

PROGRAM MATERIALS
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Trustees' Use of Trust Funds: Do's, Don'ts, and Maybes

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TRUSTEES' & FIDUCIARIES' USE OF TRUST FUNDS: DOS, DON'TS, AND **MAYBES**

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TRUSTEE COMPENSATION

How much can trustees & financial institutions charge to manage trust assets?



TRUSTEE COMPENSATION: CALIFORNIA

Probate Code § 15680

Trustees are entitled to compensation as set forth in the trust.

Courts have discretion to prospectively alter compensation if:

- (1) duties of trustee are "substantially different" than when trust was created;
- (2) Inequitable, unreasonably low, or high;
- (3) In extraordinary cases





TRUSTEE COMPENSATION: CALIFORNIA

Placencia v. Strazicich, 42 Cal. App. 5th 730 (2019)

- On appeal, court's awards of trustee fees are reviewed for abuse of discretion.
- Court of Appeal affirmed reduction of hourly rate from \$175 to \$75
- Reduced hours billed because billing statements were too vague
- Trustee inferred on appeal what the reductions were; Court of Appeal declined to accept inferences

Practical Lessons for trustees seeking fees

- Keep detailed billing statements
- Billing statements should show how the trust benefits from each act
- Provide schedule of reasonable fees in the area as evidence of compensation standards
- Counsel should seek clarifications on statements of decision in advance of appeal



TRUSTEE COMPENSATION: CALIFORNIA

Probate Code § 15681

If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances.





TRUSTEE COMPENSATION: CALIFORNIA

<u>Hourly</u>

- Should be commensurate with current rates
- In litigation, if a party requests, court has discretion to deny/reduce compensation
- Fees between \$100 and \$250 per hour have been approved
- May be increased where trustee has specialized skills required for the trust (complex real estate transactions)

Percentage of value of trust assets

- Sliding scale
- The larger the trust, the less the percentage
- In litigation, if a party requests, court has discretion to deny/reduce compensation
- Courts have approved amounts as high as ¾ of 1% of trust assets annually
- \$20 million real estate trust
 Each co-trustee received 1/4 of 1% annually



TRUSTEE COMPENSATION IN CALIFORNIA

Allocation of Compensation under Probate Code §§ 16370-16371

§ 16370(a). Disbursements from income

Except as otherwise ordered by the court, one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee.

§ 16371(a)(1). Disbursements from principal

Except as otherwise ordered by the court, the remaining one-half of the disbursements described in subdivisions (a) and (b) of Section 16370.



• Fla. Stat. § 736.0708(2) (2021)

"If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." • § 736.0708 does not provide a methodology or formula for calculating "reasonable" trustee's fees, and it does not define the "circumstances" that should be considered.



Fla. Stat. § 736.0708(2) (2021)

Trustees are entitled to compensation as set forth in the trust.

Courts have discretion to prospectively alter compensation if:

- (1) duties of trustee are "substantially different" than when trust was created;
- (2) Inequitable, unreasonably low, or high

• Fla. Stat. § 736.0708(3) (2021)

"If the trustee has rendered other services in connection with the administration of the trust, the trustee shall also be allowed reasonable compensation for the other services rendered in addition to reasonable compensation as trustee."



W. Coast Hosp. Ass'n v. Fla. Nat. Bank of Jacksonville, 100 So. 2d 807 (Fla. 1958)

- "If the compensation of the trustee has not been fixed by statute or direction of the settlor, the amount of the award rests in the discretion of the court having jurisdiction, which is ordinarily the court receiving the account of the trustee."
- The FL Supreme Court rejected a percentage approach and approved a set of factors a court may consider to determine reasonable trustee compensation.



W. Coast Hosp. Ass'n v. Fla. Nat. Bank of Jacksonville, 100 So. 2d 807 (Fla. 1958)

- The amount of capital and income received and disbursed by the trustee.
- The wages or salary customarily granted to agents or servants for performing like work in the community.
- The success or failure of the administration of the trustee.
- Any unusual skill or experience which the trustee in question may have brought to his work.
- The fidelity or disloyalty displayed by the trustee.

