law of a particular state, even though that state has no connection with the administration of the trust.").

282. *Id.*

283. *See, e.g.*, Jackson v. Mercantile Safe Deposit & Tr. Co., No. 3:07-CV-2707, 2008 WL 11349735, *1–3 (D.S.C. June 24, 2008) (applying Restatement (Second) and holding that Maryland law governed a trust beneficiary's claims against a trustee for breach of fiduciary duty in the administration of the trust based on a choice of law provision in trust agreement stating that all questions pertaining to the trust's validity, construction and administration shall be determined in accordance with the laws of Maryland); *In re* Peierls Family Inter Vivos Trs., 77 A.3d 249, 265 (Del. 2013) ("A settlor may designate, either expressly or implicitly within the trust instrument, the law governing the trust's administration.").

284. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 271 cmt. g, 272 cmt. e (AM. L. INST. 1971).

their related Comments indicate that a testator or settlor may freely designate the law of a jurisdiction to govern the administration of a trust, even when it lacks any relation to the matter at issue (unless, of course, it would contravene some public policy to apply that law).[285] While these sections give the testator or settlor autonomy to choose the controlling law, this power is withdrawn if the designated law is contrary to the public policy of the forum state.[286]

The *Russell* case did not involve a party's request for an award of attorney's fees or costs.[287] Thus, the court was not confronted with the issues of whether the choice of law provisions required the court to apply a foreign state's law to the question of attorney's fees or whether the application of foreign law would violate South Carolina public policy.[288] What if those issues had been presented? Would the choice of law provisions in the trust agreements have required the court to apply foreign law in deciding a party's entitlement to attorney's fees, even though the case involved a judicial proceeding in a South Carolina court? South Carolina has adopted UTC § 1004, but not all states have done so.[289] If a South Carolina court were to conclude that "justice and equity" require an award of attorney's fees and costs in favor of a party to the proceedings pursuant to § 62-7-1004, would the court give effect to a trust instrument's choice of law provision requiring application of a foreign state's law which disallows the award of fees and costs, or would it find the foreign law offensive to the public policy of South Carolina and disregard the provision?

These questions are difficult to answer under current South Carolina law. Their resolution necessitates an initial determination of whether the recovery of attorney's fees under fee statutes based on UTC § 1004 is a substantive matter or a procedural remedy. South Carolina traditionally follows the rule of the Restatement (First) of Conflicts of Laws (Restatement (First)) with respect to procedural or remedial matters.[290] Under the Restatement (First),

285. *Id.* §§ 271 cmt. c, 272 cmt. c.

286. *Id.* §§ 271 cmt. h, 272 cmt. e.

287. 353 S.C. 208, 216, 578 S.E.2d 329, 333 (2003).

288. *Id.*

289. Alabama and Maryland, as examples, have enacted the UTC, but they specifically rejected UTC § 1004. *See generally* ALA. CODE §§ 19-3B-101 to -1305 (West, Westlaw though Act 2020-206); MD. CODE ANN. §§ 14.5-101 to -1006 (West, Westlaw through legislation effective July 1, 2020, from the 2020 Reg. Sess. of the Gen. Assemb.).

290. Jones v. Prudential Ins. Co., 210 S.C. 264, 271, 42 S.E.2d 331, 333 (1947); McDaniel v. McDaniel, 243 S.C. 286, 289, 133 S.E.2d 809, 811 (1963); Menezes v. WL Ross & Co., 403 S.C. 522, 551 n.2, 744 S.E.2d 178, 194 n.2 (2013) (citing Menezes v. WL Ross & Co., 392 S.C. 584, 590, 709 S.E.2d 114, 117 (2011)); Nash v. Tindall Corp., 375 S.C. 36, 39–40, 650 S.E.2d 81, 83 (Ct. App. 2007).

the *lex fori*, or law of the forum, controls procedural matters.[291] Thus, a determination that the recovery of attorney's fees under the these statutes is procedural results in an application of the forum state's law regardless of the presence of a choice of law clause in the trust agreement.[292] As an example, if a beneficiary commences a judicial proceeding against a trustee in a South Carolina court and seeks an award of attorney's fees and costs against the trustee or from the trust, South Carolina law would govern the issue of whether it is a procedural matter, despite the presence of a choice of law provision in the trust agreement applying a different state's law on substantive issues.[293]

South Carolina case law has yet to decide whether any of the fee statutes applicable to trust, probate, or protected person proceedings are substantive or procedural for purposes of conflicts of law.[294] Prior South Carolina cases applying different statutes that make a party responsible for another party's attorney's fees and costs have indicated that such statutes are substantive rather than procedural.[295] However, case law from other jurisdictions has generated mixed results.[296]

Some courts take the position that attorney's fees issues are procedural and, therefore, governed by the *lex fori*, whereas other courts regard them as substantive and thus susceptible to inclusion within the scope of a choice of law provision.[297] A few courts have taken an even more nuanced approach and reached different outcomes depending on the bases for recovery of attorney's fees such as whether under a contract, pursuant to a prevailing party

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291. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (AM. L. INST. 1934) ("All matters of procedure are governed by the law of the forum."); *see* 16 AM. JUR. 2D *Conflict of Laws* § 134, Westlaw (database updated July 2020) (explaining that matters of procedure, remedies, or remedial rights are governed by the law of the forum); Danielson v. Nat'l Supply Co., 670 N.W.2d 1, 5 (Minn. Ct. App. 2003) (noting the "almost universal rule that matters of procedure and remedies [are] governed by the law of the forum state") (citing Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983)).

292. *See Nash*, 375 S.C. at 39, 650 S.E.2d at 83.

293. *See McDaniel*, 243 S.C. at 289, 133 S.E.2d at 811.

294. *See* Dowaliby v. Chambless, 344 S.C. 558, 562, 544 S.E.2d 646, 648 (Ct. App. 2001).

295. Hardaway v. Cnty. of Lexington, 314 S.C. 22, 24, 443 S.E.2d 569, 571 (1994) (changing the law under which counties became liable for reasonable attorney's fees and costs beyond those provided under Defense of Indigents Act held to create a new liability); Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011) (concluding that the newly enacted portion of Frivolous Civil Proceedings Sanctions Act created substantive rights); *cf.* Fid. Nat'l Title Ins. Co. v. Hawkins, No. 6:16-CV-02758, 2016 WL 6962775, at *4 (D.S.C. Nov. 29, 2016) ("[W]hen a plaintiff is entitled to recover attorneys' fees by statute or contract, the plaintiff has a substantive right to such fees . . . .").

296. Symeon C. Symeonides, *Choice of Law in the American Courts in 2016: Thirtieth Annual Survey*, 65 AM. J. COMPAR. L. 1, 53 (2017) (discussing and citing the conflicting case law).

297. *Id.*

statute, or as a sanction for bad faith litigation practices.[298] It appears that South Carolina courts would likely deem the fee statutes based on UTC § 1004 to involve substantive rights, but the issue is far from definitively decided at this point.

If the South Carolina fee statutes based on UTC § 1004 are substantive in nature, then §§ 271 and 272 of the Restatement (Second) give the settlor autonomy to stipulate in the trust agreement that another state's substantive law will govern that matter *unless* doing so would contravene some strong South Carolina public policy.[299] Under South Carolina's public policy exception, our courts will not give effect to foreign law if it offends the public policy of the state.[300] The applicable inquiry is whether foreign law "is against [the] good morals or natural justice" of South Carolina.[301]

South Carolina courts "exercise restraint when undertaking the amorphous inquiry of what constitutes public policy."[302] Public policy is not susceptible to an exact definition, and its contours are often blurred rather than bright-lined.[303] Public policy is "a wide domain of shifting sands" and "imports something that is uncertain and fluctuating, varying[] with the changing economic needs, social customs, and moral aspirations of a people."[304] It nevertheless must be derived (or derivable) by clear implication from the established law of the state as found in its constitution, statutes, and

298. *Id.* at 53–54.

299. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 271 cmt. c, 272 cmt. c (AM. L. INST. 1971).

300. Nash v. Tindall Corp., 375 S.C. 36, 41, 650 S.E.2d 81, 83–84 (Ct. App. 2007) (citing Boone v. Boone, 345 S.C. 8, 14, 546 S.E.2d 191, 193 (2001)); Jerrold A. Watson & Sons, L.L.C. v. C.H. Robinson Co., No. CV 8:16-2833, 2017 WL 11317861, at *4 (D.S.C. Sept. 28, 2017) (citing *Boone*, 345 S.C. at 14, 546 S.E.2d at 193); Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) (citing Standard Register Co. v. Kerrigan, 238 S.C. 54, 70–71, 119 S.E.2d 533, 541–42 (1961)).

301. *Nash*, 375 S.C. at 41, 650 S.E.2d at 83–84 (quoting *Boone*, 345 S.C. at 14, 546 S.E.2d at 193); *see* Grant v. Butt, 198 S.C. 298, 298, 17 S.E.2d 689, 693 (1941) (citing Wiggins v. Postal Tel. Co., 130 S.C. 292, 125 S.E. 568, 569 (1924)) (stating the rule as to the types of contracts that are void under public policy). In Judge Cardozo's classic formulation of the doctrine, to render foreign law unenforceable as contrary to public policy, it must "violate some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal." Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918).

302. Taghivand v. Rite Aid Corp., 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015).

303. *Id.* (quoting Patton v. United States, 281 U.S. 276, 306 (1930)).

304. Weeks v. N.Y. Life Ins. Co., 128 S.C. 223, 223, 122 S.E. 586, 587 (1924) (quoting MacKendree v. S. States Life Ins. Co. of Ala., 112 S.C. 335, 335, 99 S.E. 806, 807 (1919)). Commentators have derided the public policy exception as providing a "substitute for analysis" because it is difficult to ascertain exactly what constitutes a state's public policy. *See, e.g.*, Yasamine J. Christopherson, *Conflicted About Conflicts? A Simple Introduction to Conflicts of Laws*, S.C. LAW., Sept. 2009, at 30, 33.

judicial decisions.[305] The primary source of South Carolina's public policy declaration is the General Assembly, and the courts will assume this prerogative only in the absence of a legislative declaration.[306]

Not every foreign law inconsistent with a South Carolina statute or judicial decision will be considered offensive to South Carolina public policy, however.[307] The fact that the laws of two states may conflict or differ does not necessarily mean that the law of one jurisdiction violates the public policy of the other.[308] Otherwise, every case involving conflicts of law would result in the application of the forum state's law. Traditionally, South Carolina courts have narrowly defined the types of foreign law that qualify for the public policy exception.[309] Noted examples of cases against good morals and natural justice include prohibited marriages, wagers, lotteries, racing, contracts for gaming, and the sale of liquors.[310]

It is often difficult to predict how the "against good morals or actual justice" standard will apply to a given case. In one case, the South Carolina Supreme Court ruled that when foreign law was applied to bar a tort action for money damages (even though recovery would have been allowed under the application of South Carolina law), the good morals or natural justice of South Carolina were not violated.[311] On the other hand, the South Carolina Supreme Court refused to follow a foreign state's law that recognized the doctrine of interspousal immunity, which would have deprived the plaintiff of a right of action if it applied, on the ground that it conflicted with South

305. Temple v. McKay, 172 S.C. 305, 305, 174 S.E. 23, 31 (1934); *Weeks*, 128 S.C. at 223, 122 S.E. at 587 (citing People v. Hawkins, 51 N.E. 257, 260 (1898)); *see also* Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 599, 762 S.E.2d 705, 712 (2014) ("Public policy considerations include not only what is expressed in state law, such as the constitution and statutes, and decisions of the courts, but also a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." (citing Country Preferred Ins. Co. v. Whitehead, 979 N.E.2d 35, 42 (2012))).

306. Citizens' Bank v. Heyward, 135 S.C. 190, 190, 133 S.E. 709, 737 (1925); *Taghivand*, 411 S.C. at 244, 768 S.E.2d at 387; *see* Maybank v. BB&T Corp., 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016) (citing Gladden v. Boykin, 402 S.C. 140, 143, 739 S.E.2d 882, 883 (2013)) ("In determining the public policy of this State, our courts must rely on legislative enactments whenever possible.").

307. Rauton v. Pullman Co., 183 S.C. 495, 508, 191 S.E. 416, 422 (1937) (quoting Herrick v. Minneapolis & St. Louis Ry. Co., 16 N.W. 413, 414 (1883)).

308. *Id.*

309. *Id.* (citing Howard v. Howard, 158 S.E. 101, 104 (1931)).

310. Dawkins v. State, 306 S.C. 391, 393, 412 S.E.2d 407, 408 (1991) (citing *Rauton*, 183 S.C. at 508, 191 S.E. at 422).

311. *Dawkins*, 306 S.C. at 393, 412 S.E.2d at 408; *see* Butler v. Ford Motor Co., 724 F. Supp. 2d 575, 582 (D.S.C. 2010) ("South Carolina courts have 'repeatedly adhered to the lex loci delicti rule to apply foreign law that defeated claims which would have survived under South Carolina law.'" (quoting Thornton v. Cessna Aircraft Co., 703 F. Supp. 1228, 1232 (D.S.C. 1988))).

Carolina public policy since the same doctrine had been abolished in this state.[312] Likewise, on public policy grounds, a South Carolina federal district court refused to follow Indiana law regarding the consideration sufficient to sustain a restrictive covenant in an employment setting when South Carolina followed a contrary rule.[313] It is also significant that the South Carolina Supreme Court has ruled that contracts attempting to waive certain mandatory rights afforded by state statutes actually violate state public policy.[314]

In light of the above, whether a settlor may validly circumvent the provisions of § 62-7-1004—namely, by placing a choice of law provision in the trust agreement designating a foreign law to govern the administration of the trust—may turn on whether § 62-7-1004 is part of the "public policy" of South Carolina. At first blush, the elimination of a party's right to recover attorney's fees in a judicial proceeding involving trust administration does not neatly correspond with the "natural injustices" that our case law has historically acknowledged (e.g., prohibited marriages, wagers, lotteries, racing, contracts for gaming, or the sale of liquors).[315] However, our courts have never limited public policy to those examples.[316] Other courts have held that it would violate the forum state's fundamental public policy to apply a foreign state's conflicting law with regard to the recovery of attorney's fees, thus indicating the issue can implicate a state's public policy.[317]

The recovery of attorney's fees in judicial proceedings involving trust administration certainly is a right ensconced in a South Carolina statute,[318] which signifies that it is a legislative declaration of state public policy. Yet some courts have refused to accept that every statutory provision constitutes

312. Boone v. Boone, 345 S.C. 8, 16, 546 S.E.2d 191, 194 (2001).

313. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 729 (D.S.C. 2007).

314. *See, e.g.*, SCN Mortg. Corp. v. White, 312 S.C. 384, 386, 440 S.E.2d 868, 869 (1994) (holding that a mortgage provision waiving mortgage debtor's appraisal rights under South Carolina statute was invalid as against public policy); *see also* Charleston Cnty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 6, 437 S.E.2d 6, 8 (1993) (citing Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975)) (holding that an insurance contract providing for an appraisal process that was in contravention of appraisal process mandated by statutes relating to insurance contracts was invalid).

315. *Cf. SCN Mortg. Corp.*, 311 S.C. at 386, 440 S.E.2d at 869.

316. *Cf. id.*

317. *See, e.g.*, First Intercontinental Bank v. Ahn, 798 F.3d 1149, 1157 (9th Cir. 2015); Harleysville Mut. Ins. Co. for Carolina Stone Setting Co. v. Gate Precast Co., No. 5:05-CV-228, 2006 WL 8438619, at *8 (E.D.N.C. Oct. 4, 2006); Ribbens Int'l, S.A. de C.V. v. Transp. Int'l Pool, Inc., 47 F. Supp. 2d 1117, 1122 (C.D. Cal. 1999); ABF Capital Corp. v. Grove Props. Co., 23 Cal. Rptr. 3d 803, 815 (2005); Capital One Bank v. Fort, 255 P.3d 508, 511 (Or. Ct. App. 2011). *But see* Walls v. Quick & Reilly, Inc., 824 So. 2d 1016, 1019 (Fla. Dist. Ct. App. 2002); Precision Tune Auto Care, Inc. v. Radcliffe, 815 So. 2d 708, 710 (Fla. Dist. Ct. App. 2002) (quoting Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co., 761 So. 2d 306, 311, 312 (Fla. 2000)).

318. S.C. CODE ANN. § 62-7-1004 (2009).

the public policy of a state.[319] In *Volvo Construction Equipment North America, Inc.*, in the absence of any state court decisions determining whether these statutes embodied state public policy, the Fourth Circuit Court of Appeals viewed as determinative not only whether the text or legislative histories of the statutes explicitly declared they reflected a fundamental state policy but also whether the statutes contained anti-waiver provisions.[320] On one side, the court found that a Louisiana statute did not constitute a state public policy sufficient to override a choice of law provision in a contract because the statute contained no explicit legislative declaration that it was a fundamental state policy, and it contained no anti-waiver provision.[321] Conversely, the court found that an Arkansas statute did embody a fundamental state policy sufficient to invalidate a contractual choice of law provision when the statute contained an anti-waiver provision, as well as an "emergency clause," in which it set forth a compelling statement of state public policy.[322]

A legislature greatly simplifies the task of determining whether a state statute embodies public policy when it explicitly states that the statute constitutes such policy,[323] and the presence of an anti-waiver provision may signify the statute embodies a state public policy in light of the importance the legislature attached to the statute.[324] However, South Carolina state courts have never mandated that a state statute must explicitly declare it reflects

319. Kunda v. C.R. Bard, Inc., 671 F.3d 464, 467 (4th Cir. 2011); Cherokee Pump & Equip. Inc. v. Aurora Pump, 38 F.3d 246, 252 (5th Cir. 1994). *But see* Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581, 617 (Widener, C.J., dissenting) (alteration in original) ("The majority refuses to remand [defendant's] claims and counterclaims under the Louisiana Act to the district court on the ground that the Louisiana Act does not constitute a fundamental policy of Louisiana. In my opinion, this reasoning is not only overly-and hyper-technical, it is fundamentally wrong. A statute enacted by a state legislature establishes the public policy of that State.").

320. 386 F.3d at 607–10, 620 n.26; *see also Kunda*, 671 F.3d at 468 (noting cases have struck down contractual provisions as contrary to public policy when the related statute contains an express statement that the law is a fundamental public policy, an anti-waiver provision, or similar language of clear legislative intent).

321. *Volvo*, 386 F.3d at 609.

322. *Id.* at 610.

323. *See, e.g.*, Cromeens, Holloman, Sibert, Inc v. AB Volvo, 349 F.3d 376, 390 (7th Cir. 2003) (observing that the state legislature made the task of determining whether a statute constituted the state's public policy exceedingly easy when the statute expressly stated that a contract in violation of its provisions is deemed against public policy and is void and unenforceable); Bethlehem Steel Corp. v. G.C. Zarnas & Co., 498 A.2d 605, 608 (Md. 1985) (noting that the legislature's explicit determination of public policy was sufficient to override conflict of law provision).

324. *Volvo*, 386 F.3d at 609; Nat'l Glass, Inc. v. J.C. Penney Props., Inc., 650 A.2d 246, 250 (Md. 1994); Wyatt Energy, Inc. v. Motiva Enters. LLC, No. X01CV020467090S, 2002 WL 31374797, at *6 (Conn. Super. Ct. 2002) (citing Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1364 (2d Cir. 1993)).

public policy or contain an anti-waiver provision for it to constitute public policy.[325] Thus, it is uncertain whether South Carolina courts will find the Fourth Circuit's reasoning to be dispositive or persuasive.

The SCTC does not contain any explicit declaration by the General Assembly that its provisions constitute the public policy of South Carolina.[326] The SCTC also does not contain an anti-waiver provision explicitly referencing § 62-7-1004, although it does contain a general anti-waiver provision which could be interpreted to reach § 62-7-1004's requirements.[327] While the SCTC primarily consists of default rules that apply only if the trust agreement fails to address a particular issue, it also establishes mandatory rules that apply regardless of the settlor's intent to the contrary.[328] Among these mandatory rules is a provision stating that the trust terms cannot negate "the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice."[329]

Because § 62-7-1004 applies when "justice and equity may require" an award of attorney's fees and costs,[330] a court could find that this right fits within the scope of § 62-7-105(b)(11)'s "interests of justice" language, thereby prohibiting a settlor from overriding § 62-7-1004's requirements in the trust instrument. A court could then exercise its power to take action as "necessary in the interests of justice" and award attorney's fees and costs to a party when "justice and equity" require it, notwithstanding a conflict of law provision in the trust stipulating a contrary result. Put differently, a court could conclude that § 62-7-1004 is a mandatory rule that cannot be waived.

