

to Trustees' Objections to September 2016 Fee Application, Attorney Ad Litem's Response to Trustees' Special Exceptions and Plea to the Jurisdiction to Ad Litem's Original Petition as Realigned Plaintiff and to Ad Litem's First Amended Petition as Realigned Plaintiff; Attorney Ad Litem's Response to Individual Trustees' Motion to Stay Pending Mandamus and Attorney Ad Litem's Response to Trustees' Joint Objections to October 2016 Fee Application . Ad Litem addresses the new arguments below.

I. Allowing Ad Litem to Hire and Pay Experts Necessary For Him to Do His Job Does Not Constitute Improper Recovery of Expert Witness Fees

The Trustees cite two cases holding that, absent of the statute of rule authorizing the recovery of expert witness fees, they may not be recoverable. *See* Wallace Objections, Section A. Neither of these cases, however, dealt with suits by an ad litem appointed in a trust case.

Ad Litem was appointed to represent the interests of the AAL Parties. In doing this work he has discovered evidence of serious breaches of fiduciary duty by the Trustees and seeks to pursue claims for those breaches on behalf of the parties he represents. To do that, he needs the services of Wallace. The Trustees do not dispute Ad Litem's need for Wallace's services. But they mischaracterize the payment of Wallace's fees as an award of expert witness fees in litigation.

In this trust context, allowing Ad Litem to hire Wallace and compensate him is not an award of expert witness fees; it is a payment of costs necessary for Ad Litem to do his job. An ad litem is not like a typical plaintiff in a non-trust lawsuit. A typical plaintiff

would have some assets with which to finance the litigation, including payment of necessary expert witnesses. Ad Litem, of course, doesn't. Further, there are essentially only two sources of funds to compensate Ad Litem and pay the expenses of experts and others he needs to carry out his duties: the segregated funds or the Trustees themselves. The Trustees have not volunteered to pay Ad Litem's compensation and expenses directly. And they are seeking to keep the Court from using the segregated funds to pay compensation and expenses. As with their objections to the Ad Litem's fee applications, the Trustees hope to slam the door on the suit against them for their serious breaches of fiduciary duty by depriving Ad Litem of the funds with which to pursue such claims. That is neither equitable nor just.

That the property code provisions authorizing compensation of ad litem do not specifically refer to consulting witness fees does not mean that the Court lacks discretion to allow them. In many instances ad litem must incur costs that are necessary to their work but that would not be considered court costs. For instance, ad litem frequently must attempt to determine the existence of beneficiaries or heirs in a trust or probate matter. This often involves retaining the services of experts such as investigators and genealogy professionals. This costs money. But those costs would not be considered traditional court costs. The Trustees' construction would prevent the award of costs necessary for ad litem to do their jobs.

Under the Texas Trust Code this Court has broad discretion to determine what is reasonable compensation for an ad litem, including what are reasonable costs. The Court

has already determined that services of an expert petroleum engineer are necessary for the Ad Litem to carry out his functions in authorizing the hiring of Michael Wiggins. Significantly, the Trustees agreed to the hiring of Wiggins and did not oppose payment of his fees. They are only opposing Wallace's hiring because they want to avoid having to try to defend their breaches of fiduciary duty.

The Trustees' objections to Wallace are simply the latest step in their efforts to ensure that they escape having to account for their serious breaches of fiduciary duty. As explained at the October 3, 2016 hearing, the only way that the beneficiaries have any chance of recovering anything is if Ad Litem is free to pursue his claims. Otherwise, the Trustees will deplete the segregated fund with their own expenses. The Court should overrule the Trustees objections and allow Ad Litem to hire Bruce Wallace.

WHEREFORE, PREMISES CONSIDERED, Ad Litem prays that the Court will grant the Attorney Ad Litem's Motion to Retain Bruce Wallace as Consulting Expert, and grant Ad Litem such other and further relief, both at law and in equity, to which he may justly be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record on the 31st day of October 2016 and will be served in accordance with the Court's orders regarding service dated September 28, 2015 and January 21, 2016.

/s/Daniel C. Bitting
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