- The amount of risk and responsibility assumed; the time consumed in carrying out the trust.
- The custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks.
- The character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services.
- Payments made by the cestuis to the trustee and intended to be applied toward his compensation.



Robert Rauschenberg Found. v. Grutman, 198 So. 3d 685, 686 (Fla. 2d DCA 2016)

- Trust was silent on the amount of trustees' fees. Trustees of a \$2 billion trust requested \$51 million and \$55 million in fees based on the factors set forth in the West Coast case. Beneficiary asserted the trustees were only entitled to \$375,000 based on the lodestar method (number of hours reasonably worked, multiplied by a reasonable hourly rate).
- The court refused to apply the lodestar method, concluding that it does not apply to trustee's fees.
- The court noted that the legislative history of §736.0708 indicated an intent to apply the West Coast factors, and no indication to apply the lodestar method.



2020 Disclosure Requirements for Compensation of Attorney Serving as Trustee

Fla. Stat. § 736.0708(4)(a) (2021). Does not allow supervising/drafting attorney or attorney's relative to collect compensation unless, before trust is executed, the following disclosures are made:

- 1. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee; and
- 2. Compensation payable to the trustee is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the trustee."



2020 Disclosure Requirements for Compensation of Attorney Serving as Trustee

Fla. Stat. § 736.0708(4)(a) (2021). Does not allow supervising/drafting attorney or attorney's relative to collect compensation unless, before trust is executed, the following disclosures are made:

- 1. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee; and
- 2. Compensation payable to the trustee is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the trustee."
- Settlor must execute separate written statement, before execution of trust.
- Failure to complete disclosure does not disqualify trustee or invalidate trust instrument.



TRUSTEE COMPENSATION: MISSOURI

RSMo § 456.7-708

- 1. If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.
- 2. If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:
- (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or
- (2) the compensation specified by the terms of the trust would be unreasonably low or high.
- 3. For purposes of this section, reasonable compensation may include fees that take into account the administration of both income and principal whether or not the will or trust instrument contains provisions relating to compensation of the trustee.



TRUSTEE COMPENSATION: MISSOURI

Hanks v. Morris, 432 S.W.3d 293 (Mo. App. 2014)

Trustee was not entitled to compensation above that provided by trust document. Trust specified schedule of fees to compensate trustee for his services; trustee's duties were not substantially different from those contemplated when trust was created; and compensation was not unreasonably low for services trustee actually provided, despite his claim of special skills and expertise.

Lehmann v. Bank of America, N.A., 427 S.W.3d 315 (Mo. App. 2014)

 Genuine issue of material fact as to whether compensation specified by terms of trust would be unreasonably low precluded summary judgment in favor of beneficiaries as to whether trustee was entitled to additional fees.





ATTORNEYS' FEES

When may a trustee use trust funds to pay the trustee's attorneys' fees?

ATTORNEYS' FEES IN CALIFORNIA - ADMINISTRATION When governing instrument specifies compensation

- If the trust specifies a maximum amount that can be paid to an attorney---a rare situation--- the trustee lacks the authority to pay more than specified, absent a court order.
- The trustee may petition the court under § 17200(b)(6) for an order authorizing additional fees if compensation would be unreasonably low.
- Trustee can cite to changed circumstances under Probate Code § 15403.





ATTORNEYS' FEES IN CALIFORNIA - ADMINISTRATION When trust does not specify

Probate Code § 16247

• Trustees have the power to hire attorneys, accountants, and other agents.

Probate Code § 16243

• Trustees may pay reasonable compensation to the attorney as an agent of the trust.

Judicial Review

• Fees paid to agents, including attorneys, are always subject to court review.



- Whether a trustee may use trust funds to litigate a matter depends on the nature of the underlying litigation.
- When litigation is for the benefit of the trust or its beneficiaries, the trustee may use trust funds for the litigation.
- When the litigation is for the benefit of the trustee, the "better practice" is for the trustee to use separate funds.





Whittelsey v. Aiello, 104 Cal. App. 4th 1221, 1227 (2002)

"[L]itigation seeking to remove or surcharge a trustee for mismanagement of trust assets would not warrant the trustee to hire counsel at the expense of the trust. Such litigation would be for the benefit of the trustee, not the trust."