South Carolina courts have not yet directly addressed the questions of (1) whether the non-waiver provisions found in § 62-7-105(b) apply to the attorney's fees provision in § 62-7-1004 or (2) whether the inclusion of a choice of law provision in the trust instrument designating a foreign law that conflicts with § 62-7-1004's requirements violates South Carolina public policy.[331] This may well be what one South Carolina law professor has

325. *Cf.* Cunningham v. Feinberg, 107 A.3d 1194, 1213 (Md. 2015) ("Anti-waiver provisions and explicit legislative language are not required always in order to reach a conclusion that a Maryland Code provision represents strong public policy."); Dix v. ICT Grp., Inc., 161 P.3d 1016, 1023 (Wash. 2007) (noting that the absence of an anti-waiver provision in statute did not undercut finding that statute expressed state public policy).

326. S.C. CODE ANN. § 62-7-105 rptr.'s cmt. (2009).

327. *Id.*

328. *Id.*

329. *Id.* § 62-7-105(b)(11).

330. *Id.* § 62-7-1004.

331. As discussed above, although not explicitly relying on § 62-7-105(b)(11) for support, a South Carolina trial court has ruled that a settlor may not override the provisions of § 62-7-1004 by drafting contrary provisions in the trust instrument. Dereede v. Feeley-Karp, No. 2015CP4601409, 2016 WL 11620552, at *3 (S.C. Ct. C.P. Sept. 13, 2016), *aff'd in part sub*

described as "a chicken-and-egg issue."[332] If § 62-7-1004 is considered to provide non-waivable rights under § 62-7-105(b), it follows that a settlor cannot accomplish the same objective by choosing a foreign law that conflicts with the statute.[333] However, if it is determined that the rights under § 62-7-1004 can be waived notwithstanding the mandatory rules of § 62-7-105(b), no public policy concern would prevent a settlor from avoiding the statute's requirements by inserting a choice of law provision in the trust document stipulating to another jurisdiction's laws.[334]

Courts from other jurisdictions have held that choice of law provisions govern the parties' entitlement to attorney's fees and require the application of foreign states' laws on this subject matter, although none addressed statutes based on UTC § 105(b)(13) or confronted public policy arguments.[335] For example, in *In re Thomas H. Gentry Revocable Trust*, the trust instrument included such a provision, stating it "shall be construed and administered in accordance with the laws" of California.[336] In litigation filed in Hawaii, trust beneficiaries filed objections to several years of trust accountings submitted by the trustees.[337] They argued on appeal that the trial court erred in awarding attorney's fees and costs to the trustees based on California law rather than Hawaii law.[338]

The appellate court rejected this argument and held that the approval of the trustee's attorney's fees pertained to trust administration and, therefore, the choice of law provision in the trust document was controlling.[339] The court supported its decision with citations to the Restatement (Second) of Conflict

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nom. In re Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019). Additionally, in an unpublished decision, a Wisconsin trial court held that a Wisconsin statute nearly identical to § 62-7-105(b)(11) superseded the settlor's ability to override a statute similar to § 62-7-1004 by virtue of contrary terms in the trust instrument. *See In re* Margarete Marthe Milliette 1997 Irrevocable Tr., Appeal No. 2017AP2303, 2018 WL 2229366, at *7 (Wis. Ct. App. May 15, 2018); *see also supra* notes 247–268 and accompanying text.

332. S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 176 n.290 (2005).

333. *Cf.* Richland Horizontal Prop. Regime Homeowners Ass'n v. Sky Green Holdings, Inc., 392 S.C. 194, 198, 708 S.E.2d 225, 227 (Ct. App. 2011) (stating that parties may not contractually circumvent the requirements of a statute).

334. *Cf.* Swanson v. Image Bank, Inc., 77 P.3d 439, 443 (Ariz. 2003) (holding that because the state statute did not preclude parties from agreeing by express provision in a negotiated contract to surrender their right to a statutory remedy, they may do so by adopting the law of another state through a choice of law provision).

335. Calvert v. Est. of Calvert, 259 S.W.3d 456, 459 (Ark. Ct. App. 2007); *see In re* Thomas H. Gentry Revocable Tr., No. 29727, 2013 WL 376083, at *9 (Haw. Ct. App. Jan. 31, 2013).

336. 2013 WL 376083, at *9.

337. *Id.* at *3.

338. *Id.* at *8.

339. *Id.* at *9.

of Laws.[340] The court disagreed with the beneficiaries' argument "that [Hawaii] law must apply because the attorneys' fees were incurred in [Hawaii]-based litigation" and held that "where the fees were incurred is not determinative of which law governs the administration of the trusts."[341] Because the fees were incurred in the course of trust administration, the court found that "California law regarding their compensability and reasonableness applies."[342] This opinion does not suggest that the beneficiaries raised any public policy challenge to the application of California law or showed that a material difference existed between the substantive laws of Hawaii and California involving attorney's fees.[343]

In *Calvert v. Estate of Calvert*, a divided Arkansas Court of Appeals ruled that a trust's choice of law provision controlled a party's entitlement to attorney's fees, and it mandated the application of Texas law to that question.[344] The trust document in *Calvert* expressly stated that the Texas Trust Act governed administration of the trust, except in circumstances where the act conflicted with the trust agreement.[345] A beneficiary of the trust sued to invalidate certain transfers of trust assets made by the trustees to a trustee-beneficiary.[346] The plaintiff-beneficiary lost in the trial court and an award of attorney's fees and costs was rendered against him, albeit under Arkansas law.[347]

On the beneficiary's subsequent appeal of the attorney's fee award, the majority opinion enforced the choice of law provision and held that Texas law controlled all substantive matters in the case, including entitlement to attorney's fees.[348] In doing so, it held that the trial judge erred in applying Arkansas law.[349] The appellate court nevertheless affirmed the trial court's award of attorney's fees, maintaining that it was justified under a Texas statute similar to UTC § 1004.[350]

The concurring judge ruled that it was error to apply the choice of law provision to the question of attorney's fees based on her conclusion that the allowance of attorney's fees is a "procedural matter," rather than a substantive

340. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272 cmt. c (AM. L. INST. 1971)).

341. *Id.*

342. *Id.*

343. *See id.* at *1.

344. *See* 259 S.W.3d 456, 459 (Ark. Ct. App. 2007).

345. *Id.*

346. *See id.* at 458.

347. *See id.*

348. *See id.* at 459.

349. *See id.*

350. *Id.* at 459–60. The court further pointed out that even if Arkansas law had controlled the question, the award of attorney's fees would have been proper under an Arkansas statute derived from UTC § 1004. *Id.*

issue, and procedural matters are governed by the law of the forum state.[351] However, she concurred with the majority's conclusion that the ruling on the merits would be the same applying Arkansas law.[352]

Again, this case does not indicate that the beneficiary raised any public policy challenge to the application of Texas law, and the court specifically held there was no material difference between the substantive laws of Arkansas and Texas involving attorney's fees.[353] Although there is no South Carolina case directly addressing this issue under any of the fee statutes derived from UTC § 1004, South Carolina cases involving other laws that make one party responsible for another party's attorney's fees and costs indicate that such laws are substantive in nature.[354] Thus, the majority opinion in *Calvert* is likely more consistent with South Carolina law on this particular issue than is the concurring opinion.

VI. FEE STATUTE RELATIONSHIP TO COMMON LAW RIGHTS AND OTHER STATUTORY BASES FOR RECOVERY OF FEES

Section 62-7-106, like UTC § 106, expressly provides that, except as modified in the statute, the common law of trusts and principles of equity supplement its provisions.[355] Although the American Rule ordinarily holds parties responsible for payment of their own attorney's fees regardless of the outcome of the litigation,[356] a number of exceptions to this rule have developed under the common law and equity jurisdiction, including: (1) a "bad faith" exception, (2) the "common fund doctrine," and (3) the rule entitling trustees to reimbursement from the trust estate for attorney's fees

351. *Id.* at 460 (Heffley, J., concurring) (quoting BAAN, U.S.A. v. USA Truck, Inc., 105 S.W.3d 784, 789 (Ark. Ct. App. 2003)).

352. *Id.* at 461.

353. *See id.* at 459 (majority opinion).

354. *See* Hardaway v. Cnty. of Lexington, 314 S.C. 22, 24, 443 S.E.2d 569, 571 (1994); Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011); Fid. Nat'l Title Ins. Co. v. Hawkins, No. 6:16-CV-02758, 2016 WL 6962775, at *4 (D.S.C. Nov. 29, 2016) ("[W]hen a plaintiff is entitled to recover attorneys' fees by statute or contract, the plaintiff has a substantive right to such fees . . . .").

355. S.C. CODE ANN. § 62-7-106 (2009) ("The common law of trusts and principles of equity supplement this article, except to the extent modified by this article or another statute of this State."); *see* UNIF. TR. CODE § 106 (UNIF. L. COMM'N 2018).

356. Layman v. State, 376 S.C. 434, 451, 658 S.E.2d 320, 329 (2008).

reasonably incurred in good faith in defending the administration of the trust.[357] This last rule is now codified in UTC § 709(a)(1).[358]

Courts have reached differing conclusions as to whether the fee statutes based on UTC § 1004 supplant, supplement, or modify these traditional common law and equitable exceptions to the American Rule.[359] Some courts have held that UTC § 1004 simply codifies or echoes the old common law and equitable exceptions and does not expand or enlarge the court's discretion to award attorney's fees and costs beyond those principles.[360] To adopt this view of the South Carolina fee statutes based on UTC § 1004 would largely render them inutile in the majority of fee disputes because South Carolina common law does not recognize exceptions beyond the common fund and bad faith contexts.[361] However, other courts have concluded that the "justice and equity" standard of UTC § 1004 is not limited by the common law and equitable exceptions but rather expands the court's discretionary authority to award fees and costs.[362]

A. Common Fund Doctrine

South Carolina, like many jurisdictions, has long followed the "common fund" exception.[363] Although the doctrine applies to contexts beyond trusts and estates, it has been utilized to allow a beneficiary, trustee, or party to a trust to recover attorney's fees and expenses from the entire trust estate under certain circumstances.[364] This doctrine allows a court in its equitable

357. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258–259 (1975) (quoting F.D. Rich Co. v. U.S. for Use of Indus. Lumber Co., 417 U.S. 116, 129 (1974)); *Layman*, 376 S.C. at 452, 658 S.E.2d at 329; Lund as Tr. of Revocable Tr. of Kim A. Lund v. Lund, 924 N.W.2d 274, 285 (Minn. Ct. App. 2019) (quoting *In re* Freeman's Tr., 75 N.W.2d 906, 907 (Minn. 1956)).

358. *See* UNIF. TR. CODE § 709 (UNIF. L. COMM'N 2018).

359. A preceding section of this Article discusses that UTC § 1004 departs from the common law rule and does not require a showing of bad faith or egregious conduct for attorney's fees to be awarded, although the presence or absence of bad faith conduct is a factor to be considered. *See supra* Section III.A.1. Thus, the "bad faith" exception to the American Rule is not discussed in this section.

360. *See Lund*, 924 N.W.2d at 286.

361. *See Layman*, 376 S.C. at 452, 658 S.E.2d at 329; Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996).

362. *E.g.*, Watkins v. Tr. Under Will of William Marshall Bullitt *ex rel.* PNC Bank, N.A., No. 3:13-CV-1113-DJH-CHL, 2015 WL 13849175, at *5 (W.D. Ky. Sept. 16, 2015) (stating that Kentucky's version of UTC § 1004 widely expands the right to receive attorney's fees in judicial proceedings involving disputes over the administration of a trust beyond the common law exceptions).

363. *Layman*, 376 S.C. at 452, 658 S.E.2d at 329–30; Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

364. *See Layman*, 376 S.C. at 452, 658 S.E.2d at 329–30; *Boeing*, 444 U.S. at 478, 486 (1980).

jurisdiction to award attorney's fees to the attorney representing a party who, at the party's own expense, has maintained a suit for the creation, recovery, preservation, or increase of a common fund or common property in which others are entitled to share—with the fees to be paid directly out of the common fund or common property so created or preserved.[365]

The common fund principle derives from the equitable doctrines of quantum meruit and unjust enrichment.[366] The doctrine's rationale is that when individuals benefit from litigation without contributing to its costs, they have been unjustly enriched at the successful litigant's or lawyer's expense and, therefore, courts remedy this inequity by shifting a proportional share of reasonable attorneys' fees onto these unjustly enriched beneficiaries.[367]

"A common fund recovery places the cost of litigation on the *recovering beneficiaries of a lawsuit*, whereas a fee-shifting statute places this burden on the *losing party*."[368] It follows that a key distinction between the common fund doctrine and an award of fees authorized by a fee-shifting statute "is that the equitable principles underlying the common fund doctrine create a mechanism in which attorneys' fees are not assessed against the losing party by *fee-shifting*, but rather, are taken directly from the common fund or recovery and borne by the prevailing party through *fee-spreading*."[369] Through the method of fee-spreading, the doctrine's rationale is that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses."[370] The doctrine limits

365. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 573–74, 511 S.E.2d 372, 382 (Ct. App. 1998) (citing *In re* Crum, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)); *see* Shriner v. Dyer, 462 So. 2d 1122, 1124 (Fla. Dist. Ct. App. 1984) (holding that under the "common fund rule" the beneficiaries of a trust were entitled to recover their attorney's fees and costs for successfully requiring the trustee to refund attorney's fees previously paid from the trust in a prior action).

A notable "outgrowth" of the common fund rule is the "substantial benefit doctrine." Smith v. Szeyller, 242 Cal. Rptr. 3d 585, 592–93 (Ct. App. 2019) (citing Serrano v. Priest, 569 P.2d 1303, 1309 (Cal. 1977)). Whereas the common fund doctrine applies only to pecuniary benefits, the substantial benefit doctrine applies to both pecuniary and nonpecuniary benefits. *Id.* (citing *Serrano*, 569 P.2d at 1309). The latter doctrine "permits the award of fees when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuniary nature." *Serrano*, 569 P.2d at 1309. It has been applied to actions to remove a trustee who has breached the trust or to compel an accounting. *See Smith*, 242 Cal. Rptr. 3d at 593. South Carolina's courts have not yet addressed or adopted the substantial benefit doctrine.

366. Brundle *ex rel.* Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A., 919 F.3d 763, 785 (4th Cir. 2019) (first citing Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116, 127 (1885); and then citing Trs. v. Greenough, 105 U.S. 527, 532 (1881)).

367. *Id.* (citing Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392 (1970)).

368. *Id.* at 786.

369. *Layman*, 376 S.C. at 452, 658 S.E.2d at 330.

370. *In re* Est. of Kay, 423 S.C. 476, 489, 816 S.E.2d 542, 549–50 (2018) (quoting *Layman*, 376 S.C. at 452, 658 S.E.2d at 329).

payment of attorney's fees from the estate or trust corpus only to those whose actions benefitted the entire estate or trust—such as by bringing about an enhancement in value or an increase in the estate or trust assets—rather than solely for their own benefit.[371]

Case law reflects confusion as to whether UTC § 1004 incorporates this equitable or common law doctrine; in doing so, it would require a beneficiary or trustee to show that its actions resulted in a benefit for the trust as a whole, not just for the beneficiary or trustee individually. The result most congruous with UTC § 1004's purpose is that, while it does not supplant this equitable or common law doctrine, it departs from the limitation expressed in the case law applying that doctrine. Unlike the common fund cases, UTC § 1004 is not derived from the principles of quantum meruit and unjust enrichment.[372] Section 1004 is not confined to fee-spreading but specifically authorizes fee-shifting in favor of or against an adversary.[373] An important goal of fee-shifting statutes is to encourage plaintiffs to enforce their own statutory rights when the cost of litigation, absent the fee-shifting provision, would otherwise dissuade them from doing so. This is especially true when the pecuniary loss is small in relation to such cost.[374] This goal would be frustrated by importing into UTC § 1004 a mandate that the plaintiffs' action must be for the benefit of the trust as a whole.

Given the different rationales underlying UTC § 1004 and the common fund doctrine, the uniform statute does not limit payment of attorney's fees from the trust assets to those fiduciaries, beneficiaries, or others whose actions inure to the benefit of the entire trust as opposed to the benefit of one or more trustees or beneficiaries.[375] Though fee awards normally involve such parties,

371. *See In re* Crum, 196 S.C. 528, 528, 14 S.E.2d 21, 23 (1941); *In re* Est. of Rohrich, 496 N.W.2d 566, 572–73 (N.D. 1993).

372. *See Brundle*, 919 F.3d 763, 785 (first citing Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116, 127 (1885); and then citing Trs. v. Greenough, 105 U.S. 527, 532 (1881)); *cf.* UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018) ("This section . . . codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity.").

373. *See* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018).

374. Betz v. Diamond Jim's Auto Sales, 849 N.W.2d 292, 299–300 (Wis. 2014) (quoting Kolupar v. Wilde Pontiac Cadillac, Inc., 735 N.W.2d 93, 108 (Wis. 2007)); *see* Friolo v. Frankel, 942 A.2d 1242, 1250–51 (Md. 2008); Coleman v. Fiore Bros., 552 A.2d 141, 143 (N.J. 1989), *abrogated in part on other grounds by* Pinto v. Spectrum Chems. & Lab. Prods., 985 A.2d 1239 (N.J. 2010).

375. *See* Rouner v. Wise, 446 S.W.3d 242, 260 (Mo. 2014) (en banc); Garwood v. Garwood, 233 P.3d 977, 985 (Wyo. 2010); Atwood v. Atwood, 25 P.3d 936, 947 (Okla. Civ. App. 2001); *In re* Conservatorship of Annette H. Cross, No. W201801179COAR3CV, 2020 WL 6018759, at *11–14 (Tenn. Ct. App. Oct. 9, 2020); *see also* Kane v. Locklin Revocable Tr. Agreement, No. 116,752, 2017 WL 4700389, at *7 (Kan. Ct. App. Oct. 20, 2017) (pointing out that while "[o]lder caselaw suggests that an award of attorney fees is reasonable if the litigation

the statutes based on UTC § 1004 impose no such litmus test.[376] Provided the applicant incurs the fees in a judicial proceeding involving the administration of a trust and the fees are reasonable, UTC § 1004 permits a court to award such fees against any other party or from the trust assets "as justice and equity may require."[377] The fact that a party was acting for their personal interest rather than for the trust as a whole does not prohibit the party's recovery of fees under UTC § 1004; however, it is a consideration that may factor into the overall calculus and should be given as much or little weight as the individual circumstances validate.[378]

Despite the UTC's divergence from the traditional limitations of the common fund cases, some courts applying statutes based on UTC § 1004 nevertheless continue to hearken back to the common law cases and engraft on the statute the requirement that a party's actions must inure to the benefit of the entire estate or trust, rather than to the benefit of any particular party.[379] These cases interpret § 1004 as simply codifying the common law exceptions to the American Rule, and they fail to appreciate that the uniform act expands the court's discretionary authority to award attorney's fees and costs in trust litigation and, therefore, diverges from the case law applying those traditional exceptions.[380]

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proved beneficial to the trust estate," the case law applying § 1004 takes a more "deferential stance" towards attorney's fees) (first citing Moore v. Adkins, 576 P.2d 245, 255 (1978); and then citing *In re* Est. of Somers, 89 P.3d 898, 907–08 (Kan. 2004)); *see generally* Henry, *supra* note 47, at 23–24 (explaining why in litigation between a trustee and a beneficiary the standard in UTC § 1004 should not require a showing that the trustee's attorney's fees and costs were expended for the benefit of the trust).

376. UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018). Notably, in applying § 45 of the General Laws of Massachusetts, Massachusetts's courts have declined to require that the attorney's services confer a benefit upon the whole estate in the sense of creating, preserving, or increasing the same as a condition to the attorney's fees being paid for out of the estate. *See* First Nat'l Bank of Bos. v. Sullivan, 350 N.E.2d 473, 478–79 n.15 (Mass. App. Ct. 1976).

377. *See* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018).

378. *See Garwood*, 233 P.3d at 983, 987, 988 (holding that the trial court acted within its discretion when it required trustees to reimburse a trust for all but $10,000 of the money they had withdrawn to pay for their attorney's fees in litigation even though trustees had paid over $49,000 in fees; litigation was made necessary by trustees' actions and did little to benefit trust).

379. *See, e.g.*, Honsinger v. UMB Bank, N.A., No. 06-0018-CV-W, 2009 WL 10704888, at *2–3 (W.D. Mo. Aug. 31, 2009); Foster v. Eckert, No. 4:09-CV-328, 2010 WL 1706174, at *1–2 (E.D. Mo. Apr. 28, 2010); *In re* T.R. Potter, Jr. Exempt Tr., 593 S.W.3d 556, 570–71 (Mo. Ct. App. 2019); *In re* Schauer, No. A18-0969, 2019 WL 1510698, at *5–6 (Minn. Ct. App. Apr. 8, 2019). The courts in these cases relied upon cases pre-dating the UTC which applied the common law rule.

380. *See* Watkins v. Tr. Under Will of William Marshall Bullitt *ex rel.* PNC Bank, N.A., No. 3:13-CV-1113-DJH-CHL, 2015 WL 13849175, at *5 (W.D. Ky. Sept. 16, 2015).

