



## **H.B. 233**

124th General Assembly  
(As Introduced)

**Rep. Womer Benjamin**

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### **BILL SUMMARY**

- Excludes from the general prohibition against awarding attorney's fees in declaratory relief claims or proceedings an award of attorney's fees to a fiduciary, beneficiary, or other interested party to be paid out of trust, estate, or other property involved in the declaratory relief claim or proceeding in accordance with equitable principles permitting recovery of attorney's fees for services beneficial to the trust or estate.

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### **CONTENT AND OPERATION**

#### **Prohibition against attorney's fees award; exceptions**

##### **Existing law**

The Declaratory Judgments Law prohibits a court of record from awarding attorney's fees to any party on a claim for declaratory relief under that Law unless (1) a section of the Revised Code explicitly authorizes a court of record to award attorney's fees on a claim for declaratory relief under that Law or (2) an award of attorney's fees is authorized by the Frivolous Conduct Law, by the Civil Rules, or by an award of punitive or exemplary damages against the party ordered to pay attorney's fees. References in another section of the Revised Code to an award of costs or expenses incurred in connection with an action or proceeding does not authorize an award of attorney's fees for purposes of the above provision. (R.C. 2721.16(A).)

##### **Operation of the bill**

The bill adds another exception to the current prohibition against a court of record awarding attorney's fees to any party on a claim *or proceeding* (added by the bill) for declaratory relief under the Declaratory Judgments Law. Under the bill, the prohibition does not apply if, regardless of whether a claim for declaratory relief is granted under that Law, a court of record awards attorney's fees to a

fiduciary, beneficiary, or other interested party, the attorney's fees are to be paid out of trust property, estate property, or other property that is the subject of a fiduciary relationship and that is involved in that claim or proceeding for declaratory relief, and the attorney's fees are awarded in accordance with equitable principles that permit recovery of attorney's fees incurred for services that are beneficial to the trust or estate (see **COMMENT**). (R.C. 2721.16(A)(1)(c).) References in another section of the Revised Code to an award of costs or expenses incurred in connection with an action or proceeding does not authorize an award of attorney's fees for purposes of the provisions in current law and the bill (R.C. 2721.16(A)(2)).

### **Remedial nature and applicability of provisions**

#### **Existing law**

The Declaratory Judgments Law states that its provisions are remedial and must be liberally construed and administered (R.C. 2721.13--not in the bill). Consistent with this provision, the law states that the existing provisions described above in "**Prohibition against attorney's fees award; exceptions**" are remedial in nature. Notwithstanding any provision of the Revised Code in existence on the day immediately prior to September 24, 1999 (the effective date of R.C. 2721.16), notwithstanding any judicial construction prior to that date of a statutory provision of that nature, *notwithstanding the holding in any decision of a court of Ohio that authorized an award of attorney's fees to a party to a civil action or proceeding based on common law grounds rather than a statutory authorization of the General Assembly*, regardless of the date upon which a cause of action accrued that pertains to an action or proceeding in which declaratory relief is sought under the Declaratory Judgments Law, and regardless of who is the plaintiff or the defendant in an action or proceeding in which declaratory relief is sought under that Law, the above prohibition against awarding attorney's fees and the exceptions apply in connection with (1) an action or proceeding that is commenced on or after September 24, 1999, and that seeks declaratory relief under that Law and (2) an action or proceeding that was commenced prior to September 24, 1999, that is pending in a court of record on that date, and that seeks declaratory relief under that Law. (R.C. 2721.16(B).)