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Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 213 fn.4 (2000)

"A trustee has a right to charge the trust for the cost of **successfully** defending against claims by beneficiaries."

"The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining separate counsel with personal funds."





Estate of Gilmaker, 226 Cal. App. 2d 658 (1964)

It is **not sufficient** for a trustee's defense of claims by beneficiaries to have been in good faith.

In other words, even if the claims were arguable, the trustee still may not recover funds from the trust if the beneficiaries succeed in their claims against the trustee.





Petitioning for Fees

- Petitions for fees in probate court do not have the timelines for other fee motions in civil practice.
- Courts may reduce fees requested. These orders are reviewed for abuse of discretion.

Donahue v. Donahue, 182 Cal. App. 4th 259 (2010).

"Long-established principles of trust law impose a double-barreled reasonableness requirement: the fee award must be reasonable in amount and reasonably necessary to the conduct of the litigation, but it also must be reasonable and appropriate for the benefit of the trust." (emphasis in original).



California Probate Code § 16060

"The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration."

- Open question whether this statute requires a trustee, adverse to beneficiaries, to keep beneficiaries apprised of fees charged to the trust.
- No published case law on this issue.
- Beneficiaries can rely on accountings, but those are only annual & do not include itemized bills.





Settlement

- Settlement agreements usually contain a clause indicating parties will bear their own fees.
- As a practical matter, language should be added explicitly saying whether trustee can recover attorneys' fees from the trust, because it is arguable that the trustee can claim that charging trust for fees is equivalent to paying personally.
- If settlement allows trustee to recover fees from the trust, beneficiaries must be parties to the settlement, even if they did not participate in litigation.
- Alternatively, settling parties can petition the court for approval of the settlement and give notice to all beneficiaries.



Allocation of Fees under Probate Code §§ 16370-16371

§ 16370(b). Disbursements from income

Except as otherwise ordered by the court, one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests.

§ 16371(a)(1). Disbursements from principal

Except as otherwise ordered by the court, the remaining one-half of the disbursements described in subdivisions (a) and (b) of Section 16370.



Mandatory Disclosure Requirements

"An attorney representing a trustee in the initial administration of the trust who intends to charge a fee based upon the schedule set forth in [Fla. Stat. § 736.1007(2)] shall make [certain] disclosures in writing to the trustee."

Fla. Stat. § 736.1007(1)(a) (2021).





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- The required disclosures are listed in Fla. Stat. § 736.1007(1)(b)(1)-(5) (2021).
- The disclosure requirements apply to initial trust administrations commenced on or after October 1, 2021. See Fla. Stat. § 736.1007 (Note 1) (2021).
- Trustee Signature Required- "The attorney shall obtain the trustee's timely signature acknowledging the disclosures." Fla. Stat. § 736.1007(1)(c) (2021).
- Court Approval or Consent Required If No Disclosure Made- "If the attorney does not make the disclosures required by this section, the attorney may not be paid for legal services without prior court approval of the fees or the written consent of the trustee and all qualified beneficiaries." Fla. Stat. § 736.1007(1)(d) (2021).

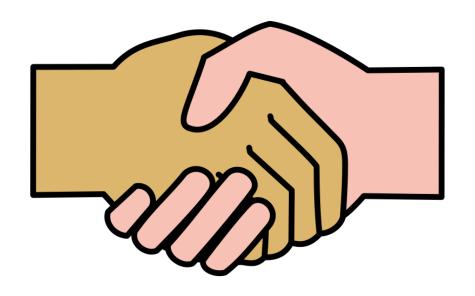


<u>Trust Administration Fees Payable without</u> <u>Court Order</u>

Unless there is a failure to make the above-mentioned disclosure, "...if the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust, subject to s. 736.0802(10), without court order." Fla. Stat. § 736.1007(1)(a) (2021).







Parties May Agree to Different Arrangement

The trustee and the attorney may agree to compensation different to that provided in § 736.1007. "The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney fees and costs." Fla. Stat. § 736.1007(1)(a) (2021).