B. Rule of Trustee Reimbursement from Trust

Confusion also exists as to the relationship between UTC § 1004 and the traditional rule of trustee reimbursement from the trust for expenses incurred in the administration of the trust, which is now codified in UTC § 709(a)(1).[381] Courts have had difficulty working out the interplay between UTC §§ 709(a)(1) and 1004 when *a trustee* seeks payment or reimbursement of attorney's fees and costs *from the trust assets*.[382] In particular, courts have struggled to decide whether UTC § 709(a)(1), UTC § 1004, or some combination of both provisions governs the situation in which a trustee seeks reimbursement from the trust estate for any attorney's fees and costs incurred in a judicial proceeding involving trust administration.[383] To solve this puzzle requires consideration of the different rationales underlying these two provisions of the UTC.

Prior to the UTC, the common law long recognized that a trustee is entitled to reimbursement or indemnification from the trust for attorney's fees and expenses that the trustee, acting reasonably and in good faith, incurs in defending their administration of the trust.[384] Reasonableness and good faith are the leading touchstones of the common law rule.[385] This rule has also been applied to personal representatives for an estate. Indeed, it has now been codified in the SCPC.[386]

This common law rule almost always encompasses a trustee's attorney's fees and costs incurred in successfully defending against actions that (1) seek the trustee's removal, (2) allege the trustee has mismanaged or misappropriated the trust estate, or (3) charge the trustee with breach of

381. *See* UNIF. TR. CODE § 709 (UNIF. L. COMM'N 2018).

382. *See* Henry, *supra* note 47, at 20–24.

383. *See id.* (discussing conflicting case law).

384. Lund as Tr. of Revocable Tr. of Kim A. Lund v. Lund, 924 N.W.2d 274, 285 (Minn. Ct. App. 2019) (quoting *In re* Freeman's Tr., 75 N.W.2d 906, 907 (Minn. 1956)); *In re* Trusteeship of Williams, 591 N.W.2d 743, 748 (Minn. Ct. App. 1999) (citing *In re* Tr. Created by Hill, 499 N.W.2d 475, 494 (Minn. Ct. App. 1993)); *see* W.A.K., II *ex rel.* Karo v. Wachovia Bank, N.A., No. 3:09-CV-575, 2010 WL 2976518, at *4 (E.D. Va. July 19, 2010) (quoting Ward v. NationsBank of Va., N.A., 507 S.E.2d 616, 624 (1998)); RESTATEMENT (THIRD) OF TRS. § 88 cmt. d (AM. L. INST. 2007); 90A C.J.S *Trusts* § 400 (2020); 76 AM. JUR. 2D *Trusts* § 395 (2020). This rule has been applied to trustees who were no longer trustees by the time the lawsuit was brought against them or the award was made. *See* Ladd v. Stockham, 209 So. 3d 457, 474 (Ala. 2016); Kasperbauer v. Fairfield, 88 Cal. Rptr. 3d 494, 499 (Ct. App. 2009).

385. *See* 76 AM. JUR. 2D *Trusts* § 395 (2020).

386. S.C. CODE ANN. § 62-3-720 (2009) ("If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred."); *see In re* Est. of Connor, No. 2009-UP-501, 2009 WL 9530096, at *4 (S.C. Ct. App. Oct. 29, 2009).

trust.[387] Additionally, because reasonableness and good faith are the guideposts, many courts have held that the mere lack of success in the litigation is not determinative of the trustee's right to reimbursement.[388] Courts have allowed attorney's fees of unsuccessful trustees to be paid from the trust estate when "honest differences of opinion" existed over the administration of the trust.[389] These courts effectively recognize that a trustee may act reasonably and in good faith in prosecuting or defending litigation, but its judgment nevertheless may turn out to be wrong in light of subsequent events.[390]

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387. *See* DuPont v. S. Nat'l Bank of Hous., 771 F.2d 874, 886 (5th Cir. 1985) (citing Grey v. First Nat'l Bank, 393 F.2d 371, 387 (5th Cir. 1968)); French v. Wachovia Bank, 722 F.3d 1079, 1089 (7th Cir. 2013) (first citing McGeoch Bldg. Co. v. Dick & Reuteman Co., 40 N.W.2d 577, 579 (Wis. 1950); and then citing *In re* Cole's Est., 78 N.W. 402, 406 (Wis. 1899)); Snook v. Tr. Co. of Ga. Bank of Savannah, 909 F.2d 480, 485 (11th Cir. 1990); Regions Bank v. Lowrey, 101 So. 3d 210, 220 (Ala. 2012); First Union Nat'l Bank v. Jones, 768 So. 2d 1213, 1215 (Fla. Dist. Ct. App. 2000) (citing W. Coast Hosp. Ass'n v. Fla. Nat'l Bank of Jacksonville, 100 So. 2d 907, 812 (Fla. 1958)); Caruso v. N.Y.C. Police Dep't Pension Funds, 470 N.Y.S.2d 963, 967 (Sup. Ct. 1983); Willson v. Whitehead, 27 S.E.2d 213, 216 (Va. 1943); Saulsbury v. Denton Nat'l Bank, 335 A.2d 199, 201 (Md. Ct. App. 1975) (citing Jessup v. Smith, 119 N.E. 403, 404 (N.Y. 1918)); Bond v. Bond, 592 S.E.2d 801, 810 (W. Va. 2003).

388. *See* Am. Nat'l Bank of Beaumont v. Biggs, 274 S.W.2d 209, 222 (Tex. Civ. App. 1954); Webbe v. First Nat'l Bank & Tr. Co. of Barrington, 487 N.E.2d 711, 713 (Ill. App. Ct. 1985) (citing Brown v. Com. Nat'l Bank of Peoria, 237 N.E.2d 567, 570 (Ill. App. Ct. 1968), *aff'd*, 247 N.E.2d 894 (Ill. 1969)); *In re* Thomas Rowe Stockton Tr., No. 332278, 2017 WL 4158017, at *4 (Mich. Ct. App. Sept. 19, 2017); *see also* Evans v. Super. Ct. of S.F., 96 P.2d 107, 113 (Cal. App. Dep't Super. Ct. 1939) ("If the trustee acts in good faith, he has the power to employ such assistants and to compensate such assistants out of the assets of the trust even though he may not ultimately succeed in establishing the position taken by him as such trustee." (citing Dingwell v. Seymour, 267 P. 327 (Cal. Ct. App. 1928))); GEORGE GLEASON. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 971 (June 2020) (stating that the reimbursement of trustee's legal fees from trust is not conditioned on the outcome of the legal services being favorable to the trust).

389. *E.g.*, Stuart v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi., 369 N.E.2d 1262, 1279 (Ill. 1977) (citing Orme v. Northern Tr. Co., 183 N.E.2d 505, 513 (Ill. 1962)) (explaining that in litigation between individual trustees and corporate co-trustee, attorney's fees and expenses of individual trustees were paid from trust even though court adopted corporate trustee's position when the trustees were hopelessly deadlocked over the manner in which they should discharge their duties as trustees, resort to the courts was necessary to resolve the impasse, and the litigation was the result of honest differences of opinion).

390. *See In re* Est. of Burnette, No. E2016-02452-COA-R3-CV, 2018 WL 1413122, at *5 (Tenn. Ct. App. Mar. 21, 2018) (citing *In re* Est. of Ladd, 247 S.W.3d 628, 637–38 (Tenn. Ct. App. 2007)). In harmony with the common law tradition, it is not uncommon for trust agreements to contain provisions explicitly requiring that trustees be reimbursed or indemnified for legal fees incurred in trust matters unless the trustee acted in bad faith or was guilty of some level of culpable conduct beyond ordinary negligence. *Cf.* Brown v. Brown-Thill, 543 S.W.3d 620, 635 (Mo. Ct. App. 2018) (holding trustee did not breach her fiduciary duty by reimbursing her legal expenses from trust when the trust agreement provided that the trustee shall be indemnified and reimbursed for any expense the trustee incurred, individually or as a fiduciary, absent gross negligence or willful malfeasance).

With good reason, the common law rule (now UTC § 709(a)(1)) treats trustees differently from beneficiaries with respect to the payment of attorney's fees from a trust, primarily because they have inherently dissimilar obligations and interests.[391] The nature of a beneficiary's interest is a personal one: to protect or maximize its own share in the trust estate.[392] Unlike a beneficiary, a trustee has no personal stake in the trust's assets but instead has a fiduciary duty to protect and defend the trust and its assets for the benefit of others.[393] A trustee should not have to personally bear the expense for performing its duty to the trust.[394] Equity requires that the trust estate must bear the trustee's attorney's fees and costs reasonably incurred in the good faith administration of the trust.[395] As one court has expressed the rationale underpinning the rule:

> The reason involved in the rule is this: trustees have no beneficial interest in the trust property. They hold it for the accommodation and benefit of others. If they perform their duties faithfully, and are guilty of no unjust, improper, or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys. If, therefore, they are brought before the court without blame on their part, they should be reimbursed all the expenses that they incur[] and allowed their costs as between solicitor and client for this purpose.[396]

The common law rule is rooted in the notion that it is necessary for the trustee's attorney's fees and costs to be paid from the trust estate because doing so effectuates the settlor's intent.[397] Because the trustee must take reasonable action to uphold the trust, carry out its purposes, and defend against lawsuits that will invalidate the trust or reduce its assets, the fees and expenses incurred in such actions should be reimbursed directly from the trust estate.[398]

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391. *See Beneficiary*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Trustee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

392. *See Beneficiary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

393. *See Trustee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

394. Garwood v. Garwood, 233 P.3d 977, 985 (Wyo. 2010).

395. Lund as Tr. of Revocable Tr. of Kim A. Lund v. Lund, 924 N.W.2d 274, 285–86 (Minn. Ct. App. 2019) (quoting *In re* Freeman's Tr., 75 N.W.2d 906, 907 (Minn. 1956)).

396. Klinkerfuss v. Cronin, 199 S.W.3d 831, 845 (Mo. Ct. App. 2006).

397. *Cf.* O'Riley v. U.S. Bank, N.A., 412 S.W.3d 400, 419 (Mo. Ct. App. 2013) (stating that justice and equity required that trustee recover the expenses it incurred in defending against beneficiaries' claims because by defending its conduct, it defends the settlor's intent).

398. *See Klinkerfuss*, 199 S.W.3d at 844 (citing Anselmo v. Guasto, 13 S.W.3d 650, 653 (Mo. Ct. App 1999)).

This includes the trustee's good faith defense of actions seeking the trustee's removal from office.[399] In his classic statement of the principle, then-Judge Benjamin Cardozo explained that a trustee "owe[s] a duty to the estate to stand his ground against unjust attack[,]" to "resist[] an attempt to wrest the administration of the trust from one selected by the testator[,] and to place it in strange hands."[400] Judge Learned Hand later reiterated that "[w]hen 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."[401]

UTC § 709 embraces these common law principles.[402] Section 709(a)(1) of the UTC codifies the longstanding rule that a "trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for . . . expenses that were properly incurred in the administration of the trust."[403] The Comments further explain that "[r]eimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action," except that "a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust."[404] Taken together, this section and its Comments suggest that a trustee's attorney's fees and costs incurred in defending an action involving trust administration are authorized expenses and, unless the trustee is "determined" to have breached the trust, they are reimbursable from the trust's assets.[405]

Importantly, § 709(a)(1) is not a litigation fee-shifting statute by which parties in litigation may be ordered by the court to pay the attorney's fees of their adversary. Instead, it represents a codification of a trustee's broader right to reimbursement from the trust estate in line with the trustee's "authority to

399. *Id.*

400. Jessup v. Smith, 119 N.E. 403, 404 (N.Y. 1918).

401. Weidlich v. Comley, 267 F.2d 133, 134 (2d Cir. 1959).

402. *See* UNIF. TR. CODE § 709(a)(1) cmt. (UNIF. L. COMM'N 2018).

403. UNIF. TR. CODE § 709(a)(1) (UNIF. L. COMM'N 2018). South Carolina has adopted this uniform provision with slight modifications. *See* S.C. CODE ANN. § 62-7-709(a)(1) (2009).

404. UNIF. TR. CODE § 709 cmt. (UNIF. L. COMM'N 2018); S.C. CODE ANN. § 62-7-709 rptr.'s cmt. (adopting the uniform act's comment). A trustee is not entitled to attorney's fees and expenses of litigation when it is determined that the trustee committed a breach of trust, unless the court otherwise orders reimbursement under § 709(a)(2) because the trustee's actions would unjustly enrich the trust. *See* UNIF. TR. CODE § 709 cmt. (UNIF. L. COMM'N 2018); S.C. CODE ANN. § 62-7-709 rptr.'s cmt. Specifically, a trustee "is entitled to reimbursement for unauthorized expenses [under subsection (a)(2)] only if the unauthorized expenditures benefited the trust." UNIF. TR. CODE § 709(a)(2) cmt. (UNIF. L. COMM'N 2018); S.C. CODE ANN. § 62-7-709 rptr.'s cmt. A finding that a trustee committed a breach of fiduciary duty would be inconsistent with a finding of good faith. *See* Cohen v. Minneapolis Jewish Fed'n, 346 F. Supp. 3d 1274, 1288 (W.D. Wis. 2018), *aff'd*, 776 F. App'x 912 (7th Cir. 2019).

405. UNIF. TR. CODE § 709 cmt. (UNIF. L. COMM'N 2018).

expend trust funds as necessary in the administration of the trust."[406] The trustee is not seeking to require another party to pay its attorney's fees; instead, the fees are to be reimbursed from the trust itself.[407] Additionally, UTC § 709(a)(1) provides for reimbursement of a trustee's expenses irrespective of any litigation involving the trust.[408]

In contradistinction to § 709(a)(1), the animating principle of UTC § 1004 is not to reimburse a trustee for expenses incurred in the performance of its duty to the trust.[409] Instead, § 1004 is a fee-shifting statute by which one party is ordered to pay the fees and expenses of an adversary incurred in the litigation, either directly from personal assets or indirectly through the trust estate.[410] Rights arise under this provision only in the specific context of litigation involving trust administration.[411]

Because the reimbursement detailed in UTC § 709(a)(1) is broadly worded, there exists a potential overlap as to whether a trustee is entitled to recover fees and costs under UTC § 709(a)(1), UTC § 1004, or both when the trustee is a party to a judicial proceeding involving the administration of the trust.[412] This overlap has led to inconsistent case law involving the relationship between UTC §§ 709(a)(1) and 1004 and the proper application of those sections to trustee requests for litigation-related attorney's fees and expenses.[413]

Some courts have conflated the two standards in the context of trustee requests for payment of litigation expenses from the trust.[414] Other courts have constrained the "justice and equity" analysis by importing into UTC § 1004

406. UNIF. TR. CODE § 709 cmt. (UNIF. L. COMM'N 2018) ("A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents."); S.C. CODE ANN. § 62-7-709 rptr.'s cmt. (same); *see* Rudd v. Branch Banking & Tr. Co., No. 2:13-CV-02016, 2016 WL 7209727, at *3 (N.D. Ala. Aug. 8, 2016); *see also* Rudd v. Branch Banking & Tr. Co., No. 2:13-CV-02016, 2019 WL 3082585, at *4 (N.D. Ala. July 15, 2019).

407. UNIF. TR. CODE § 709(a) (UNIF. L. COMM'N 2018).

408. *See* UNIF. TR. CODE § 709 cmt. (UNIF. L. COMM'N 2018).

409. *See* UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018).

410. *See* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018).

411. *See id.*

412. *See* Lund as Tr. of Revocable Tr. of Kim A. Lund v. Lund, 924 N.W.2d 274, 285–86 (Minn. Ct. App. 2019).

413. *See* Henry, *supra* note 47, at 23–24 (noting uncertainty in case law with respect to the role of UTC § 709(a)(1), at least when a trustee is seeking fees in connection with litigation).

414. *See, e.g.*, *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 490–92 (Iowa 2013) (holding that in analyzing a trustee's request for reimbursement of attorneys' fees from the trust the correct legal standard requires the court to "first consider whether the expenditures were properly incurred in the administration of the trust or otherwise benefited the trust" pursuant to Iowa's version of UTC § 709(a)(1) *and* then it must also apply the *Atwood* factors under the "justice and equity" analysis of Iowa's version of UTC § 1004); *In re* Joan T. Goetzinger Living Tr. Dated May 30, 2014, No. 19-1342, 2020 WL 4201492, at *4 (Iowa Ct. App. July 22, 2020) (applying *Trimble*, 826 N.W.2d at 491–92).

the standards of the common law cases relative to a trustee's right to reimbursement from the trust for expenses incurred in the administration of the trust, which is the rule now codified in UTC § 709(a)(1).[415] With respect to trustee requests for reimbursement of litigation expenses from the trust, these courts effectively construe UTC §§ 709(a)(1) and 1004 as having the same or equivalent requirements.[416] However, the "justice and equity" standard of UTC § 1004 is not synonymous with the common law standard codified in UTC § 709(a)(1);[417] there is no persuasive reason to construe the former as simply incorporating the same standard as the latter.

Instead of conflating the two sections, courts should construe UTC §§ 709(a)(1) and 1004 to principally apply to separate spheres with their own purpose-oriented criteria. In those instances when the sections potentially overlap (which may occur when deciding a trustee's request for attorney's fees and costs in a judicial proceeding involving trust administration), UTC §§ 709(a)(1) and 1004 are best harmonized by applying UTC § 709(a)(1) to decide a trustee's entitlement to payment or reimbursement of fees and expenses *from the trust estate* and by applying UTC § 1004 when deciding a trustee's right to payment or reimbursement of fees and expenses *from another party to the proceeding*, such as a beneficiary or fellow fiduciary. Either UTC § 709(a)(1) or UTC § 1004 may govern a trustee's entitlement to fees and costs incurred in a judicial proceeding involving trust administration, but it should depend on the *source* from which the trustee seeks payment.

In this sense, the two sections complement and do not take away from one another. Additionally, it would be erroneous to conclude that either section *exclusively* governs a trustee's ability to recover attorney's fees and costs in such a judicial proceeding. UTC § 1004 would exclusively govern a *non-trustee's* (e.g., beneficiary's) entitlement to payment or reimbursement of fees and expenses, either from the trust estate or from another party to the

415. *See, e.g.*, W.A.K., II *ex rel.* Karo v. Wachovia Bank, No. 3:09-CV-575, 2010 WL 2976518, at *4 (E.D. Va. July 19, 2010) (finding the common law cases applying the rule of trustee reimbursement were "instructive" in resolving a trustee's request for payment of litigation expenses from the trust under a Virginia statute based on UTC § 1004); Duke v. Simmons, No. M200801967COAR3CV, 2009 WL 1175114, at *6 (Tenn. Ct. App. Apr. 30, 2009) (quoting Marshall v. First Nat'l Bank, 622 S.W.2d 558, 560 (Tenn. Ct. App. 1981)). (holding that the requirement of common law cases predating the enactment of the UTC, which permit an award of attorney's fees from the trust corpus "only when the services of such attorneys inure to the benefit of the entire estate as distinguished from services rendered to benefit one or more of the individuals interested in the trust," governed application of the Tennessee statute based on UTC § 1004).

416. *See, e.g.*, *W.A.K.*, 2010 WL 2976518, at *4; *Duke*, 2009 WL 1175114, at *6.

417. *See* Julian C. Zebot & Evan A. Nelson, *Tilting the Litigation Playing Field Under the Uniform Trust Code: The Availability of Temporary Injunctive Relief in Trustee Removal Actions*, 34 PROB. & PROP. 34, 34–35 (2020) ("These standards are not the same.").

proceeding, because UTC § 709(a)(1) relates only to a trustee's request for reimbursement.

Several considerations support this construction of the two statutes. First, UTC § 709(a)(1) codifies the longstanding common law rule of trustee reimbursement from the trust estate for expenses reasonably incurred in the good faith administration of the trust.[418] Nothing in UTC § 1004 or the related Comments suggests the drafters intended to displace or modify this rule of reimbursement.[419] If it was the drafters' intention for UTC § 1004 to override or modify UTC § 709(a)(1), they would have clearly stated as much. Thus, § 709(a)(1) should govern when a trustee seeks payment or reimbursement from the trust estate.

The rule reflected in UTC § 709(a)(1) justifiably considers a trustee more favorably than UTC § 1004 considers a beneficiary with respect to payment of expenses from the trust estate because a trustee, unlike a beneficiary, lacks a beneficial interest in the trust and has a duty to protect and defend the trust and its assets.[420] Provided the trustee acts reasonably and in good faith, the trustee should be entitled to payment from the trust for expenses incurred in carrying out its trust duties without having to satisfy the *Atwood* factors—which include, *inter alia*, relative ability to bear the financial burden, results obtained, and prevailing party concepts—or UTC § 1004's justice and equity analysis, even though those criteria rightfully apply when the trustee seeks payment of fees and expenses from another party to the judicial proceeding. Whereas a trust beneficiary ordinarily will not recover any attorney's fees under UTC § 1004 unless the beneficiary achieved at least partial success on the merits in the litigation, a trustee (absent a showing of bad faith or breach of trust) is generally entitled to reimbursement of reasonable attorney's fees under UTC § 709(a)(1), even if unsuccessful.[421]

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418. *See supra* Section VI.B; UNIF. TR. CODE § 709(a)(1) (UNIF. L. COMM'N 2018).