#### **Operation of the bill**

The bill provides that notwithstanding any provision of the Revised Code in existence on the day immediately prior to September 24, 1999, notwithstanding any judicial construction prior to that date of a statutory provision of that nature, notwithstanding the holding in any decision of a court of Ohio, *other than a decision based on equitable principles described above in R.C. 2721.16(A)(1)(c)* (added by the bill) (see **COMMENT**), that authorized an award of attorney's fees

to a party to a civil action or proceeding based on common law grounds rather than a statutory authorization of the General Assembly, regardless of the date upon which a cause of action accrued that pertains to an action or proceeding in which declaratory relief is sought under the Declaratory Judgments Law, and regardless of who is the plaintiff or the defendant in an action or proceeding in which declaratory relief is sought under that Law, the above prohibition against awarding attorney's fees and the exceptions apply in connection with an action or proceeding that is described in (1) and (2) in the preceding paragraph. (R.C. 2721.16(B).)

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## COMMENT

The equitable basis for the award of attorney's fees in fiduciary litigation to benefit an estate or trust evolved from the "common fund" theory of recovery that was first recognized in *Trustees v. Greenough* (1881), 105 U.S. 527, in which the United States Supreme Court declared as follows:

It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. (At pp. 532-533.)

In *Kirkbride v. Hickok* (1951), 155 Ohio St. 165, 170, although the Ohio Supreme Court disallowed the payment of fees from the estate to the attorneys for the beneficiaries of a will since the beneficiaries were not acting for the benefit of the whole estate, the Court noted that it "will not condemn or thwart the allowance of reasonable expenses and attorney fees in an appropriate case." In *In re Keller* (C.A. 8<sup>th</sup> Dist. 1989), 65 Ohio App.3d 650, 659, the Court of Appeals for Cuyahoga County held that the probate court did not abuse its discretion by authorizing the payment of attorney's fees for legal services that "unquestionably benefited the whole estate" involved. The rationale for its holding is as follows:

It is clear that Ohio probate courts have equitable powers. R.C. 2101.24(C); *In re Estate of Colosimo* (1957), 104 Ohio App. 342 . . . . As a general equitable rule, it has been held that an allowance may be made out of the decedent's estate for the services of attorneys for beneficiaries where those services are beneficial to the entire estate. See

Annotation (1941), 142 A.L.R. 1459-1479, and supplements. *Our holding results in part from application of a well-established and generally recognized rule of equity, the "common fund theory" of recovery.* The appellate court in the case of *In re Estate of Brown* (Ariz.App.1983) . . . 670 P.2d 414, stated the rule in the following manner:

" \* \* \* [A] person or persons who employ attorneys for the preservation of a common fund may be entitled to have their attorney's fees paid out of that fund. *Steinfeld v. Zeckendorf*, . . . 138 P. 1044 (1914), affirmed, 239 U.S. 26 . . . (1915)."

*This rule operates as a narrow exception to the general rule that attorney fees are allowed only pursuant to statute or contract, and is based upon well-founded principles, to wit:*

" '[F]airness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful.' *Estate of Korth* (1970), 9 Cal.App.3d 572, at 575 . . . ."

*In re Keller*, at pp. 656-657. Emphasis supplied.

Citing *Keller*, the Court of Appeals for Butler County in *In re Estate of Brown* (C.A. 12<sup>th</sup> Dist. 1992), 83 Ohio App.3d 540, 543, defined "for the benefit of the estate" as "whether or not all of the beneficiaries or distributees of the estate, in their capacities as such, have become entitled to receive from the assets of the estate, when distributed, greater sums than those which they would have received has such attorney's services not been rendered."

Other related cases discussing the "common fund" theory of recovery and the equitable powers of probate courts under R.C. 2101.24(C) are *In re Estate of*

*Fugate* (C.A. 4<sup>th</sup> Dist. 1993), 86 Ohio App.3d 293, *Truog and Attorney General v. Kane* (C.A. 11<sup>th</sup> Dist. 1981), 1981 Ohio App. Lexis 14547, *In re Estate of Colosimo* (C.A. 2<sup>nd</sup> Dist. 1957), 104 Ohio App. 342, and *In re Hughes* (C.A. 12<sup>th</sup> Dist. 1946), 78 Ohio App. 143.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-01-01	p. 324

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