Fees Presumed Reasonable for Ordinary Services in Initial Administration

Unless otherwise agreed (and subject to § 736.1007(1)), compensation based on the value of the trust assets immediately after the Settlor's death and the income earned by the trust during initial administration, at the rate of 75% of the schedule provided in § 733.6171(a)(h) (PR compensation scale) is presumed reasonable for ordinary services provided by all attorneys employed to advise the trustee during initial trust administration.



Fees for Extraordinary Services

Subject to § 736.1007(1), the trustee's attorney is allowed further compensation for extraordinary services. What constitutes extraordinary services varies, depending on the trust's size and complexity. Fla. Stat. § 736.1007(5) (2021)

Fla. Stat. § 736.1007(5)(a)-(k) contains a non-exclusive list of extraordinary services.

Attorneys Retained for Limited Purpose

Subject to § 736.1007(1), attorneys "retained to render only limited and specifically defined legal services shall be compensated as provided in the retaining agreement. If the amount or method of determining compensation is not provided in the agreement, the attorney is entitled to a reasonable fee, taking into account the factors set forth in [§ 736.1007 (6)]." Fla. Stat. § 736.1007(3) (2021).



Right to Judicial Review of Attorneys' Fees

Any interested person may seek review of compensation paid or to be paid to the trustee's attorney. The court may increase or decrease compensation for ordinary services or award compensation for extraordinary services, if warranted by the particular facts and circumstances of administration. Fla. Stat. § 736.1007(6) (2021).

The Court shall consider the factors listed in . § 736.1007(6)(a)-(j).





Fee Agreement between Settlor and Attorney

Fla. Stat. § 736.1007(7) details the procedures regarding attorney's fee agreements entered into between Settlor and attorney. There are notice requirements to the trustee and interested parties.





Fees and Costs Incurred in Court Proceedings

Trustee can generally pay fees and costs from trust assets without approval of other persons or the court.

Breach of Trust Actions

The trustee may pay attorney's fees or costs from trust assets without approval of other persons or the court, BUT, must serve written notice of intent upon each qualified beneficiary (unless identity or location is unknown or not reasonably ascertainable) whose share may be affected before payment is made. See Fla. Stat. § 736.0802(10)(b) (2021).



Notice of Intent to Pay Fees & Costs

The notice must identify the judicial proceeding involved, inform of right to seek an order prohibiting payment from the trust or compelling return of fees and costs to the trust, and be served as prescribed by the statute. See Fla. Stat. § 736.0802(10)(c) (2021).

Fees & Costs Paid without Notice

Qualified beneficiaries whose shares are affected (and who are not barred by § 736.1008) are entitled to file a motion and obtain an order compelling return of the payment to the trust, with statutory interest. There is a mandatory fee award for the cost of having to file the motion.



Motion to Prohibit Payment of Fees & Costs from Trust

Qualified beneficiaries whose shares are affected (and who are not barred by § 736.1008) may file a motion to prohibit payment of fees and costs from trust assets. If payment was made after service of a notice of intent, the court may order the return of the fees and costs, with statutory interest. See Fla. Stat. § 736.0802(10)(e) (2021).

The court may deny the motion unless it finds a reasonable basis to conclude there has been a breach of trust, but the court has discretion to deny the motion even if it finds a reasonable basis, if there is good cause to do so. The movant may show a reasonable basis exists, and the trustee can rebut the showing with admissible evidence. See Fla. Stat. § 736.0802(10)(e)(1)-(2) (2021).



Failure to Comply with Order
Prohibiting or Compelling Return of
Payment

Trustee is subject to sanctions including, but not limited to, striking of pleadings or defenses. *See* Fla. Stat. § 736.0802(10)(f) (2021).

Even if an order prohibiting or compelling return of fees and costs paid by the trust, if a claim or defenses is dismissed, withdrawn, or judicial resolved without a determination that the trustee committed breach of trust, the trustee can pay their fees and costs without serving a notice of intent or obtaining a court order. This may include fees and costs refunded to a trust per court order. See Fla. Stat. § 736.0802(10)(g) (2021).



Covenant Tr. Co. v. Guardianship of Ihrman, 45 So. 3d 499 (Fla. 4th DCA 2010).