419. *See* UNIF. TR. CODE § 1004 cmt. (UNIF. L. COMM'N 2018) ("With respect to a party's own fees, § 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust."); *see also* S.C. CODE ANN. § 62-7-1004 rptr.'s cmt. (2009) (containing substantially same Comment).

420. *See* Zebot & Nelson, *supra* note 417, at 35 ("As a practical matter, the standard for a beneficiary challenging the trustee's actions to be reimbursed from the trust can be difficult to meet, while the trustee enjoys a presumption that its attorney fees will be reimbursed from the trust as a matter of course.").

421. *See* Regions Bank v. Lowrey, 154 So. 3d 101, 109–12 (Ala. 2014); Regions Bank v. Lowrey, 101 So. 3d 210, 220–21 (Ala. 2012). In the *Regions Bank* litigation, the court held the trustee was not only entitled to reimbursement from the trust under Alabama's version of UTC § 709(a)(1) for its attorney's fees and expenses reasonably incurred during its successful defense of the beneficiaries 'claims for breach of fiduciary duty, but also to reimbursement for its fees and expenses incurred in litigating its right to reimbursement and to prejudgment interest on the amount of its reimbursement. *Regions Bank*, 154 So. 3d at 112.

Consistent with an understanding that UTC § 1004 is not intended to override a trustee's right to reimbursement contained in UTC § 709(a)(1), a few states have added provisions to their versions of the UTC to make this intention explicit.[422] For example, Michigan, Utah, and Wisconsin have added a subparagraph to § 1004 of their trust codes specifying that if a trustee defends or prosecutes a judicial proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust attorney's fees and expenses necessarily incurred in the proceeding.[423] These additional subparagraphs are modeled after Uniform Probate Code § 3-720, which applies to personal representatives and persons nominated as personal representatives for an estate.[424]

Alabama also added language to its version of UTC § 709(a)(1) to expressly state that the expenses properly incurred in the administration of the trust for which a trustee "is entitled to be reimbursed" include "the defense or prosecution of any action, whether successful or not, unless the trustee is determined to have willfully or wantonly committed a material breach of the trust."[425] Similarly, Arizona has enacted a provision stating that a trustee's right to reimbursement from the trust includes attorney's fees and costs "that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful."[426]

Second, UTC § 1004 is the only provision that specifically authorizes a trustee's fees and costs "to be paid by another party."[427] This section is more specific to the question of a trustee's entitlement to have its fees and expenses

422. *See* MICH. COMP. LAWS ANN. § 700.7904(2) (West, Westlaw through 2020 Reg. Sess., 100th Leg.); UTAH CODE ANN. § 75-7-1004(2) (West, Westlaw through 2020 5th Spec. Sess.); WIS. STAT. ANN. § 701.1004(2) (West, Westlaw through 2019 Act 186).

423. *See* § 700.7904(2); § 75-7-1004(2); § 701.1004(2). In *Fisher v. Fisher*, 221 P.3d 845, 855 (Utah Ct. App. 2009) (Thorne, J., concurring in part and dissenting in part), a majority of the court held that a trustee was not entitled to have the trust reimburse his attorney's fees when the trial court had found him guilty of self-dealing, even though the trial court also found that he had acted in good faith with respect to the challenged transactions. The court said that the trustee's "actions, even if done in good faith, violated the prohibition against self-dealing, and reimbursement of reasonable attorney fees used to defend against self-dealing is not appropriate or allowed under Utah Code § 75-7-1004(2)." *Id. But see* Feeley v. Feeley, No. 64896, 2016 WL 276452, at *5 (Nev. Ct. App. Jan. 20, 2016) (holding it was not an abuse of discretion under the "justice and equity" analysis to award attorney's fees to trustee out of trust property even though she had breached her fiduciary duty to the trust).

424. *See* UNIF. PROB. CODE § 3-720 (UNIF. L. COMM'N 2010). South Carolina is among the jurisdictions that have enacted this provision. *See* S.C. CODE ANN. § 62-3-720 (2009).

425. ALA. CODE § 19-3B-709(a) (Westlaw through Act 2020-206).

426. ARIZ. REV. STAT. ANN. § 14-11004(A) (Westlaw through legislation effective June 5, 2020 of the 2d Reg. Sess. of the Fifty-Fourth Legislature).

427. UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018); *see* S.C. CODE ANN. § 62-7-1004 (2009).

paid by another party and, therefore, controls over § 709(a)(1)—the more general provision authorizing similar reimbursements from the trust property.[428] Settled law holds that a specific statutory provision controls over a general provision on the same subject; thus, UTC § 1004 rather than UTC § 709(a)(1) governs a trustee's ability to recover fees and expenses from another party in litigation involving the administration of the trust.[429]

A corollary to this point is that because UTC § 709(a)(1)'s terms speak only to a trustee being "reimbursed out of the trust property" and not from any other source, it could lead to unjust and inequitable results. Specifically, if courts find that § 709(a)(1) exclusively governs a trustee's ability to recover attorney's fees and costs in a judicial proceeding involving trust administration, this could deprive courts of the flexibility to order another party (rather than the trust itself) to pay or reimburse the trustee's fees and costs.[430] As explained in *Webbe v. First National Bank & Trust Co. of Barrington*:

> [W]hen one of several beneficiaries brings essentially groundless and unsuccessful litigation against a trustee the purpose of which was to benefit only himself, no reason suggests itself why the other beneficiaries, who did not join with him, sought no relief and had no voice in the conduct of the case, should share the expense with the initiating beneficiary. If such were not the case, a beneficiary could assault will and trust provisions attempting to increase his individual shares secure in the knowledge that, if he was unsuccessful, the cost

428. *Compare* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018), *with* UNIF. TR. CODE § 709(a)(1) (UNIF. L. COMM'N 2018).

429. *See* Garwood v. Garwood, 233 P.3d 977, 985 (Wyo. 2010) ("[T]he UTC provision governing an award of fees and costs is more specific to the question of litigation expenses and therefore controls over the general UTC provisions authorizing a trustee to defend claims and pay expenses related to trust administration."); Atwood v. Atwood, 25 P.3d 936, 947 (Okla. Civ. App. 2001) (explaining that the Oklahoma version of § 1004 governed trustee's recovery of litigation-related expenses, not the more general provision allowing a trustee to employ attorneys to assist with trust administration); *see also* Henry, *supra* note 47, at 24 (arguing that applying "each section in the appropriate circumstance" is "consistent with the principal of statutory construction that the more specific statute (applying to litigation) controls over the more general"). South Carolina follows the rule that specific statutory provision prevails over a more general one. Dreher v. S.C. Dep't of Health & Envtl. Control, 412 S.C. 244, 251, 772 S.E.2d 505, 509 (2015) (quoting Wooten *ex rel.* Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999)).

430. Wisconsin's version of UTC § 1004, which states that if a trustee defends or prosecutes a judicial proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust his or her attorney's fees and expenses necessarily incurred in the proceeding, further provides that "[t]his subsection does not preclude a court from ordering another party to reimburse the trust for these expenses and disbursements as provided in [§ 701.1004(1)]." WIS. STAT. ANN. § 701.1004(2) (West, Westlaw through 2019 Act 186).

> would be borne by the other beneficiaries equally and not recovered solely out of the share of the party seeking to further his own ends.[431]

This would be an unjust and inequitable outcome.

In such a circumstance, instead of requiring the trust to absorb the trustee's fees and expenses incurred in defending against a beneficiary's groundless action (which would harm those beneficiaries who did not join in or support the action), it would be more just and equitable to require the beneficiary who initiated the ill-advised action to directly bear those expenses.[432] A court can make such an award of fees and costs against the beneficiary only under UTC § 1004—not under UTC § 709(a)(1).[433]

Third, UTC § 1004 expressly states the court may award fees and expenses "to any party."[434] It nowhere indicates that a trustee should be exempt from the ambit of this term.[435] To hold that UTC § 709(a)(1) exclusively governs a trustee's ability to recover these fees effectively rewrites UTC § 1004 to eliminate trustees from the term or phrase "any party" as used in the latter section.[436] On the other hand, construing § 1004 to include

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431. 487 N.E.2d 711, 714 (Ill. App. Ct. 1985).

432. *See* Henry, *supra* note 47, at 24; Shurtleff v. United Effort Plan Tr., 289 P.3d 408, 414–16 (Utah 2012) (noting that although § 709 provides the usual mechanism for a trustee's payment for trust administration because in most cases the trustee will be paid directly from trust assets, § 1004 provides an alternative mechanism in unusual circumstances where justice and equity require a different source of payment); Warner v. Warner, 319 P.3d 711, 727 n.18 (Utah 2014) (citing *Shurtleff*, 289 P.3d at 415–16); *see also* Klinkerfuss v. Cronin, 289 S.W.3d 607, 617–18 (Mo. Ct. App. 2009) (finding that justice and equity required an innocent beneficiary, who had no part in the litigation, should not have her share of the trust depleted due to other beneficiary's vexatious litigation); Regions Bank v. Davis, 521 S.W.3d 283, 288 (Mo. Ct. App. 2017) ("It is not just or equitable for the beneficiaries of the Trust, who are not a part of Davis's appeal and who are innocent as to Davis's disagreements with the Trustee, to bear the Trustee's attorney fees in this appeal.").

433. *Compare* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018), *with* UNIF. TR. CODE § 709(a)(1) (UNIF. L. COMM'N 2018).

434. UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018); *see* S.C. CODE ANN. § 62-7-1004 (2009).

435. *See In re* Est. of Hohler, 915 N.W.2d 730, at *2 n.4 (Wis. Ct. App. 2018) ("[I]f the legislature had intended the statute to apply only to legal fees for another beneficiary it would have used that term. Instead, the statute broadly utilizes the term 'party.'"); Gray v. Gray, No. 18-CV-522-JD, 2019 WL 2106390, at *5 (D.N.H. May 14, 2019) (a trustee can recover attorney's fees and costs under § 1004); *In re* Joan T. Goetzinger Living Tr. Dated May 30, 2014, No. 19-1342, 2020 WL 4201492, at *3 (Iowa Ct. App. July 22, 2020) ("By its express terms, [Iowa's statute based on § 1004] applies to an award of attorney fees to *any party*. Nothing in the statute confines its application to a beneficiary's attorney fees.").

436. *See* Henry, *supra* note 47, at 24 (observing that this application effectively changes the language of § 1004 to limit a trustee's request for fees to § 709). Under the plain meaning rule of statutory construction, "[w]hen the terms of a statute are clear, the court must apply those terms according to their literal meaning" and "it is not the court's place to change the meaning

the situation in which a trustee seeks payment or reimbursement from another party to the proceeding is consistent with a more natural reading of that section's use of the term "any party."[437]

Finally, because UTC § 709(a)(1) specifically references a trustee being "reimbursed" for expenses, a question arises as to whether this section applies to litigation fees and expenses that the trustee has not actually paid.[438] In *Foulston Siefkin LLP v. Wells Fargo Bank of Texas N.A.*, for instance, the Fifth Circuit Court of Appeals construed a trust provision stating the trustee "shall be entitled to *reimbursement out of the trust* estate for all reasonable costs and expenses, including attorneys' fees, *incurred* in resisting" any lawsuit for which the trustee is adjudicated to be free from liability.[439] The court held this clause did not entitle a trustee to be reimbursed for fees and expenses that were incurred but which the trustee had not paid.[440] The court construed the term "reimbursement" as "necessarily impl[ying] that something has been paid which requires compensation for money spent."[441] Unlike UTC § 709(a)(1), UTC § 1004 is not limited to "reimbursement" of fees or expenses the trustee has paid; thus, it may be the sole means of recovery (either from the trust or another party) for a trustee who has incurred liability for such fees or expenses but has not yet paid them.[442]

A pair of Minnesota cases illustrate the difficulty courts have had with the proper interplay between UTC §§ 709(a)(1) and 1004 and the significant impact that an enacting state's slight deviation from the language of the uniform provisions can have on that analysis.[443] In *Lund as Trustee of Revocable Trust of Kim A. Lund v. Lund*, which involved a trust beneficiary's breach of fiduciary duty claims against the trustees, the Minnesota Court of Appeals elucidated the relationship between that state's versions of UTC

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of a clear and unambiguous statute." Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken, 354 S.C. 18, 24–25, 579 S.E.2d 334, 337 (Ct. App. 2003) (first citing Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); then citing Holly v. Mount Vernon Mills, 312 S.C. 320, 323, 440 S.E.2d 373, 374 (1994); then citing Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 489, 523, S.E.2d 795, 802 (Ct. App. 1999); then citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); and then citing Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001)).

437. *See* Henry, *supra* note 47, at 24.

438. UNIF. TR. CODE § 709(a)(1) (UNIF. L. COMM'N 2018); *see* S.C. CODE ANN. § 62-7-709(a)(1) (2009).

439. 465 F.3d 211, 214 (5th Cir. 2006).

440. *See id.* at 215.

441. *Id.* (citing United States v. Upton, 91 F.3d 677, 682, n.8 (5th Cir. 1996)).

442. *Compare* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018), *with* UNIF. TR. CODE § 709(a)(1) (UNIF. L. COMM'N 2018).

443. *See* Lund as Tr. of Revocable Tr. of Kim A. Lund v. Lund, 924 N.W.2d 274 (Minn. Ct. App. 2019); *In re* Schauer, No. A18-0969, 2019 WL 1510698, at *1 (Minn. Ct. App. Apr. 8, 2019).

§§ 709(a)(1) and 1004.[444] The court held that § 501C.1004[445] of the Minnesota Statutes (derived from UTC § 1004) does not supplant or supersede a trustee's common law right to payment or reimbursement from the trust estate for its attorney's fees and costs incurred in litigation with a beneficiary, which Minnesota has codified in its own version of UTC § 709(a)(1) (Minnesota Statutes § 501C.0709(a)(1)).[446] The court instead held that § 501C.1004 leaves "undisturbed" the common law standard reflected in § 501C.0709(a)(1), which authorizes a trustee to recover from the trust its expenditures, including attorney's fees, reasonably incurred in the good faith administration of the trust.[447] The court found that while a beneficiary's right to attorney's fees is subject to the "justice and equity" analysis, trustees are "entitled" to fees when "the fees are reasonable and incurred in good faith."[448]

The trial court in *Lund* ruled that, in the context of a trustee's litigation with a beneficiary regarding administration of the trust, § 501C.1004 superseded the common law rule of trustee reimbursement and, thus, the trial court did not apply § 501C.0709(a)(1).[449] After it determined that § 501C.1004—as opposed to the common law standard—controlled, the trial court found that "justice and equity" did not require the payment of the trustees' attorney's fees and costs from the trust assets.[450] The court of appeals reversed this decision, holding that the trial court "applied the wrong legal standard" by reviewing the trustees' request under § 501C.1004, and it remanded the case for the trial court to determine whether the trustees were entitled to recover their fees and costs from the trusts pursuant to the standard in § 501C.0709(a)(1), which focuses on whether the fees are reasonable and incurred in good faith.[451] Critically, *Lund* decided a trustee's right to payment of attorney's fees and costs *from the trust assets*, not from the beneficiary or another party to the litigation.[452] The court did not confront the question of

444. *See Lund*, 924 N.W.2d at 286.

445. MINN. STAT. ANN. § 501C.1004 (West, Westlaw through 2020 Reg. Sess.). South Carolina has enacted a similar provision, but with important differences. *See* S.C. CODE ANN. § 62-7-1004 (2009).

446. *Lund*, 924 N.W.2d at 286 (codified at MINN. STAT. ANN. § 501C.0709(a) (West, Westlaw through 2020 Reg. Sess.)). As noted above, the SCTC also codifies the same common law rule. *See* S.C. CODE ANN. § 62-7-709(a)(1) (2009).

447. *See Lund*, 924 N.W.2d at 286. Minnesota's Trust Code provides that the "common law of trusts and principles of equity supplement [the code], except to the extent modified by [the code] or another law of this state." MINN. STAT. ANN. § 501C.0106 (West, Westlaw through 2020 Reg. Sess.). As discussed above, the SCTC includes a similar provision. *See* S.C. CODE ANN. § 62-7-106 (2009).

448. *Lund*, 924 N.W.2d at 285–86.

449. *See id.*

450. *Id.* at 286.

451. *See id.*

452. *See id.*

whether the trustee would be entitled to recover attorney's fees or costs from another party to the proceedings, rather than from the trust, or what standard (UTC § 709(a)(1) or UTC § 1004) governs that determination.[453]

More recently in *In re Schauer*,[454] the Minnesota Court of Appeals indicated that its prior decision in *Lund* means § 501C.1004 governs a *beneficiary's or third party's* ability to recover attorney's fees in a judicial proceeding involving the administration of a trust, whereas § 501C.0709(a)(1) exclusively governs a *trustee's* ability to recover fees in such a proceeding.[455] The court stated that "[w]hile beneficiary attorney fees are subject to a justice-and-equity analysis, trustees are *entitled* to fees when 'the fees are reasonable and incurred in good faith[,]'" implying it is never necessary for a trustee to satisfy the justice and equity analysis to recover attorney's fees in this context.[456]

To the extent that *Lund* and *Schauer* are construed to mean that UTC § 709(a)(1) exclusively governs a trustee's ability to recover fees, these cases are sensible when viewed through the lens of Minnesota's unique versions of the uniform statutes. Minnesota adopted UTC § 709(a)(1) *literatim*.[457] It also enacted UTC § 1004 but not *in toto*.[458] Minnesota made a subtle but significant change to its version of § 1004 by omitting the language that allows a court to order a party's attorney's fees and costs "be paid by another party."[459] Consequently, the state's versions of UTC §§ 709(a)(1) and 1004 only permit a court to order payment or reimbursement of a trustee's attorney's fees and expenses from the trust itself, not from another party to the proceeding.[460] The Minnesota legislature essentially denuded its version of UTC § 1004 of the fee shifting component.

With Minnesota's alteration to the uniform provision in focus, it becomes understandable that the *Lund* and *Schauer* courts (1) construed § 501C.1004

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453. *See id.*

454. *In re* Schauer, No. A18-0969, 2019 WL 1510698 (Minn. Ct. App. Apr. 8, 2019).

455. *Id.* at *5 ("In *Lund*, we held that [MINN. STAT. ANN. § 501C.1004] did not apply to the trustee fees, but that [] did apply, as supplemented by common law. On the other hand, [§ 501C.1004], the justice-and-equity rule, applies to the award of beneficiary and third-party attorney fees, as supplemented by the common law." (citations omitted)).

456. *See id.* (quoting *Lund*, 924 N.W.2d at 286).

457. *Compare* UNIF. TR. CODE § 709 (UNIF. L. COMM'N 2018), *with* MINN. STAT. ANN. § 501C.0709 (West, Westlaw through 2020 Reg. Sess.).

458. *Compare* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018), *with* MINN. STAT. ANN. § 501C.1004.

459. The UTC states, "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, *to be paid by another party or* from the trust that is the subject of the controversy." UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018) (emphasis added). Minnesota's version of this provision omits the italicized language. *See* MINN. STAT. ANN. § 501C.1004 (West, Westlaw through 2020 Reg. Sess.).

460. *See* MINN. STAT. ANN. § 501C.0709(a)(1); *id.* § 501C.1004.

to exclusively govern a beneficiary's or third party's ability to recover attorney's fees in a judicial proceeding involving the administration of a trust[461] and (2) construed § 501C.0709(a)(1) to exclusively govern a trustee's ability to recover fees in such a proceeding.[462] Because the source of the payment of the trustee's attorney's fees and costs is the same under either section (i.e., from the trust),[463] it makes perfect sense to analyze a trustee's request for such fees and costs only under § 501C.0709(a)(1) because a trustee's right to reimbursement under that section is broader than that of § 501C.1004.[464]

On the other hand, looking at the uniform provisions from a panoptic view, it distorts the proper relationship between UTC §§ 709(a)(1) and 1004 to hold that either section exclusively governs a trustee's ability to recover attorney's fees and costs in a judicial proceeding involving trust administration. Either UTC § 709(a)(1) or UTC § 1004 governs a trustee's entitlement to fees and costs incurred in a judicial proceeding involving trust administration, depending on the source from which the trustee seeks payment (i.e., the trust estate or another party to the proceeding).[465]

VII. RETROACTIVITY OF FEE STATUTES

South Carolina's appellate courts have not yet addressed the question of whether the fee statutes are to have prospective or retroactive application. The retrospective application of a statute is disfavored, and statutes are presumed to be prospective in effect.[466] "Legislative intent is paramount in determining whether a statute has a prospective or retroactive application."[467] If the statute itself clearly indicates that it is to be applied prospectively or retroactively, then that intent controls. "Absent a specific provision or clear legislative intent to the contrary, the general rule is that statutes are to be construed

461. *See Lund*, 924 N.W.2d at 285–86; *In re Schauer*, 2019 WL 1510698, at *6.

462. *Lund*, 924 N.W.2d at 285–86; *In re Schauer*, 2019 WL 1510698, at *6.

463. *See* MINN. STAT. ANN. § 501C.0709(a); *id.* § 501C.1004.

464. *Compare id.* § 501C.0709(a), *with id.* § 501C.1004 (illustrating that § 501C.0709(a) allows reimbursement for expenses incurred not only in the administration of the trust but also to prevent unjust enrichment, while § 501C.1004 only covers expenses incurred because of a judicial proceeding).

465. *See supra* notes 417–437 and accompanying text.

466. State v. Isaac, 405 S.C. 177, 186, 747 S.E.2d 677, 681 (2013) (citing State v. Dickey, 380 S.C. 384, 404, 669 S.E.2d 917, 928 (Ct. App. 2008), *rev'd on other grounds*, 394 S.C. 491, 716 S.E.2d 97 (2011)). *But see* Est. of Derzon, 908 N.W.2d 471, 485 n.9 (Wis. Ct. App. 2018) (refusing to assume that § 1004 was inapplicable to trustee's actions that took place before the statute's enactment when the trustee had failed to "develop any argument that the statute does not apply in this case").

467. *Isaac*, 405 S.C. at 186, 747 S.E.2d at 681 (citing Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990)).

prospectively rather than retroactively, unless the statute is remedial or procedural in nature."[468]

The South Carolina fee statutes based on UTC § 1004 were not enacted as free-standing provisions but were appended to comprehensive legislation covering other topics.[469] These thorough statutes contain provisions expressly addressing their application to judicial proceedings commenced before their "effective dates."[470] It is unclear how courts will apply these provisions with respect to the particular sections authorizing recovery of attorney's fees and costs.

The effective date provisions applicable to the fee statutes for trust and probate matters are located in the codified statutes,[471] while the corresponding provision for the fee statute applicable to formal proceedings involving protected persons is found only in the session laws.[472] Although these provisions are not identical, they are similar in material respects.[473] They both provide that the fee statutes will apply to judicial proceedings commenced before their effective dates unless the court determines their application would substantially interfere with the litigation or prejudice the rights of the parties, in which case the former law will apply.[474] They further provide that any act done and any right acquired before the effective date of the fee statutes (e.g., a vested right) will not be affected by the statutes.[475]

It is difficult to predict whether courts will find that the retroactive application of the South Carolina fee statutes to previously commenced judicial proceedings would substantially interfere with the conduct of the litigation, prejudice the rights of the parties, affect acts done or rights acquired before the statutes became effective, or impair vested rights. Good arguments can be made both ways, and the outcome will likely depend on the particular facts and circumstances of each individual case.

If the courts determine that the effective date provisions are unclear as to the retroactive or prospective application of the fee sections to any given case, the presumption applies that they are applied prospectively. This presumption may be overcome only when a statute is "remedial" or "procedural" in

468. Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 106, 713 S.E.2d 650, 654–55 (Ct. App. 2011) (citing Bartley v. Bartley Logging Co., 293 S.C. 88, 90, 359 S.E.2d 55, 56 (1987)).

469. *See* S.C. CODE ANN. §§ 62-1-100, -7-1106 (2009).

470. *Id.* §§ 62-1-100(b)(4), -7-1106(a)(3).

471. *Id.* §§ 62-1-100, -7-1106.

472. *See* Act effective Jan. 1, 2019, No. 87, § 6, 2017 S.C. Acts 104–105.

473. A South Carolina law professor has described the effective date provisions in the statutes as being "substantially similar." Medlin, *supra* note 332, at 201–02.

474. *See* S.C. CODE ANN. §§ 62-1-100(b)(2), -7-1106(a)(3); § 6(B)(3), 2017 S.C. Acts at 104–105.

475. *See* S.C. CODE ANN. §§ 62-1-100(b)(4), -7-1106(a)(5); § 6(B)(3), 2017 S.C. Acts at 104–105.

nature.[476] A statute is "remedial" when it creates new remedies for existing rights "unless it violates a contractual obligation, creates a new right, or divests a vested right."[477] This exception is not applicable to a statute that supplies a legal remedy where formerly there was none.[478] When a statute creates new obligations or imposes a new duty, it is remedial.[479] Conversely, a law is "procedural" when it establishes a court procedure or prescribes a method of enforcing rights.[480]

South Carolina case law has not yet decided whether any of the fee statutes applicable to trust, probate, or protected person proceedings are substantive or procedural. If the courts determine that these fee statutes create a new substantive right or supply a legal remedy where formerly there was none, then the statutes must only be applied prospectively. Looking to former South Carolina case law, it is evident that changes in law that make a party responsible for another party's attorney's fees and costs effect a substantive change and are to be applied prospectively.[481]

In addition, federal district courts in Kentucky and Missouri have held that their respective states' versions of UTC § 1004 do not apply to trustees' actions when the trustees' tenure ended prior to the statutes' effective dates.[482] These states based their holdings either on the conclusion that the fee statutes were substantive provisions that could not be applied retroactively or on statutory provisions stating the statutes do not affect acts completed before

476. State v. Bolin, 381 S.C. 557, 561, 673 S.E.2d 885, 887 (Ct. App. 2009) (citing State v. Davis, 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992)).

477. Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 106, 713 S.E.2d 650, 655 (Ct. App. 2011) (citing Smith v. Eagle Constr. Co., 282 S.C. 140, 143, 318 S.E.2d 8, 9 (1984)).

478. Boyd v. Boyd, 277 S.C. 416, 418, 289 S.E.2d 153, 154 (1982) (first citing Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48–49 (1980); and then citing Hyder v. Jones, 271 S.C. 85, 88, 245 S.E.2d 123, 125 (1978)).

479. *Se. Site Prep*, 394 S.C. at 106, 713 S.E.2d at 655; *see* Edwards v. State Law Enf't Div., 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011).

480. *Edwards*, 395 S.C. at 580, 720 S.E.2d at 466.

481. Hardaway v. Cnty. of Lexington, 314 S.C. 22, 24, 443 S.E.2d 569, 571 (1994) (holding change to law under which counties became liable for reasonable attorney's fees and costs beyond those provided under Defense of Indigents Act applies prospectively only because it created a new liability for counties where none formerly existed); *Se. Site Prep*, 394 S.C. at 107, 713 S.E.2d at 655 (holding that newly enacted portion of Frivolous Civil Proceedings Sanctions Act that created substantive rights and which imposed new obligations for imposing sanctions applied prospectively, rather than retroactively).

482. *See* Watkins v. Tr. Under Will of William Marshall Bullitt *ex rel.* PNC Bank, N.A., No. 3:13-CV-1113-DJH-CHL, 2015 WL 13849175, at *5 (W.D. Ky. Sept. 16, 2015); Jo Ann Howard & Assocs., P.C. v. Cassity, No. 4:09-CV-01252, 2020 WL 870987, at *5 (E.D. Mo. Feb. 21, 2020).

they became effective.[483] In a recent case discussing a Virginia statutory amendment established to create an award of attorney's fees "as justice and equity may require" in a judicial proceeding concerning a power of attorney, the Virginia Supreme Court declined to give the amendment retroactive application to a proceeding commenced before the amendment's effective date.[484]

Other courts applying state versions of UTC § 1004 have reached contrary conclusions.[485] These courts deemed the fee statutes based on § 1004 to be merely effectuating procedural changes.[486] In *Vander Boegh v. Bank of Oklahoma, N.A.*, the Kentucky Court of Appeals rejected the defendants' argument that Kentucky's version of UTC § 1004 did not apply because it became effective during the pendency of the proceedings.[487] The court did not mention a prior case, however, in which a federal district court in Kentucky reached a contrary holding involving the same state statute.[488] The *Vander Boegh* court based its decision on Kentucky precedent holding that statutes that authorize an attorney's fee award are deemed remedial and, therefore, applicable to pending cases.[489] The court also cited to other states' decisions which reached similar conclusions under their versions of UTC § 1004.[490] The court further disagreed that application of the statute to the pending case would substantially interfere with the conduct of the litigation or prejudice the parties' rights because the defendants "had actual and constructive knowledge when the statute took effect that the [plaintiff] would seek to recover its attorney fees under [the statute]," but they "persisted in vigorously

483. *Watkins*, 2015 WL 13849175, at *5 (finding that fee statute is substantive and does not apply retroactively to a trustee's conduct prior to the statute's enactment); *Howard*, 2020 WL 870987, at *5.

484. Harold v. Devening, No. 181308, 2020 WL 1943524, at *4 n.5 (Va. Apr. 23, 2020) (discussing VA. CODE ANN. § 64.2-1614(E) (West, Westlaw through 2020 Reg. Sess.)). This statutory amendment was a response to the decision in *Mangrum v. Chavis*, No. 160782, 2018 WL 1101719, at *4 (Va. Mar. 1, 2018), in which the plaintiffs had successfully sued an agent under a durable general power of attorney for breach of fiduciary duty when the agent had improperly deposited the proceeds from the principal's annuity into his own personal bank account, but the plaintiffs were denied recovery of their legal fees from the agent and were not made whole.

485. *See* Vander Boegh v. Bank of Okla., No. 2016-CA-001307-MR, 2019 WL 1495712, at *8–9 (Ky. Ct. App. Apr. 5, 2019).

486. *See id.*

487. *See id.*

488. *See id.*; *Watkins*, 2015 WL 13849175, at *5.

489. *Vander Boegh*, 2019 WL 1495712, at *9 (citing Cent. Ky. Prod. Credit Ass'n v. Smith, 633 S.W.2d 64, 66 (Ky. 1982)).

490. *Id.* (first citing Young v. Young, No. CA08-212, 2008 WL 5176763, at *8 (Ark. Ct. App. Dec. 10, 2008); and then citing Atwood v. Atwood, 25 P.3d 936, 948–49 (Okla. Civ. App. 2001)).

prosecuting their counterclaims, and even amended them after the statute became effective."[491]

Whether the fee statutes derived from UTC § 1004 will be applied to conduct or judicial proceedings commenced before their effective dates is presently an open question under South Carolina law. Even though the fee statutes involving trusts and probate matters have been in effect for several years, thus diminishing the likelihood that retroactivity concerns will arise, the statute applicable to such proceedings with regard to protected persons did not become effective until January 1, 2019; therefore, retroactivity questions may still arise under this statute.[492] Hopefully, South Carolina appellate courts will provide some clarity on this issue in the near future.

VIII. INTERIM OR *PENDENTE LITE* AWARDS OF FEES

The fee statutes based on UTC § 1004 and their related Reporter's Comments do not specifically address at what point in the litigation fees can or should be awarded to a party.[493] Moreover, the statutes give no guidance as to whether a trustee, personal representative, or other party can be entitled to an interim or *pendente lite* award of fees from the trust, estate, or other party during the pendency of the litigation or whether they must wait until the litigation is finally resolved in their favor.[494]

Answering the question of whether a trustee[495] can pay its attorney's fees and costs either from the assets of the trust *pendente lite* or while the litigation is ongoing can have significant and determinative ramifications. On the one hand, when a trustee can pay its attorney's fees from trust assets while litigation is ongoing, the trustee has less of an incentive to settle disputes and is given greater leverage in the litigation vis-à-vis a trust beneficiary who does not have access to the trust assets to pay litigation expenses.[496] Although South Carolina has not addressed this issue, some states have indicated that

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491. *Id.*

492. *See, e.g.*, Berlinsky v Berlinsky, No. 2013-GC-10-0150, 2019 WL 7212469, at *8 n.4 (S.C. Ct. Com. Pl. Dec. 20, 2019) (noting that retroactivity issues involving the applicability of § 62-5-105 were raised, but the case was disposed of on other grounds).

493. *See, e.g.*, S.C. CODE ANN. § 62-7-1004 (2009).

494. *See* UNIF. TR. CODE § 1004 (UNIF. L. COMM'N 2018); *see, e.g.*, S.C. CODE ANN. § 62-7-1004 (2009).

495. Although the immediate discussion refers to trustees for simplicity, this discussion equally applies to other fiduciaries such as trust advisors, trust protectors, and personal representatives.

496. *See* Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64, 79 n.21 (2002) ("The question of fees and the source of their payment can dramatically affect the cooperation of a trustee. Where fees can be drawn from the trust funds, a trustee has less of an incentive to settle a dispute.").

trustees sued for trust mismanagement in both their individual capacities and as trustees may have a conflict of interest with respect to the decision to use trust assets to pay their legal bills in defending the litigation.[497] The interim payment of fees from the trust may end up unjustly enriching a trustee who is ultimately found guilty of malfeasance at the action's conclusion, especially if the trustee is unable to repay or reimburse the payments to the trust or estate.

On the other hand, if a trustee cannot use the trust's or estate's assets to pay its fees during the litigation, it usually means the trustee will have to use personal funds to retain legal counsel until the matter is concluded. This not only "evens the playing field" between a trustee and an adverse litigant (such as a beneficiary), but it arguably tilts the field in favor of the beneficiary by forcing the trustee to expend personal funds to defend against those allegations. This effectively diminishes any compensation the trustee was once entitled to receive for its services, which was part of the inducement for the trustee to accept the rigors of fiduciary responsibility in the first place.[498] Very few corporate trustees, and even less individual trustees, are willing or able to undertake such a financial burden.[499] The denial of interim awards of fees and costs can make it difficult—if not impossible—to find qualified persons or entities willing to serve as trustees.[500] Withholding payment of interim fees may also prevent trustees from defending themselves against even meritless allegations, which would ultimately frustrate or defeat the settlor's purpose in creating the trust.[501]

The resolution of this issue is the most challenging when a beneficiary sues a trustee for breach of fiduciary duty or other malfeasance in office, and

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497. *See* Shriner v. Dyer, 462 So. 2d 1122, 1124 (Fla. Dist. Ct. App. 1984) (explaining that "[s]ince [trustees] defended against individual liability for trust mismanagement in the previous action, their personal interests conflicted with their position as trustees[,]" and they "should have obtained court approval before exercising their trustee power to use trust funds to pay their attorney's fees"); J.P. Morgan Tr. Co. v. Siegel, 965 So. 2d 1193, 1196–1197 (Fla. Dist. Ct. App. 2007). The *Shriner* and *J.P. Morgan* courts based their holdings on a Florida statute that has since been repealed. The statute in effect at the time had provided that "[i]f the duty of the trustee and the trustee's individual interest . . . conflict in the exercise of a trust power, the power may be exercised only by court authorization." FLA. STAT. ANN. § 737.403(2) (West, repealed 2008). The statute had further stated that "[c]ourt authorization is not required" for "[p]ayment of costs or attorney's fees incurred in any trust proceeding from the assets of the trust *unless an action has been filed or defense asserted against the trustee based upon a breach of trust*." *Id.* (emphasis added).

498. *See* Weidlich v. Comley, 267 F.2d 133, 134 (2d Cir. 1959).

499. *See* Regions Bank v. Davis, 521 S.W.3d 283, 288 (Mo. Ct. App. 2017); Shurtleff v. United Effort Plan Tr., 289 P.3d 408, 416 (Utah 2012).

500. *See Shurtleff*, 289 P.3d at 417 (upholding interim payment of attorney's fees and expenses to a special fiduciary appointed for a charitable trust and noting that to hold otherwise would deter future potential fiduciaries from answering the call to come to the aid of charitable trusts).

501. *See Weidlich*, 267 F.2d at 134.

the trustee wants to pay its attorney's fees from the assets of the trust or estate before the merits of the claims are determined. A trustee is ordinarily entitled to reimbursement or indemnification from the trust for attorney's fees and expenses incurred in the *successful* defense of an action seeking the trustee's removal or alleging mismanagement or misappropriation of the trust.[502] However, if the defense was *unsuccessful*, the trustee usually will not be entitled to such reimbursement or indemnification of fees and costs unless it acted reasonably and defended or prosecuted the litigation in good faith.[503] The question can be further complicated if the trustee was sued both in its official and individual capacities because a trustee cannot use trust assets to defend against claims asserted against the trustee solely in an individual capacity.[504]

South Carolina courts have not yet addressed the perplexing issue of interim or *pendente lite* awards of fees in litigation involving the fiduciary's conduct or challenging the fiduciary's administration of the trust or estate. Case law from other jurisdictions reflects a wide divergence of approaches to this question.[505] A number of courts held not only is it unnecessary for the trustee to prevail in the litigation in order to obtain payment of its attorney's fees from the trust but also the court need not await the final conclusion of the lawsuit to do so.[506] Yet, some courts condition interim awards upon some showing beyond the mere allegations in the pleadings that the action was prosecuted or defended in good faith and the fees were necessary.[507] In applying § 45 of the General Laws of Massachusetts, Massachusetts courts have held that an award of fees and costs can be made at any stage of a pending proceeding.[508]

In a California case involving a fee statute that was not based on UTC § 1004, the court utilized a balancing of the harms approach to resolve a trustee's petition for an award of interim attorney's fees incurred in the defense of the state attorney general's lawsuit seeking the trustee's removal

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502. *See supra* note 387 and accompanying text.

503. Snook v. Tr. Co. of Ga. Bank of Savannah, 909 F.2d 480, 485 (11th Cir. 1990).

504. *See, e.g.*, Jelletich v. Pawlaksi, No. 5:14-CV-00017, 2015 WL 1249673, at *3 (W.D. Ky. Mar. 18, 2015).

505. *See supra* notes 508–524 and accompanying text.

506. *See, e.g.*, Shurtleff v. United Effort Plan Tr., 289 P.3d 408, 414, 416 (Utah 2012); *In re* Life Ins. Tr. Agreement of Julius F. Seeman, Dated Apr. 19, 1962, 841 P.2d 403, 404–05 (Colo. App. 1992); *In re* Daly's Est.,120 N.Y.S.2d 896, 903 (Sur. Ct. 1953); Kasperbauer v. Fairfield, 88 Cal. Rptr. 3d 494, 499 (Ct. App. 2009); *cf. In re* Guardianship of Hollis, No. 14-13-00659-CV, 2014 WL 5685570, at *4 (Tex. Ct. App. Nov. 4, 2014) (finding trustee did not engage in gross mismanagement by seeking reimbursement from trust of $23,000 in attorney's fees that it had incurred to defend itself in proceedings).

507. *See, e.g.*, Ball v. Mills, 376 So. 2d 1174, 1181 (Fla. Dist. Ct. App. 1979).

508. *See* Clark v. Clark, 716 N.E.2d 144, 150 (Mass. App. Ct. 1999).

for alleged mismanagement and self-dealing.[509] Under this approach, "the court first must assess the probability that the trustee will ultimately be entitled to reimbursement of attorney's fees and then balance the relative harms to all interests involved in the litigation, including the interests of the trust beneficiaries."[510] This assessment "requires at least some inquiry into the ability of the trustee or former trustee to repay [the interim] fees [awarded] if ultimately determined not to be entitled to the costs of defense."[511] The court held that it must consider whether the trustee would be unduly prejudiced by having to bear its own fees until the merits of the case were determined (i.e., its ability to mount an adequate defense) and whether the beneficiaries would be unduly prejudiced if the fees were advanced and not repaid (i.e., trust assets would be placed at risk).[512]

A growing number of courts have refused to approve the expenditure of trust assets to pay a trustee's legal fees and expenses in defending against allegations of maladministration of the trust until the allegations have been resolved in the trustee's favor.[513] These courts view it as premature to allow the trustee to use the trust's assets for payment of fees and costs until the merits are decided.[514] The result in these cases may have differed if the trustee was able to show that the assets of the trust or estate would likely be depleted

509. People *ex rel.* Harris v. Shine, 224 Cal. Rptr. 3d 380, 392 (Ct. App. 2017).

510. *Id.*

511. *Id.*

512. *Id.* at 393. The court commented that "an award of *pendente lite* fees will seldom be justified where, as here, the trust is silent on interim fees and the trustee's misconduct is at issue." *Id.* at 392 (emphasis added).