Trial court could not prohibit trustee from paying its attorney fees from trust assets to defend against action seeking its removal as trustee, where no evidence was provided or proffered to show that trustee had breached the trust.





Restatement (Third) of Trusts § § 2, 3 (2003)

"A trust . . . is a fiduciary relationship with respect to property . . . subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee."

"The person who creates a trust is the settlor.

The property held in trust is the trust property.

The person who holds property in trust is the trustee.

A person for whose benefit property is held in trust is a beneficiary."



ATTORNEYS' FEES: MISSOURI Trust Language

Exculpatory clause:

"No Trustee may be held liable so long as his or her actions are taken in good faith."

"The wording of the [exculpatory] clause may be that the trustee is not to be liable except for malfeasance, or that he is not to be liable if he acts in good faith, or is to be liable only if he acts in bad faith." G. Bogert, THE LAW OF TRUSTS AND TRUSTEES § 542.



ATTORNEYS' FEES: MISSOURI RSMo § 456.7-709

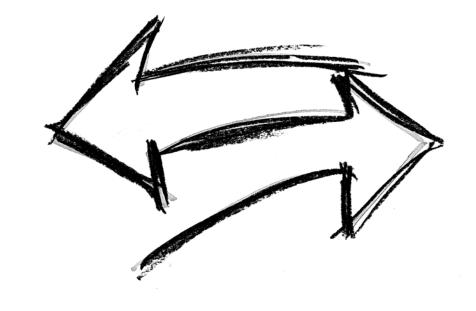
- 1. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:
- (1) expenses that were properly incurred in the administration of the trust; and
- (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
- 2. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

UTC Comment - "Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust."



ATTORNEYS' FEES: MISSOURI RSMo 456.10-1004

"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."





Klinkerfuss v. Cronin, 199 S.W.3d 831, 844-45 (Mo. Ct. App. E.D. 2006)

"When the trustee's administration of the assets is unjustifiably assailed it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose."

"It is well-established that the good faith defense of a lawsuit to remove a trustee falls within the ambit of actions that uphold the trust and preserve the trust property."

"A trustee is entitled to reasonable attorneys' fees, to be paid out of the trust estate, incurred in good faith in defending his administration of the trust."



Selleck v. Hawley, 331 Mo. 1038, 56 S.W.2d 387 (1932)

Trustees were not surcharged for inheritance taxes allegedly wrongfully paid, where litigation respecting validity of tax would have cost estate more than tax.

Fulkerson v. New Gazette Co., 222 Mo. App. 230, 297 S.W. 115 (1927)

Trustee that had no power to bring foreclosure suit was not allowed legal fees for unsuccessfully attempting to foreclose mortgage that was not in default.



Anselmo v. Guasto, 13 S.W.3d 650 (Mo. Ct. App. E.D. 1999)

Decedent's revocable trust was declared invalid on undue influence grounds. Trustee's legal fees in defending the trust were allowed.

Kutten v. Bank of America, N.A., 2008 WL 4838152 (E.D. Mo. 2008).

Trustee's legal fees were awarded against plaintiff beneficiaries and their attorneys where plaintiffs and their counsel had pursued multiple lawsuits, propounded voluminous discovery, and engaged in blatant forum shopping. Lipic v. Wheeler, 362 Mo. 499, 242 S.W.2d 43 (1951)

The court may decline to allow trustees' attorney's fees out of the trust property where they have been guilty of a breach of trust in not notifying the beneficiaries of the trust, in assuming a hostile position, and in failing to invest.



Sebree v. Rosen, 349 S.W.2d 865, 887 (1961)

In action to set aside inter vivos trust, court held that trust was voluntarily executed and set up and free from undue influence or fraud but the trustee should be removed and held accountable for losses while trustee.

Quoting Restatement (Second) of Trusts § 188: "The trustee can properly incur expenses which are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust, and such other expenses as are authorized by the terms of the trust."

Comment b.: "Costs in judicial proceedings. The trustee can properly incur expenses for costs in maintaining or defending an action in the proper administration of the trust even though he is unsuccessful in the action."



EXPENSES

What expenses can be charged to the trust?