513. *See, e.g.*, Sierra v. Williamson, 784 F. Supp. 2d 774, 777 (W.D. Ky. 2011); Jelletich v. Pawlaksi, No. 5:14-CV-00017, 2015 WL 1249673, at *3 n.3 (W.D. Ky. Mar. 18, 2015); Cohen v. Minneapolis Jewish Fed'n, 286 F. Supp. 3d 949, 979 (W.D. Wis. 2017), *aff'd*, 776 F. App'x 912 (7th Cir. 2019); Ralph Anderson Family Tr. v. Anderson, No. BDV 2017-29, 2018 WL 6721944, at *2 (Mont. Dist. Ct. Sept. 28, 2018); *Ex parte* Adams, 514 So. 2d 845, 850 (Ala. 1987). In *In re Louise v. Steinhoefel Tr.*, 854 N.W.2d 792, 794 (Neb. Ct. App. 2014), the trial court had initially awarded interim attorney's fees to a trustee, but later determined that the trustee had breached his fiduciary duties. As part of the subsequent ruling, the appellate court vacated the prior award of interim fees and remanded the matter "to determine whether justice and equity require that the trust bear the cost of these fees." *Id.* at 803.

514. *See, e.g.*, *Cohen*, 286 F. Supp. 3d at 979; *see also* Burns v. Burns Rhine, No. 15-CV-02329, 2016 WL 6679807, at *3–4 (N.D. Cal. Nov. 14, 2016) (approving an interim award of attorney's fees to a trustee that were incurred in preparing an accounting requested by a beneficiary, including responding to the beneficiary's objections to the accounting, but denying the trustee's request for an interim award of attorney's fees incurred in defending against the beneficiary's lawsuit alleging the trustee had improperly used trust funds for her own benefit). The court held that "[t]hese questions are the subject of this litigation, and their resolution now would be premature." *Id.* at *4.

before the merits were determined, thus jeopardizing the trustee's recovery of fees and costs if a decision was delayed until the end of the case.[515]

Unlike South Carolina, Florida and Wisconsin both enacted rather unique statutes specifically addressing the propriety of a trustee's use of trust assets to make interim payments of attorney's fees in an action against the trustee alleging breach of trust.[516] These statutes allow a trustee to use trust funds to pay attorney's fees and costs incurred in defending a breach of trust claim without prior court approval, provided the trustee first gives written notice of its intention to do so to the qualified beneficiaries whose shares of the trust may be affected by the payment.[517] This "notice of intent" must be given prior to making a payment and must inform the beneficiary that it has the right to apply for an order prohibiting the trustee from paying attorney's fees or costs from trust assets.[518] If the notice requirement is satisfied, the trustee may pay the attorney's fees and costs incurred in defending the breach of trust proceeding from the trust assets without court approval, unless an affected beneficiary applies for and obtains a court order prohibiting the payment.[519] If the trustee fails to give notice before using trust assets to pay attorney's fees, the court can order the trustee to personally reimburse the trust for the amounts paid from the trust assets.[520]

Once the trustee provides notice of intent, these statutes put an affirmative burden on the beneficiary to obtain a court order barring the trustee from using trust assets to pay its attorney's fees and costs.[521] To obtain such an order, the affected beneficiary must demonstrate a "reasonable basis" for concluding that a breach of trust occurred.[522] "Conclusory allegations" are insufficient to

515. *See Sierra*, 784 F. Supp. 2d at 778 ("[B]ecause the parties have agreed that no distributions from the Trust shall be made to beneficiaries during the pendency of this action, there is no concern that sufficient funds will not be available should the Court decide to award attorney's fees from the Trust at a later time.").

516. FLA. STAT. ANN. § 736.0802(10) (West, Westlaw through 2020 2d Reg. Sess. of the 26th Leg.); WIS. STAT. ANN. § 701.1004(3) (West, Westlaw through 2019 Act 186).

517. § 736.0802(10)(b); § 701.1004(3)(a)–(b).

518. § 736.0802(10)(c); § 701.1004(3)(b).

519. § 736.0802(10)(b)–(e); § 701.1004(3)(a)–(c).

520. *See, e.g.*, *In re* Margarete Marthe Milliette 1997 Irrevocable Tr., Appeal No. 2017AP2303, 2018 WL 2229366, at *8 (Wis. Ct. App. May 15, 2018) (affirming trial court's order requiring a trustee to reimburse the trust for attorney's fees paid from the trust to defend against a beneficiary's petition seeking the trustee's removal when the trustee had failed to provide the beneficiary with the statutory notice pursuant to § 701.1004(3)).

521. *See, e.g.*, Schwab v. Huntington Nat'l Bank, 516 F. App'x 545, 550 (6th Cir. 2013) (discussing changes to Florida's statute and observing that current version puts the burden on the beneficiary to seek a court order enjoining payments of fees and costs once the trustee gives notice to the beneficiaries).

522. FLA. STAT. ANN. § 736.0802(10)(e)(1); WIS. STAT. ANN. § 701.1004(3)(c)(2); *see* Cohen v. Minneapolis Jewish Fed'n, No. 16-CV-325, 2017 WL 108087, at *3 (W.D. Wis. Jan.

make this showing, although the affected beneficiary does not have "a burden akin to that of a movant on summary judgment."[523] If this showing is made, the court must enter an order barring further payment and compelling the return to the trust of any fees and costs already paid, unless the court finds "good cause" not to do so.[524]

Even though South Carolina does not have statutory provisions like those enacted in Florida and Wisconsin,[525] these statutes could still inform courts in deciding whether a trustee or other fiduciary is entitled to an interim award of fees from the trust or estate under the statutes patterned after UTC § 1004. Additionally, the statutes also address the closely related question of whether a beneficiary should be entitled to an order prohibiting a trustee or fiduciary from using trust or estate assets to pay attorney's fees and expenses on an interim basis before the court has determined the merits of the litigation.

IX. TEMPORARY OR PRELIMINARY INJUNCTIVE RELIEF INVOLVING FEES

Beneficiaries have received mixed results when seeking injunctions to restrain a trustee or personal representative from using trust or estate assets to pay attorney's fees and expenses on an interim basis during the litigation.[526] In *Snook v. Trust Co. of Georgia Bank of Savannah*, which involved beneficiaries' claims against the trustees for breach of fiduciary duties, the Eleventh Circuit Court of Appeals held the trial judge did not abuse his discretion in denying the beneficiaries' motion for a preliminary injunction to enjoin the trustees from using trust funds to pay their attorney's fees during the litigation.[527] The court reached this conclusion despite the trial court

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11, 2017) (prohibiting trustees from using trust funds to pay their attorney's fees during litigation when trust beneficiary satisfied its burden under § 701.1004(3)(c)(2) of the Wisconsin Code and showed a "reasonable basis" for concluding that the trustees had breached their duties to the trust); Covenant Tr. Co. v. Guardianship of Ihrman, 45 So. 3d 499, 505 (Fla. Dist. Ct. App. 2010) (holding trial court erred in entering order barring trustee from making further payment of attorney's fees out of the trust in the absence of any finding of a breach of trust by the trustee).

523. Abromats v. Abromats, No. 16-CV-60653, 2016 WL 5941888, at *4 n.4 (S.D. Fla. Oct. 13, 2016).

524. FLA. STAT. ANN. § 736.0802(10)(e)(1); WIS. STAT. ANN. § 701.1004(3)(c)(2); *see Abromats*, 2016 WL 5941888, at *6 (finding good cause existed pursuant to § 736.0802(10)(e)(1) of the Florida Code to deny beneficiary's motion to enjoin trustee from using trust assets to fund his legal fees and costs); *Cohen*, 2017 WL 108087, at *4 (concluding that the trustees did not show good cause sufficient to allow them to use trust funds to pay their attorney's fees and costs associated with beneficiary's litigation against them alleging a breach of their duties to the trust).

525. *See* S.C. CODE ANN. §§ 62-3-720, -7-709 (Supp. 2019).

526. *See* Snook v. Tr. Co. of Ga. Bank of Savannah, 909 F.2d 480, 487 (11th Cir. 1990); Salmon v. Old Nat'l Bank, No. 4:08CV-116-M, 2010 WL 1463196, at *5 (W.D. Ky. Apr. 8, 2010).

527. *See* 909 F.2d at 486–87.

finding that the beneficiaries were substantially likely to prevail on the merits of their claim and that the trustees had no authority absent prior judicial authorization to use trust funds for that purpose.[528] The appellate court held that the beneficiaries would have an adequate legal remedy at the end of the case in the form of a monetary recovery against the trustees and that the beneficiaries failed to establish irreparable harm.[529] Other courts have likewise denied beneficiaries' motions for preliminary injunctions in similar circumstances.[530]

On the opposing side, a Kentucky federal district court granted the trust beneficiaries' preliminary injunction motion in *Salmon v. Old National Bank*.[531] The beneficiaries in this case sued the trustee, alleging breach of fiduciary duties.[532] The trust settlor was a ninety-eight-year-old widow who suffered a stroke and required around-the-clock nursing care and rehabilitation therapy.[533] The trustee used trust funds to pay approximately $103,000 in attorney's fees incurred in defending the breach of fiduciary duty suit.[534] The trustee was also attempting to sell the trust's real estate holdings because the settlor was in immediate need of disbursements from the trust due to her personal income and assets being insufficient to meet her needs.[535]

The district court granted the beneficiaries' motion for a preliminary injunction to prevent the trustee from selling the trust's real property; it further ordered the trustee to return to the trust the amount taken for attorney's fees to defend the fiduciary duty case.[536] The court maintained that it initially denied the beneficiaries' motion because they failed to offer proof of irreparable harm absent a preliminary injunction, but it also noted that "the circumstances [had] changed" when it became aware of the settlor's imminent

528. *See id.*

529. *Id.* at 486.

530. *See, e.g.*, Alexander v. Martin, No. 2:08-CV-400, 2010 WL 11530306, at *5–6 (E.D. Tex. Aug. 23, 2010); McCoy v. U.S. Bank, N.A., No. D067110, 2015 WL 6438478, at *3–5 (Cal. Ct. App. Oct. 23, 2015). In *Alexander*, the court later denied the trustee's motion for summary judgment involving the beneficiary's claim that the trustee's payment of interim attorney's fees from the trust constituted a breach of fiduciary duty on the grounds it would be premature to rule on the issue until the merits of the case had been adjudicated. Alexander v. Martin, No. 2:08CV400, 2010 WL 11527378, at *17 (E.D. Tex. Aug. 31, 2010).

531. *Salmon*, 2010 WL 1463196, at *5.

532. *Id.* at *3.

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.* at *5–6.

need of disbursements from the trust and the need to sell the trust's real property to provide continued support to the settlor.[537]

One commentator has argued that a beneficiary may be able to obtain temporary injunctive relief by suspending or thwarting a trustee's ability to reimburse its attorney's fees from the trust in conjunction with an action under UTC § 706 seeking the trustee's removal from office.[538] Section 706(c) of the UTC states that "[p]ending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under [§] 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries."[539] The accompanying Comments to UTC § 706 explain that it "authorizes the court to intervene pending a final decision on a request to remove a trustee."[540] In turn, UTC § 1001(b) lists a broad arsenal of remedies that a court may award for "a breach of trust that has occurred or may occur," including a catch-all clause permitting the court to "order any other appropriate relief."[541] This authorization allows a court to grant an injunction that seeks the trustee's removal to restrain the trustee from using trust assets to pay or reimburse its attorney's fees and costs.[542] Despite this statutory authorization, the commentator suggests that the availability of a preliminary injunction under UTC § 706(c) may depend on whether the traditional requirements for

537. *See id.* at *3; *see also* Jelletich v. Pawlaksi, No. 5:14-CV-00017, 2015 WL 1249673, at *3 (W.D. Ky. Mar. 18, 2015), which involved a Kentucky federal district court that entered an order granting the trust beneficiaries' motion seeking to bar the trustee from paying any further attorney's fees and costs from the trust corpus during the litigation without leave of the court. Although the court did not analyze the motion as if it was seeking injunctive relief, the opinion makes clear the court granted the motion because the trustee was presently paying her and her husband's attorney's fees from the trust estate and was thereby dissipating the funds that the beneficiaries may ultimately be entitled to if they were to prevail in the litigation. *Id.* at *4. The court said its "present ruling is intended to preserve the remaining trust corpus pending the resolution of this lawsuit," which is akin to granting a preliminary injunction to maintain the status quo. *Id.* at *3 n.3.

538. *See* Zebot & Nelson, *supra* note 417, at 36–37.

539. UNIF. TR. CODE § 706(c) (UNIF. L. COMM'N 2018). South Carolina has adopted this uniform provision with slight modifications. *See* S.C. CODE ANN. § 62-7-706(c) (Supp. 2019).

540. UNIF. TR. CODE § 706 cmt. (UNIF. L. COMM'N 2018). The Comments to § 706 further note that "[p]ursuant to Section 1004, the court may also award attorney's fees as justice and equity may require," thus suggesting that an interim award of attorney's fees and costs may be appropriate during a proceeding for the trustee's removal. *Id.*

541. *Id.* § 1001(b). South Carolina has adopted this uniform provision with slight modifications. *See* S.C. CODE ANN. § 62-7-1001(b).

542. *See* Zebot & Nelson, *supra* note 417, at 36–37. The Comments to § 706 state that "[a]mong the relief that the court may order under Section 1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions." UNIF. TR. CODE § 706 cmt. (UNIF. L. COMM'N 2018).

injunctive relief—including "no adequate remedy at law"—can be satisfied.[543]

It is open to debate whether the requirement of an inadequate remedy at law is even relevant when the purpose of the temporary injunction is either to "freeze" specific funds or assets held by a trustee or personal representative as a fiduciary or to prevent their disposition when those assets may be the subject of an equitable decree (e.g., constructive trust, restitution, accounting, disgorgement) at the conclusion of the case. When a person holds legal title to funds as a fiduciary and the party requesting the preliminary injunctive relief holds equitable title (such as a beneficiary), courts no longer require a showing of inadequate remedy at law if the purpose of the preliminary injunction is to preserve the court's ability to provide final equitable relief.[544] Neither the *Snook* nor *Salmon* cases indicate the parties raised this argument.[545]

Under these principles, the ordinary requirement of an inadequate remedy at law is satisfied based on the view that the legal remedy by way of a money judgment is "inadequate" because the funds will be reduced pending final hearing and, thus, will not be available in their entirety for the purposes for which they were entrusted to the fiduciary in the first place.[546] "[T]he court

543. *See* Zebot & Nelson, *supra* note 417, at 37 ("Regardless, the availability of temporary injunctive relief may still be limited by the common law factors governing the propriety of such relief in a particular jurisdiction. Given that many trust litigation actions involve distribution-related issues, it may be rare to find circumstances in which there is 'no adequate remedy at law' for the threatened harm—such that a subsequent monetary award of damages would not provide an adequate remedy—to justify immediate injunctive relief. But exceptions exist." (citations omitted)).

544. *See, e.g.*, Deckert v. Indep. Shares Corp., 311 U.S. 282, 290 (1940) (holding that plaintiffs were entitled to a preliminary injunction to restrain defendants from transferring assets during the pendency of the action where plaintiffs stated a claim for final equitable relief and demonstrated a risk of dissipation of assets by defendants); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97–98 (6th Cir. 1982) (upholding preliminary injunction that froze defendant's assets because it secured plaintiffs' claim for restitution and a constructive trust, the court stated that "[t]he power of the district court to preserve a fund or property which may be the subject of a final decree is well established" (citing DeBeers Consol. Mines v. United States, 325 U.S. 212, 220 (1945))); Heckmann v. Ahmanson, 214 Cal. Rptr. 177, 189–190 (Ct. App. 1985) (affirming grant of preliminary injunction to enjoin transfer of money as to which a constructive trust was sought in action alleging breach of fiduciary duty); *see* 183/620 Grp. Joint Venture v. SPF Joint Venture, 765 S.W.2d 901, 903 (Tex. Ct. App. 1989); Sargeant v. Al Saleh, 512 S.W.3d 399, 415 (Tex. Ct. App. 2016); Korn v. Ambassador Homes, Inc., 546 So. 2d 756, 757 (Fla. Dist. Ct. App. 1989); Keeshin v. Schultz, 262 N.E.2d 753, 757 (Ill. App. Ct. 1970); Am. Exp. Travel Related Servs. Co. v. Laughlin, 623 A.2d 854, 856 (Pa. Super. Ct. 1993).

545. *See* Snook v. Tr. Co. of Ga. Bank of Savannah, 909 F.2d 480 (11th Cir. 1990); Salmon v. Old Nat'l Bank, No. 4:08CV-116-M, 2010 WL 1463196, at *1 (W.D. Ky. Apr. 8, 2010).

546. *183/620 Grp.*, 875 S.W.2d at 904 (citing Minexa Ariz., Inc. v. Staubach, 667 S.W.2d 563, 567 (Tex. Ct. App. 1984)); Gryphon Master Fund, L.P. v. Path 1 Network Techs., Inc., No.

can be seen as having not only the discretion but the duty, when requested, to attempt preservation of the property or fund in controversy so that ultimate success by plaintiffs may not result in a meaningless victory."[547] Provided the complaint asserts a cause of action cognizable in equity, the court may exercise its general equitable powers to enter an asset-preserving preliminary injunction.[548] The fact that a complaint seeks money damages or other legal relief along with equitable relief does not defeat the court's equitable powers to enter an asset-freezing preliminary injunction.[549] In such "mixed" relief cases, however, the preliminary injunction must be ancillary to the plaintiff's claims for equitable relief.[550]

The South Carolina Supreme Court followed these principles in *Grosshuesch v. Cramer*.[551] In this case, an elderly couple suffering from dementia brought an action against an employee of their bank who eventually became the couple's caregiver as well as the trustee of different trusts in which the couple had assets.[552] The defendant transferred substantial assets (including funds from an investment account) belonging to the couple to herself and her husband, and she claimed that the couple gifted the assets to her.[553] Through their guardians, the couple sued the defendant to set aside the transfers and sought a preliminary injunction to prevent the defendant from exercising any control over the couple's trusts and assets during the litigation.[554]

The South Carolina Supreme Court rejected the trial judge's ruling that the prejudgment attachment statute provided an adequate remedy at law.[555] The court maintained that the underlying action was not one at law and the couple was not seeking an injunction to preserve "another's assets for

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3:06 CV 0107 D, 2007 WL 1723703, at *5 (N.D. Tex. June 14, 2007) (citing Lometa Bancshares, Inc. v. Potts, 952 S.W.2d 631, 633 (Tex. Ct. App. 1997)); Gatlin v. GXG, Inc., No. 05-93-01852-CV, 1994 WL 137233, at *8 (Tex. Ct. App. Apr. 19, 1994) (citing *Minexa*, 667 S.W.2d at 567–68).

547. *Keeshin*, 262 N.E.2d at 757.

548. *See* Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 133 (2d Cir. 2014).

549. U.S. *ex rel.* Rahman v. Oncology Assocs., 198 F.3d 489, 498 (4th Cir. 1999); Dong v. Miller, No. 16CV5836NGGJO, 2018 WL 1445573, at *8 (E.D.N.Y. Mar. 23, 2018) (quoting Paradigm BioDevices, Inc. v. Centinel Spine, Inc., No. 11 CIV. 3489, 2013 WL 1915330, at *2 (S.D.N.Y. May 9, 2013)).

550. *Dong*, 2018 WL 1445573, at *8; *cf.* Quantum Corp. Funding, Ltd. v. Assist You Home Health Care Servs. of Va., 144 F. Supp. 2d 241, 250 (S.D.N.Y. 2001) (granting a preliminary injunction when there was a "nexus" between the injunction and the plaintiff's claim for equitable relief).

551. 367 S.C. 1, 6, 623 S.E.2d 833 (2005).

552. *Id.* at 2–3, 623 S.E.2d at 833–34.

553. *Id.* at 3–4, 623 S.E.2d at 834.

554. *Id.* at 3, 623 S.E.2d at 834.

555. *Id.* at 6, 623 S.E.2d at 835 (discussing S.C. CODE ANN. § 15-19-10 (2005)).

satisfaction of a potential [money] judgment."[556] Instead, the case was "an equitable action in which the assets sought to be preserved, specifically $2 million worth of accounts, monies, and personal property, are the subject of the instant dispute."[557] In the court's view, the case "involve[d] the quintessential hallmark of an injunction: preservation of the property at issue until the matter has been adjudicated."[558]

Whenever a beneficiary's action against a trustee, personal representative, or fiduciary asserts a claim cognizable in equity as to specific assets or an equitable remedy involving those assets, the beneficiary should seek a preliminary injunction that freezes the assets—first to avoid their dissipation before the conclusion of the case and, second, to further the court's ability to grant the final relief requested.[559] By doing this, a court may issue a preliminary injunction restraining a trustee or personal representative from dissipating trust or estate funds to pay for their legal fees, irrespective of the existence of an adequate remedy at law.[560]

In *McDevitt v. Wellin*, a South Carolina federal district court treated a trustee and trust protector's motion for payment of interim attorney's fees as a request for injunctive relief when no statute clearly authorized the award of such fees.[561] In *McDevitt*, a co-trustee and trust protector of an irrevocable trust filed a breach of fiduciary duty and conversion lawsuit against three co-trustees and beneficiaries who liquidated all of the trust's assets and distributed over $95.6 million of those assets to themselves personally.[562] The

556. *Id.* at 5, 623 S.E.2d at 835.

557. *Id.*

558. *Id.* The supreme court also affirmed the trial judge's findings that the couple had shown a likelihood of success on the merits and they would suffer irreparable harm if a preliminary injunction was not issued. *Id.* at 6, 623 S.E.2d at 835. The court's opinion did not discuss whether the defendant was financially capable of satisfying a judgment against her for the return of the funds or assets in question.

559. In *Verenes v. Alvanos*, the South Carolina Supreme Court held that a grantor's breach of fiduciary duty claims against a former trustee, individually and as former trustee, sounded in equity when the main purpose of the action was to seek relief that was equitable in nature. 387 S.C. 11, 17–18, 690 S.E.2d 771, 773–74 (2010). The remedies requested in that case included restitution (restoring funds back into the trust) and disgorgement of commissions and profits. *Id.* at 17–18, 690 S.E.2d at 774.

560. *See, e.g.*, Greenspan v. Mesirow, 485 N.E.2d 1196, 1201 (Ill. App. Ct. 1985); *In re* Est. of Reilly, 933 A.2d 830, 834 (D.C. 2007). *Contra* Zaffirini v. Guerra, No. 04-14-00436-CV, 2014 WL 6687236, at *3–4 (Tex. Ct. App. Nov. 26, 2014) (reversing a temporary injunction that prevented trustees from paying their attorney's fees from the trust in defending breach of fiduciary duty lawsuit filed by beneficiaries, the court ruled there was no evidence of irreparable harm or an inadequate legal remedy given that trustees could pay back the money at the end of the case).

561. McDevitt v. Wellin, No. 2:13-cv-3595, 2016 WL 199626, at *4 (D.S.C. Jan. 15, 2016).

562. *Id.* at *1; *see* Schwartz v. Wellin, No. 2:13-cv-3595, 2014 WL 51212, at *1–2 (D.S.C. Jan. 7, 2014).

defendants were the children of the trust settlor, who was then deceased.[563] The plaintiffs' lawsuit sought to remove the defendants from their positions as co-trustees and to compel them to restore the trust's assets to the trust and compensate the trust for lost appreciation damages of approximately $42 million.[564] The defendants held funds in certain accounts and used millions of dollars of the trust's assets to pay their own attorneys, experts, and consultants in the litigation.[565]

During the litigation, the *McDevitt* plaintiffs moved for payment of interim trustee fees, trust protector fees, and attorneys' fees and expenses from the trust assets that were under the defendants' control.[566] Because the trust contained a choice of law provision stating it was governed by South Dakota law, the plaintiffs brought their motion under that state's version of UTC § 706(c), which governs the removal of trustees.[567] Critically, South Dakota had yet to enact its own version of UTC § 1004, which means there was no clear statutory basis for the district court to award attorney's fees and expenses.[568] The Comments to § 706 include a reference to § 1004, thereby suggesting it may be appropriate for the court to intervene pending a final decision on a request to remove a trustee under § 706 and make an interim award of fees and expenses to the moving party under § 1004.[569] Although the district court acknowledged both the Comments' reference to § 1004 and § 1004's authorization to "award attorneys' fees as justice and equity may require," the court did not apply that section or standard in resolving the plaintiffs' motion.[570]

Instead, the district court in *McDevitt* held the plaintiffs' motion constituted a request for injunctive relief pursuant to the court's general equity power and, as such, the plaintiffs were required to satisfy the elements necessary for the issuance of a preliminary injunction.[571] In the Fourth Circuit, a preliminary injunction consists of four elements: (1) the movant is likely to succeed on the merits, (2) the movant is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of the equities tips in its

563. *McDevitt*, 2016 WL 199626, at *1 n.1.

564. *Id.* at *1, *5.

565. *Id.* at *2.

566. *Id.*

567. *Id.* at n.3. The South Dakota statute provides that "[p]ending a final decision on a request to remove a trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries." S.D. CODIFIED LAWS § 55-3-20.1 (West, Westlaw through 2020 Reg. Sess.).

568. *See* S.D. CODIFIED LAWS §§ 55-3-1 to -4-58 (West, Westlaw through 2020 Reg. Sess.).

569. UNIF. TR. CODE § 706 cmt. (UNIF. L. COMM'N 2018) ("Pursuant to [§] 1004, the court may also award attorney's fees as justice and equity may require.").

570. *McDevitt*, 2016 WL 199626, at *4 n.5.

571. *See id.* at *4.

favor, and (4) the injunction is in the public interest.[572] Because the plaintiffs' motion included a request for the segregation of trust assets or funds for the payment of ongoing or future fees and expenses, the district court further treated the motion as a request for a mandatory—rather than prohibitory—injunction, which is subject to a "heightened" or more exacting standard.[573]

By applying this heightened standard to the criteria, the district court denied the plaintiffs' motion based on its finding they could not satisfy the "irreparable harm" element.[574] The court reached this conclusion primarily because the special administrator for the settlor's estate entered an agreement with the plaintiffs that obligated the estate to both advance the plaintiffs' fees and expenses incurred in the litigation with the defendants and to relieve the plaintiffs of any obligation to repay those advances if they were unsuccessful in recovering the fees and expenses from the defendants.[575] As a result, the district court determined "there [was] no real risk that the trust plaintiffs [would] go unpaid in this case," thus defeating any assertion of irreparable harm to the plaintiffs if their motion was denied.[576]

The outcome of the motion in *McDevitt* may have been different if the district court considered South Dakota's version of UTC § 706(c) to be an independent source of power explicitly authorizing it to award attorney's fees and expenses, rather than simply a codification of the court's inherent or general equitable power which requires satisfaction of the elements necessary for a mandatory injunction.[577] Likewise, the outcome would have been

572. *Id.* In comparison, South Carolina state courts traditionally require a three-part showing to support the issuance of a preliminary injunction: (1) the movant will suffer irreparable harm without such relief, (2) it has a likelihood of success on the merits, and (3) there is no adequate remedy at law. Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). The "balancing the equities" requirement utilized by the federal courts is unnecessary as it is "subsumed by the irreparable harm and inadequate remedy at law components of the three-part test." *Id.* at 587, 694 S.E.2d at 17.

573. *McDevitt*, 2016 WL 199626, at *4. The district court observed that "[w]hereas 'prohibitory injunctions aim to maintain the status quo,' . . . '[m]andatory preliminary injunctions generally do not [ ] and normally should be granted only in those circumstances when the exigencies of the situation demand such relief.'" *Id.* (first quoting Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013); then quoting E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 828 (4th Cir. 2004); and then citing Vollette v. Watson, No. 2:12CV231, 2012 WL 3026360, at *3 (E.D. Va. July 24, 2012)).

574. *Id.* at *6. Because the court ruled against the plaintiffs on the irreparable harm element, it did not reach or analyze the other elements necessary for a preliminary injunction.

575. *See id.* at *5.

576. *Id.*

577. *Id.* at *3 (holding that § "55-3-20.1 does not provide an independent basis for any court action, but simply confirms the availability of the court's general equitable power" and concluding "that section 55-3-20.1 does not provide the court with an independent source of equitable power."). Earlier in the same litigation, the district court ruled that § 55-3-20.1 "does not expressly authorize court-ordered injunctive relief," but "simply codifies a court's inherent

different if South Dakota enacted UTC § 1004 because the fee statutes derived from this section constitute an independent source of power explicitly authorizing the court to award fees and expenses.[578]

X. PROCEDURAL ASPECTS OF FEE APPLICATIONS

The terms of the fee statutes derived from UTC § 1004 are silent on many procedural matters involving fee applications including when and how an applicant must raise a request for attorney's fees, whether a party is entitled to a jury trial on such a request, what type of evidentiary hearing is necessary or proper to resolve a contested application for fees, and the degree of scrutiny that an appellate court will give to a subordinate court's fee award on appeal. Case law has addressed some of these procedural questions, while others remain unsettled.

A. Procedure for Applying for Fees Once Merits of Action Decided

The fee statutes based on UTC § 1004 do not speak to the timing or method of requesting fees after the merits of the action are decided.[579] The statutes also do not discuss whether a request for fees against another party is an element of damages to be proven at trial on the merits of the underlying claims or if it is a collateral matter to be determined following an adjudication of the merits.[580] In this same vein, they do not indicate whether a request for fees must be specifically pled as special damages, raised as an affirmative claim or counterclaim in a party's pleading, or raised for the first time in a post-trial or post-judgment motion.[581]

In determining a party's statutory request for an award of fees against an opposing party at the conclusion of litigation, South Carolina cases have generally treated such a request as a motion to tax costs under Rule 54(d) of the South Carolina Rules of Civil Procedure[582] or a motion to alter or amend

power by reiterating that the court may award appropriate relief to parties before it." Schwartz v. Wellin, No. 2:13-CV-3595, 2014 WL 51212, at *3 (D.S.C. Jan. 7, 2014).

578. *See, e.g.*, S.C. CODE ANN. § 62-7-1004 (2009).

579. *See, e.g., id.*

580. *See, e.g., id.*

581. *See, e.g., id.*

582. Berlinsky v. Berlinsky, No. 2013-GC-10-0150, 2019 WL 7212469, at *4 (S.C. Ct. Com. Pl. Dec. 20, 2019). South Carolina Rule of Civil Procedure 54(d) states that "[a] motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, may be filed by the prevailing party within 10 days of the receipt of written notice of the entry of final judgment," and "[u]pon allowance, the costs shall be included in the judgment or decree." S.C. R. CIV. P. 54(d). Rule 54(e)(1), which is entitled "Costs Authorized by Statute and Sanctions Imposed in Favor of Prevailing Party," also states that "[a]ll sanctions including

the judgment under Rule 59(e) of the same rules.[583] Under the state rule, a properly supported motion for attorney's fees must be filed no later than ten days after the termination of the action or the court loses jurisdiction to award such fees.[584] In following this rule, a South Carolina trial court dismissed a party's request for attorney's fees under § 62-5-105 when the party failed to file a motion for fees within ten days after the opposing party voluntarily dismissed the action.[585]

Other cases across the state involving the recovery of attorney's fees under contract provisions indicate that the request must be specifically pled as special damages.[586] In a case involving an attorney's claim for attorney's fees in representing a class of plaintiffs in a class action lawsuit, the South Carolina Court of Appeals held the attorney waived his right to recover such fees by failing to raise the request in his pleading, presumably based on the conclusion (although not explicitly stated) that the fees were part of the underlying substantive claim and, therefore, must be specifically pled as an element of damages.[587] Although the attorney raised the issue of attorney's fees on appeal, he did not plead a claim for fees to the trial court.[588] Further, the

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reasonable attorney[']s fees, if ordered, imposed upon another party and in favor of the prevailing party under any statute or Rule of Civil Procedure are taxable" as costs. *Id.* r. 54(e)(1).

583. *Berlinsky*, 2019 WL 7212469, at *4; *see* Lollis v. Dutton, 421 S.C. 467, 486–87, 807 S.E.2d 723, 733 (Ct. App. 2017) (citing Rules 54(d) and 59(e) as support for holding that a post-trial motion sufficiently raised requests for attorney's fees pursuant to two statutes and a rule); *see also* Belton v. State, 339 S.C. 71, 73, 529 S.E.2d 4, 5 (2000) (observing generally that attorney's fees may be taxed as costs under Rule 54 if otherwise allowed by statute or rule); Hueble v. S.C. Dep't of Nat. Res., 416 S.C. 220, 236 n.9, 785 S.E.2d 461, 469 n.9 (2016) (Kittredge, J., dissenting) (citing *id.*) (same).

584. *Berlinsky*, 2019 WL 7212469, at *4; *see* Pitman v. Republic Leasing Co., Inc., 351 S.C. 429, 430, 432, 570 S.E.2d 187, 188–89 (Ct. App. 2002) (requesting for attorney's fees as sanctions under the South Carolina Frivolous Proceedings Sanctions Act (FCPSA)); *cf. In re* Beard, 359 S.C. 351, 359–60, 597 S.E.2d 835, 839 (Ct. App. 2004) (distinguishing between motions requesting attorney's fees as sanctions under the FCPSA and S.C. R. CIV. P. 11, the court held that a motion under the former must be made within the ten day limitation for post-judgment motions while motions under the latter are not required to be made within the ten day limitation); Russell v. Wachovia Bank, 370 S.C. 5, 20 n.11, 633 S.E.2d 722, 730 n.11 (2006) (same). This ten-day limitation does not govern when the trial court retained jurisdiction over the question of attorney's fees, such as by granting a party leave to file a motion for fees or by reserving the matter of attorney's fees for future determination. *See* Jackson v. Speed, 326 S.C. 289, 299–300, 486 S.E.2d 750, 755 (1997); Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 233, 647 S.E.2d 488, 497 (Ct. App. 2007); Baird Pac. W. v. Blue Water Sunset Park, Inc., No. 2004-UP-011, 2004 WL 6248287, at *5 (S.C. Ct. App. Jan. 14, 2004).

585. *See Berlinsky*, 2019 WL 7212469, at *4–5, *9.

586. *See infra* notes 587–560 and accompanying text.

587. *See* Premium Inv. Corp. v. Green, 283 S.C. 464, 467, 474, 324 S.E.2d 72, 74, 78 (Ct. App. 1984) (citing Glass v. Glass, 276 S.C. 625, 628, 281 S.E.2d 221, 222 (1981)).

588. *See id.*

court's opinion does not indicate whether the attorney filed a post-trial motion in the trial court seeking an award of attorney's fees.[589]

In a later case involving an award of attorney's fees based on a provision in an option contract, the South Carolina Court of Appeals rejected the argument that a special referee improperly awarded attorney's fees to the prevailing party when that party's complaint requested "an award of attorney's fees and costs for the maintenance of this action which has been occasioned by [the opposing party's] actions and conduct[]" but did not specifically plead the contract between the parties as the basis for its claim.[590] The court stressed that (1) the prevailing party commenced the action to determine the validity of the option pursuant to the contract, (2) the contract allowed any prevailing party to seek attorney's fees in an action to enforce any right under the contract, and (3) the prevailing party requested attorney's fees in its pleading.[591] Therefore, the opposing party was on notice that the prevailing party would be seeking fees if successful.[592]

The Tennessee Court of Appeals likewise rejected the argument that a request for attorney's fees under that state's version of UTC § 1004 must be specifically pled as special damages, although it reached this decision primarily because the objecting party failed to raise the issue in the lower court.[593] The court observed that Tennessee's rule (which would normally require requests for attorney's fees be specifically pled as special damages) is relaxed or modified (1) when the recovery of fees is statutorily authorized, putting the parties on notice that fees may be recovered from another party and (2) when the party seeking fees files a timely post-trial motion for approval following the issuance of the court's judgment.[594]

The federal rule differs from the South Carolina state rule. Federal Rule of Civil Procedure 54(d)(2)(A) provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages."[595] The rule further states that "[u]nless a statute or a court order provides otherwise,

589. *See id.*

590. S.C. Elec. & Gas Co. v. Hartough, 375 S.C. 541, 550–51, 654 S.E.2d 87, 91–92 (Ct. App. 2007).

591. *Id.* at 551, 654 S.E.2d at 92.

592. *Id.*

593. Duke v. Simmons, No. M2008–01967–COA–R3–CV, 2009 WL 1175114, at *5 (Tenn. Ct. App. Apr. 30, 2009).

594. *Id.* at *4–5 (citing Marshall v. First Nat'l Bank of Lewisburg, 622 S.W.2d 558, 561 (Tenn. Ct. App. 1981)); *see also* George v. Dunn, No. E2015–02312–COA–R3–CV, 2016 WL 6471334, at *8 n.2 (Tenn. Ct. App. Nov. 2, 2016).

595. FED. R. CIV. P. 54(d)(2)(A).

the motion must . . . be filed no later than 14 days after the entry of judgment[.]"[596]

Consequently, if a request for attorney's fees under §§ 62-1-111, 62-5-105, or 62-7-1004 is deemed to be part of the substantive law governing the action, then the federal rule holds such fees are an element of damages that must be claimed in a pleading and proved at trial and cannot be raised by post-judgment motion.[597] If a request for fees under those statutes is considered collateral to the merits of the action, however, then the federal rule allows for the request to be raised in a post-judgment motion.[598] In applying Rule 54(d), federal courts have distinguished between requests for fees under a contract (which generally, but not always, are treated as part of the merits under the substantive law) and requests for fees under a prevailing party statute (which are collateral to the merits of the litigation).[599]

Because §§ 62-1-111, 62-5-105, and 62-7-1004 do not indicate whether a request for fees is an element of damages under the substantive law or a matter collateral to the merits, the law is unsettled as to whether a party must include a request for attorney's fees in its pleading or if it may wait to raise the matter in a post-trial or post-judgment motion.[600] It appears it is best to allow a party to make such a request by motion after judgment is entered, provided the

596. *Id.* r. 54(d)(2)(B)(i). Importantly, this 14-day period does not begin running until the court has entered a "judgment" in the case, which is an "order from which an appeal lies." W.A.K., II *ex rel.* Karo v. Wachovia Bank, N.A., No. 3:09CV575, 2010 WL 2976518, at *4 n.1 (E.D. Va. July 19, 2010). The federal rule elaborates that the motion must "specify the judgment and the statute, rule, or other grounds entitling the movant to the award," "state the amount sought or provide a fair estimate of it," and "disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made." FED. R. CIV. P. 54(d)(2)(B)(ii)–(iv). Rule 54(d)(2)(D) also provides that "[b]y local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings." *Id.* r. 54(d)(2)(D).

597. FED. R. CIV. P. 54(d)(2)(A).

598. *Id.* r. 54(d)(2)(A)–(B)(i).

599. *See* Carolina Power & Light Co. v. Dynegy Mktg. & Trade, 415 F.3d 354, 358–59, 361 (4th Cir. 2005), *abrogated on other grounds by* Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emps., 571 U.S. 177 (2014); Richardson v. Wells Fargo Bank, 740 F.3d 1035, 1039–40 (5th Cir. 2014); Sequoia Fin. Sols., Inc. v. Warren, 660 F. App'x 725, 728 (11th Cir. 2016); Medtronic, Inc. v. Mirowski Fam. Ventures, LLC, 682 F. App'x 921, 927 (Fed. Cir. 2017). The Comments to the 1993 amendments to Rule 54(d) explain that subdivision (2) was added to that rule "to provide for a frequently recurring form of litigation not initially contemplated by the rules—disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards or in which the court must determine the fees to be paid from a common fund." FED. R. CIV. P. 54(d) cmt. to 1993 amend. However, "it does not . . . apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury." *Id.* r. 54(d)(2) cmt. to 1993 Amend. "Nor . . . does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927." *Id.*

600. *See* S.C. CODE ANN. §§ 62-1-111, -5-105, -7-1004 (2009).

motion is made within the ten day limitation of Rules 54(d) and 59(e) in the state court or within the fourteen day limit under Rule 54(d)(2) in the federal courts.

Sections 62-1-111, 62-5-105, and 62-7-1004 all refer to the attorney's fees that can be awarded using the "costs and expenses" language.[601] When the substantive law governing an action provides for attorney's fees as a recoverable cost as opposed to an element of damages, a request for such fees need not be asserted in a pleading.[602] Additionally, although these sections are not dependent on prevailing party status, the factors courts must consider to determine entitlement of an award of fees and costs, as well as to establish the reasonableness of the amount to be awarded under those statutes, include the beneficial result obtained by the litigation and prevailing party concepts.[603] Determining these factors before the merits of the underlying litigation have been resolved would be impractical.[604] As such, there is no logical reason to require that a party either plead a request for attorney's fees and costs or offer evidence proving the fees and expenses during the trial on the merits of the underlying claims.[605]

In *Garwood v. Garwood*, the Wyoming Supreme Court addressed a request for attorney's fees and costs under Wyoming's version of UTC § 1004.[606] In this case, trustees argued the trial court did not have jurisdiction under the statute to order them to reimburse amounts they withdrew from the trust for payment of their attorney's fees and costs in litigation adverse to the settlor, especially when the settlor did not raise the request for attorney's fees

601. *Id.* §§ 62-1-111, -5-105, -7-1004 (stating that the court "may award costs and expenses, including reasonable attorney's fees").

602. *See* Perry v. Serenity Behav. Health Sys., No. CV106–172, 2009 WL 1259367, at *2 n.5 (S.D. Ga. May 6, 2009); Riordan v. State Farm Mut. Auto. Ins. Co., No. CV 07–38–M–DWM, 2008 WL 2512023, at *2–3 (D. Mont. June 20, 2008), *aff'd*, 589 F.3d 999 (9th Cir. 2009); NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC, No. 2:08–CV–3378, 2010 WL 3258145, at *3–5 (D.S.C. Aug. 16, 2010); *see also In re* Joseph A. Bulger Living Tr., 394 P.3d 898, at *9 (Kan. Ct. App. 2017) (treating attorney's fees and guardians ad litem fees as an element of costs, rather than part of the merits judgment).