EXPENSES: CALIFORNIA

- Probate Code § 16243
 Trustee has power to pay reasonable expenses of administration, including hiring agents.
- Probate Code § 16247

 Where the trust does not specify, the trustee has the authority to hire accountants and other agents.
- Probate Code § 16370(c)
 Any expenses related primarily related to the income are charged to income.
- Probate Code § 16371(a)(4), (7)
 Expenses related to principal are charged to principal.



EXPENSES: CALIFORNIA Property sale expenses allocated to principal

Probate Code § 16371(a)(2)

Except as otherwise ordered by the court, all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale.



Expenses of administration

"In administering a trust, the trustee shall only incur expenses that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee." Fla. Stat. § 736.0805 (2021).





"A trustee is entitled to receive payment of his reasonable expenses in managing a trust from the assets of that trust." *Sheaffer v. Trask*, 813 So. 2d 1051, 1052 (Fla. 4th DCA 2002) (citing *First Union Nat'l Bank v. Jones*, 768 So.2d 1213, 1214 (Fla. 4th DCA 2000)).





In re Guardianship of Bloom, 295 So. 3d 1255, 1259 (Fla. Dist. Ct. App. 2020)

"[T]he burden of proof is upon the trustee to demonstrate that the expense was reasonably necessary and that such expense was incurred for the benefit of the trust, and not for his own benefit nor the benefit of others." *Barnett v. Barnett*, 340 So. 2d 548, 550 (1st DCA 1976) (trustee not entitled to pay, from trust, attorneys' fees for services rendered by trustee's attorneys to other parties). "A trustee has the burden of proving the necessity of all expenses incurred by him or her, including attorneys' fees."



Examples of Allowable Trust Expenses

Expenses specifically authorized or required by the terms of the trust.

Expenses to maintain and improve trust's real property. Fla. Stat. § 736.0816(9) (2021).

Calls, assessments, and other sums chargeable or accruing against trust's securities. Fla. Stat. § 736.0816(8)(c) (2021).

Claims against the trust. Fla. Stat. § 736.0816(14) (2021).

- Taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust." Fla. Stat. § 736.0816(15) (2021).
- Employ persons, including, but not limited to, attorneys, accountants, investment advisers, or agents...and pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust, subject to s. 736.0802(10) with respect to attorney fees and costs...." Fla. Stat. § 736.0816(20) (2021).



Reimbursement

- "A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for reasonable expenses that were properly incurred in the administration of the trust." Fla. Stat. § 736.0709(1) (2021).
- An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest. Fla. Stat. § 736.0709(2) (2021).



Expenses and Obligations of Settlor's Estate

"A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate." Fla. Stat. § 736.05053(1) (2021).

Fla. Stat. § 733.707(3) refers to a trust to which a decedent grantor had a right of revocation at the decedent's death, and provides that such a trust is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them. § 736.05053 the specific assets to be used to pay these expenses, and the order of payment.



EXPENSES: MISSOURI

RSMo § 456.7-709. Reimbursement of expenses

- 1. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:
 - (1) expenses that were properly incurred in the administration of the trust; and
 - (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
- 2. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.



EXPENSES: MISSOURI

RSMo 456.8-807. Delegation by trustee

- 1. A trustee may delegate to an agent duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.



QUESTIONS?

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West's Annotated California Codes
Probate Code (Refs & Annos)
Division 9. Trust Law (Refs & Annos)
Part 2. Creation, Validity, Modification, and Termination of Trusts (Refs & Annos)
Chapter 3. Modification and Termination of Trusts (Refs & Annos)

West's Ann.Cal.Prob.Code § 15403

§ 15403. Modification or termination of irrevocable trust by all beneficiaries

Effective: January 1, 2018 Currentness

- (a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may petition the court for modification or termination of the trust.
- (b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. If the trust is subject to a valid restraint on the transfer of a beneficiary's interest as provided in Chapter 2 (commencing with Section 15300), the trust may not be terminated unless the court determines there is good cause to do so.
- (c) If the trust provides for the disposition of principal to a class of persons described only as "heirs" or "next of kin" of the settlor, or using other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is necessary to modify or terminate a trust to the beneficiaries who are reasonably likely to take under the circumstances.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991. Amended by Stats.2017, c. 61 (S.B.333), § 1, eff. Jan. 1, 2018.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment

Section 15403 continues Section 15403 of the repealed Probate Code without change.