603. *See* S.C. CODE ANN. §§ 62-1-111, -5-105, -7-1004; Atwood v. Atwood, 25 P.3d 936, 947 (Okla. Ct. App. 2001).

604. *See Carolina's Power*, 415 F.3d at 361 (treating a claim for attorney's fees as a collateral issue, rather than as part of the merits of the action, makes sense when the fees are sought as costs for prosecuting an underlying litigation).

605. When it is known that attorney's fees is an issue in the case, it is not uncommon for the parties in state court cases to stipulate before the trial that the court will reserve the issue of attorney's fees for determination after the trial so the parties are not having to litigate that question during the trial of the underlying claims. *See, e.g.*, Vick v. S.C. Dep't of Transp., 347 S.C. 470, 483 n.6, 556 S.E.2d 693, 700 n.6 (Ct. App. 2001).

606. 233 P.3d 977, 985 (Wyo. 2010).

until a post-judgment motion.[607] In rejecting this argument, the court observed:

> The question of attorneys' fees and costs in a given civil action is a common issue that a trial court may address, and it does not, as suggested by the Trustees, require the filing of a separate action or a motion to amend a judgment. The issue may be addressed as an element of damages, or it may be addressed, as it was in this case, through the filing of a post-judgment motion, as described in Rule 54.[608]

The court further held that "[t]he issue of attorneys' fees and costs was properly placed before the district court by [the settlor's] timely filing of a post-judgment application for fees and costs, and the court thus had authority to address the issue in the action before it."[609]

Similarly, in *Khalsa v. Puri*, the New Mexico Court of Appeals rejected a trust beneficiary's argument that the trustees waived their claim to attorney's fees and costs by failing to request them in their pleadings.[610] Instead, the trustees made their request for fees and costs in a post-judgment motion.[611]

Moreover, in *Gray v. Gray*, the court denied a trust beneficiary's motion to dismiss the trustee's counterclaim for indemnification in which the trustee sought reimbursement of attorney's fees, expenses, and costs incurred in defending against the beneficiary's action, alleging the trustee breached his fiduciary duties and requesting his removal as trustee.[612] The trustee's counterclaim was based, in part, on New Hampshire's versions of UTC §§ 709 and 1004.[613] Applying Federal Rule of Civil Procedure 54(d)(2), the court rejected the beneficiary's arguments, first that the trustee's counterclaim was premature until the beneficiary's underlying claims were adjudicated and second, that the trustee could not request fees under the statutes through a counterclaim but must do so instead through a motion under Rule 54(d)(2) at the end of the case.[614]

The court acknowledged but did not decide the issue of whether fees under the statutes are part of the substantive law that must be proved as an element of damages at trial.[615] Regardless, the court held that a counterclaim

607. *Id.* at 983–94.
608. *Id.* (citations omitted).
609. *Id.*
610. 344 P.3d 1036, 1053 (N.M. Ct. App. 2014).
611. *Id.*
612. No. 18-CV-522-JD, 2019 WL 2106390, at *5 (D.N.H. May 14, 2019).
613. *Id.*
614. *Id.* at *3, *5.
615. *See id.* at *5.

"for attorneys' fees and expenses puts the parties on notice that [the beneficiary] is claiming them and does not preclude [the beneficiary] from later filing a motion under Rule 54(d)(2), if appropriate" and, therefore, the trustee in *Gray* "ha[d] not shown that the counterclaim [should] be dismissed in favor of a later motion under Rule 54(d)(2)."[616]

B. Fee Question is In the Province of the Court

The decision involving whether to award attorney's fees under a statute patterned on UTC § 1004 belongs to the court; no party is entitled to a jury trial.[617] In *Ralph Anderson Family Trust v. Anderson*, the jury returned a verdict finding that a co-trustee breached her fiduciary duties and wrongfully distributed trust assets.[618] The jury's special verdict form indicated that the co-trustee's actions caused damages to the trust in the total amount of "$305,000.00 and no other damages."[619] Based on this verdict form, the co-trustee argued that the jury concluded the attorney's fees and costs were unwarranted.[620] In rejecting this argument and holding it "will not consider the jury's restriction or whether the jury intended to limit any award of attorney fees," the court observed that "[w]hether to award attorney fees is within the province of the Court, not the jury."[621]

C. Need for Evidentiary Hearing

Courts have ruled that at least some form of a hearing is necessary prior to an award of attorney's fees in contested cases under the statute, although a full blown evidentiary hearing with live testimony may not be required, particularly where the award of fees is being considered by the judge who presided over the trial on the merits.[622] In *Klinkerfuss v. Cronin*, the Missouri

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616. *Id.*

617. *See* Ralph Anderson Fam. Tr. v. Anderson, No. BDV 2017-29, 2018 WL 6721944, at *1 (Mont. Dist. Ct. Sept. 28, 2018).

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.*

622. *In re* Est. of King, 920 N.E.2d 820, 828 (Mass. 2010); *see also In re* Alice Stedman 1989 Tr. 2013 Restatement, No. 2017-0288, 2018 WL 3862925, at *3 (N.H. Aug. 15, 2018) (affirming trial court's denial of party's request for evidentiary hearing involving award of attorney's fees); *In re* Rayola A. Banfield Irrevocable Tr., No. 321204, 2016 WL 3020798, at *16 (Mich. Ct. App. May 24, 2016) (suggesting that submission of attorney's itemized billing statements, which included description of services rendered, may have been sufficient to establish reasonableness of attorney's fees when opponent was given an opportunity to cross-examine the attorney regarding the entries and failed to so); *cf.* Seabrook Island Prop. Owners'

Court of Appeals held the trial court was correct to determine the reasonable amount of attorney's fees by way of affidavit and documentary evidence rather than oral testimony at a hearing.[623]

D. Appellate Review of Fee Awards and Recovery of Appellate Fees

The trial judge is typically in the best position to evaluate the nature of the case, the conduct of the litigation, the amount of time reasonably required to litigate it, and the fair value of the attorney's services.[624] As a result, appellate courts are generally deferential to trial court awards of attorney's fees and costs.[625] Because a trial judge possesses a broad degree of discretion in such matters, the judge's decision "may be presumed to be right and ordinarily ought not to be disturbed."[626] The appellate court will not simply substitute its judgment for that of the trial court.[627] Rather, "[t]here are many variables a trial court may consider when determining an award of attorney's fees and even a significantly lower award than the amount of the fees requested will not constitute an abuse of discretion."[628]

Despite this deference to the trial court, South Carolina cases make clear that when a statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record for each of the required factors to

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Ass'n v. Berger, 365 S.C. 234, 244, 616 S.E.2d 431, 436 (Ct. App. 2005) (holding that a trial judge, in the exercise of discretion in an award of attorney's fees under a contract between the parties, is not required to take live testimony, provided the adverse party is allowed to present a full and complete presentation against the award of attorney's fees by affidavits). *But see Ralph Anderson Fam. Tr.*, 2018 WL 6721944, at *2 ("[P]rior to making any award, the Court will hold an evidentiary hearing where the parties may present testimony and argument as to the proper amount of attorney fees to be awarded.").

623. 289 S.W.3d 607, 615 (Mo. Ct. App. 2009).

624. *E.g.*, Brady v. Citizens Union Sav. Bank, 71 N.E.3d 925, 927 (Mass. App. Ct. 2017).

625. Strand v. Hubbard, 576 N.E.2d 688, 690 (Mass. App. Ct. 1991); *see* Young v. Young, No. CA 08-212, 2008 WL 5176763, at *8 (Ark. Ct. App. Dec. 10, 2008) (citing Meyer v. CDI Contractors, LLC, 284 S.W.3d 530, 536 (Ark. Ct. App. 2008)); Winston v. Winston, 449 S.W.3d 1, 15 (Mo. Ct. App. 2014) (quoting Rosehill Gardens, Inc. v. Luttrell, 67 S.W.3d 641, 648 (Mo. Ct. App. 2002)).

626. *King*, 920 N.E.2d at 827 (quoting Smith v. Smith, 282 N.E.2d 412, 415 (Mass. 1972)); *see* Alves v. Snow, 40 N.E.3d 1056, at *2 (Mass. App. Ct. 2015) ("This court generally defers to a judge's setting of counsel fees and therefore presumes an award under § 45 is proper unless the record reflects otherwise."); *In re* Gene Wild Revocable Tr., 299 S.W.3d 767, 782 (Mo. Ct. App. 2009) ("An award of attorney's fees is presumed to be correct, with the burden on the complaining party to prove otherwise." (citing Scott v. Blue Springs Ford Sales, Inc., 215 S.W.3d 145, 170 (Mo. Ct. App. 2006))).

627. Morrow v. SunTrust Bank, No. W2010–01547–COA–R3CV, 2011 WL 334507, at *8 (Tenn. Ct. App. Jan. 31, 2011).

628. *In re* Henry B. Wilson, Jr., Revocable Tr. Dated June 27, 2002, Nos. A–15–1014, A–15–1015, 2017 WL 5608085, at *14 (Neb. Ct. App. Nov. 21, 2017), *aff'd on other grounds sub nom. In re* Wilson, 915 N.W.2d 50 (Neb. 2018).

be considered.[629] Upon appeal, "[i]f . . . there is inadequate evidentiary support for each of the factors supporting the [trial] court's decision, the appellate court should reverse and remand so the trial court may make specific findings of fact."[630] As a result, appellate courts have reversed lower court rulings involving awards of attorney's fees when the lower courts did not attempt to analyze the relevant factors in making the awards.[631]

The fees recoverable under the statutes based on UTC § 1004 include appellate attorney's fees.[632] However, parties intending to appeal an order must first be sure that the order is final and appealable. South Carolina law generally holds that a judgment or order must be final before it can be appealed.[633] If there is some further act that must be done by the court before a determination of the rights of the parties is made, then the order is interlocutory and not immediately appealable.[634]

The Iowa Court of Appeals in *In re Barbara Mills Trust Dated April 16, 2015* dismissed a trustee's appeal from an order requiring her to personally pay the beneficiaries' attorney's fees and costs.[635] An Iowa statute derived from UTC § 1004 controlled the dismissal on the grounds that the trial court's order was not final.[636] The order maintained that an award of attorney's fees and costs was "appropriate," directed the attorneys for the beneficiaries to

629. McKinney v. Pedery, 413 S.C. 475, 490, 776 S.E.2d 566, 574 (2015) (first quoting Griffith v. Griffith, 332 S.C. 630, 646, 506 S.E.2d 534–535 (Ct. App. 1998); then citing Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993); and then citing Atkinson v. Atkinson, 279 S.C. 454, 457–58, 309 S.E.2d 14, 16 (Ct. App. 1983)); *see also* Vander Boegh v. Bank of Okla., No. 2016-CA-001307-MR, 2019 WL 1495712, at *12 (Ky. Ct. App. Apr. 5, 2019). In *Regions Bank v. Lowrey*, the Alabama Supreme Court construed that state's version of § 709(a)(1) and held that "a trial court's order regarding an attorney fee must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee." 154 So. 3d 101, 109 (Ala. 2014) (citing of Birmingham v. Horn, 810 So. 2d 667, 682 (Ala. 2001)).

630. *McKinney*, 413 S.C. at 489–90, 776 S.E.2d at 574 (citing *Griffith*, 332 S.C. at 646, 506 S.E.2d at 535).

631. *See, e.g.*, Davis v. Davis, 889 N.E.2d 374, 387–88 (Ind. Ct. App. 2008) (reversing trial court's reduction of attorney's fees awarded to trust beneficiary from $29,628.69 to $4,000.00 when trial court provided an insufficient explanation to justify the significant reduction).

632. *See* Duval v. Fox, No. 13-0542, 2013 WL 6700352, at *2–3 (Iowa Ct. App. Dec. 18, 2013); O'Riley v. U.S. Bank, N.A., 412 S.W.3d 400, 419–20 (Mo. Ct. App. 2013); *In re* Boenker, No. ED 106929, 2019 WL 2590963, at *1 (Mo. Ct. App. June 25, 2019); Goza v. SunTrust Bank, No. W2014–00635–COA–R3–CV, 2015 WL 4481267, at *6–7 (Tenn. Ct. App. July 22, 2015); Anderton v. Boren, 414 P.3d 508, 516–517 (Utah Ct. App. 2017).

633. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (citing Bolding v. Bolding, 283 S.C. 501, 502, 323 S.E.2d 535, 536 (Ct. App. 1984)).

634. Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (citing Adickes v. Allison, 21 S.C. 245, 259 (1884)).

635. No. 17-0610, 2017 WL 3525311, at *1–2 (Iowa Ct. App. Aug. 16, 2017).

636. *Id.* at *1.

submit fee affidavits, and stated that "[u]pon receipt of the affidavits, the Court will enter a judgment for fees against [the trustee] personally."[637] However, the trustee appealed the order before the trial court determined the amount of attorney's fees or entered a judgment.[638] The appellate court dismissed the appeal because the order did not fully resolve the attorney's fees issue.[639]

XI. CONCLUSION

Patterned after UTC § 1004, the SCTC and SCPC grant trial courts sweeping authority and discretion to award attorney's fees and costs to any party "as justice and equity may require" in judicial proceedings involving the administration of a trust and in formal proceedings commenced in the probate court.[640] Although the statutes themselves provide no guideposts to trial judges in applying and interpreting the "justice and equity" standard and there is scant interpretative case law in South Carolina, case law from other jurisdictions with similar enactments of the uniform statute provide useful guidance and should be especially persuasive.[641] These decisions elucidate a flexible standard to arrive at what is just and equitable on a case by case basis.

The statutes are permissive rather than mandatory.[642] Courts should not simply rubber-stamp requests for fees and costs or grant them as a matter of course. By requiring a reason, grounded in equity, as to why an award of fees and costs should be made, the standard contemplates a principled basis for the decision.

In deciding the question of entitlement to fees and costs, the commonly expressed considerations draw attention to (1) the respective reasonableness of the parties' positions and their conduct in the litigation, (2) the parties' relative ability to bear the financial burden, (3) the results or outcome of the litigation, and (4) the punitive or deterrent effect of the award. No single factor is dispositive.[643] Moreover, courts may also consider additional factors attuned to the particular facts and circumstances presented to them.[644] The standard is capacious, and courts are not immured by rigid criteria or formulaic analysis.[645]

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637. *Id.*

638. *Id.*

639. *Id.*

640. S.C. CODE ANN. §§ 62-1-111, -5-105, -7-1004 (2009).

641. *See id.* §§ 62-1-111, -7-1004; *see, e.g.*, Atwood v. Atwood, 25 P.3d 936, 947 (Okla. Ct. App. 2001); Shurtleff v. United Effort Plan Trust, 289 P.3d 408, 415–16 (Utah 2012).

642. *See* S.C. CODE ANN. §§ 62-1-111, -5-105, -7-1004.

643. *See Atwood*, 25 P.3d at 947.

644. *See, e.g.*, *id.*

645. *See, e.g.*, *id.*

Although a showing of egregious conduct, such as bad faith, fraud, or intentional misconduct, is not a prerequisite to recovery of fees and costs, the presence of such conduct is among the factors to be considered and weighed.[646] Additionally, punishment of past misbehavior or deterrence of future misconduct may, but need not, animate an award of fees and costs.[647] Entitlement to fees and costs is not dependent on prevailing party concepts, though who prevailed on the merits of the case is an important consideration.[648]

Vast disparities in resources available to pay legal costs may inhibit enforcement of rights relating to a trust or estate. Thus, interim awards of fees and costs during the proceedings, as well as final awards at the conclusion of the proceedings, can level the playing field.[649] On one hand, courts risk hindering access to the judicial system for all individuals by awarding fees and costs against parties with reasonable grounds or probable cause for exercising their right to litigate a dispute in good faith, even if ultimately not meritorious.[650] On the other hand, denying awards of fees and costs to those who necessarily had to prevail in arduous litigation to vindicate a right involving a trust or estate may discourage other wronged parties from enforcing their rights due to prohibitive legal costs. Thus, a failure to award fees and costs can have a deterrent effect. Moreover, a victory in trust or estate litigation may be a hollow achievement if the legal fees and costs are allowed to deplete the estate or trust, thereby thwarting the estate plan or trust purposes altogether.

Trustees, personal representatives, and other fiduciaries should have less difficulty than beneficiaries or other persons in obtaining payment or reimbursement of their attorney's fees from the trust or estate because they have different obligations and interests. Unlike a beneficiary, the trustee or personal representative has no personal stake in the trust or estate assets; rather, the trustee has a fiduciary duty to protect and defend the trust or estate for the benefit of others.[651] When deciding a trustee's or personal

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646. *See id.*

647. *See id.* at 948; Klinkerfuss v. Cronin, 289 S.W.3d 607, 618 (Mo. Ct. App. 2009).

648. *See Atwood*, 25 P.3d at 947.

649. *See, e.g.*, Counsell v Colfack, No. 040400326, 2007 WL 3237069 (Utah Dist. Ct. June 22, 2007) (In awarding attorney's fees and costs to trust beneficiary to be paid by the trustee, the court found "that [the beneficiary] has financial need and cannot afford to pay all of the attorney's fees required to bring this matter to trial, while [the trustee] is gainfully employed and is capable of assisting [the beneficiary] in this matter.").

650. *Cf.* Est. of Clark v. Foster & Good Funeral Home, Inc., 568 N.E.2d 1098, 1100–01 (Ind. Ct. App. 1991) (explaining that one of the purposes of a fee shifting statute is to allow litigation in good faith without the associated expense); Hill v. Cox, 424 S.E.2d 201, 205 (N.C. Ct. App. 1993) (stating that the trial court has discretion to allow attorney fees even for unsuccessful parties where a proceeding has "substantial merit").

651. *See Trustee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

representative's entitlement to payment or reimbursement of fees and expenses from the trust or estate, the more lenient standard of the common law, as codified in UTC § 709(a)(1), should govern over the fee-shifting standard of UTC § 1004.

The trustee or personal representative should also be entitled to payment or reimbursement *from the trust or estate* for attorney's fees and expenses which the trustee or personal representative, acting reasonably and in good faith, incurred in defending their administration of the trust or estate. The payment or reimbursement of these fees and expenses should not be dependent on whether the trustee or personal representative was successful in the proceeding. Rather, their good faith in prosecuting or defending the action and the reasonableness of the fees and costs should be the determinative considerations. However, when deciding a trustee's or personal representative's request for payment or reimbursement of fees and expenses *from another party to the proceeding* (such as a beneficiary or fellow fiduciary) or when calculating a beneficiary's entitlement to payment of fees or costs, UTC § 1004's justice and equity analysis should control.

Parties to judicial proceedings must be conscientious of any choice of law provisions that may alter the rules involving entitlement to attorney's fees and costs. If this occurs, state public policy may render such provisions unenforceable.

In calculating the specific amount of fees and costs to award, the critical inquiry involves evaluating the reasonable time expended in litigating the case and multiplying that number by a reasonable hourly rate, with adjustments to be made depending on any exceptional circumstances.[652] Courts must be mindful of the size of the estate or trust and vigilant that their award does not upset or defeat the estate plan or the purposes of the trust; they must carefully scrutinize the requested fees and costs, especially when they will be borne by a losing party or the trust or estate.[653] Unreasonable hourly rates will be rejected.[654] Redundant or excessive billings, time spent unnecessarily, or time expended on unsuccessful claims unrelated to successful ones should be excised.[655] It remains to be seen whether courts will judicially engraft upon the SCTC and SCPC the same "strictly conservative principles" adopted by Massachusetts's courts in applying § 45 of the General Laws of Massachusetts, which is the statutory forerunner to the uniform provision.

652. Layman v. State, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008).

653. *Cf.* O'Riley v. U.S. Bank, N.A., 412 S.W.3d 400, 419 (Mo. Ct. App. 2013) (stating that justice and equity required that trustee recover the expenses it incurred in defending against beneficiaries' claims because by defending its conduct, it defends the settlor's intent).

654. *See Layman*, 376 S.C. at 457, 658 S.E.2d at 332 (rejecting the circuit court's award of attorney's fees that resulted in an hourly rate of $6,000).

655. Atwood v. Atwood, 25 P.3d 936, 952 (Okla. Ct. App. 2001).

The statutes also give courts great latitude in deciding who is responsible for paying or bearing the fees and costs—whether one or more of the parties, the trust or estate itself, or some combination of them.[656] This allows courts to fairly allocate the burden among the parties and, when appropriate, to the trust or estate as well.

Above all else, the "justice and equity" standard connotes fundamental fairness, not only to the parties directly involved but also to the beneficiaries of the trust or estate to be affected by the ruling. The court must judiciously balance and weigh all of the competing considerations to arrive at what is just and equitable under the particular facts of each case.

656. S.C. CODE ANN. §§ 62-1-111, -5-105, -7-1004 (2009).