This section is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement, however, subdivision (b) gives the court some discretion in applying the material purposes doctrine except in situations where transfer of the beneficiary's interest is restrained, such as by a spendthrift provision. See Section 15300 (restraint on transfer of beneficiary's interest). Section 15403 permits termination of an irrevocable trust with the consent of all beneficiaries where the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest. The discretionary power provided in subdivision (b) also represents a change in the prior California caselaw rule. See, e.g., Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 462,

165 P.2d 15 (1946). Section 15403 is intended to provide some degree of flexibility in applying the material purposes doctrine in situations where transfer of the beneficiary's interest is not restrained. For provisions governing judicial proceedings, see Section 17200 et seq. For provisions relating to obtaining consent of persons under an incapacity, see, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob.Code §§ 2580 (conservator), 1003 & 15405 (appointment of guardian ad litem). See also Section 15406 (rebuttable presumption of fertility). For provisions governing modification and termination of trusts where the consent of all beneficiaries cannot be obtained, see Sections 15408 (trust with uneconomically low principal) and 15409 (modification or termination by court order in changed circumstances).

Subdivision (a) limits the application of this section to irrevocable trusts since if the trust is revocable by the settlor, the method of revocation is governed by Section 15401. Compare Section 15404 (modification or termination by settlor and all beneficiaries).

For general provisions relating to petitions and other papers, see Sections 1020-1023, 17201; see also Sections 1021 (petition to be verified), 1041 (clerk to set petition for hearing). For general provisions relating to notice of hearing, see Sections 1200-1221, 15802-15804, 17100-17105, 17203-17205; see also Sections 1260-1265 (proof of giving notice). For general provisions relating to hearings and orders, see Sections 1040-1050, 17000-17006, 17201-17202, 17206-17207.

Background on Section 15403 of Repealed Code

Section 15403 was a new provision added by 1986 Cal.Stat. ch. 820 § 40. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (11)

West's Ann. Cal. Prob. Code § 15403, CA PROBATE § 15403

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Probate Code (Refs & Annos)

Division 9. Trust Law (Refs & Annos)

Part 3. Trustees and Beneficiaries (Refs & Annos)

Chapter 1. Trustees (Refs & Annos)

Article 5. Compensation and Indemnification of Trustees (Refs & Annos)

West's Ann.Cal.Prob.Code § 15680

§ 15680. Compensation; variance from terms of trust

Effective: January 1, 2009 Currentness

- (a) Subject to subdivision (b), and except as provided in Section 15688, if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument.
- (b) Upon proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances:
- (1) Where the duties of the trustee are substantially different from those contemplated when the trust was created.
- (2) Where the compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high.
- (3) In extraordinary circumstances calling for equitable relief.
- (c) An order fixing or allowing greater or lesser compensation under subdivision (b) applies only prospectively to actions taken in administration of the trust after the order is made.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991. Amended by Stats.2008, c. 237 (A.B.2343), § 6.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment

Section 15680 continues Section 15680 of the repealed Probate Code without change. See also Sections 15682 (court determination of prospective compensation), 17200(b)(9) (petition to fix compensation). Subdivision (c) makes clear that an order changing the amount of compensation cannot be applied retroactively to actions already taken.

For general provisions relating to petitions and other papers, see Sections 1020-1023, 17201; see also Sections 1021 (petition to be verified), 1041 (clerk to set petition for hearing). For general provisions relating to notice of hearing, see Sections 1200-1221, 15802-15804, 17100-17105, 17203-17205; see also Sections 1260-1265 (proof of giving notice). For general provisions relating to hearings and orders, see Sections 1040-1050, 17000-17006, 17201-17202, 17206-17207.

Background on Section 15680 of Repealed Code

Section 15680 was added by 1986 Cal.Stat. ch. 820 § 40. Subdivision (a) continued the first sentence of former Civil Code Section 2274 (repealed by 1986 Cal.Stat. ch. 820 § 7) without substantive change and restated the first sentence of former Probate Code Section 1122 (repealed by 1986 Cal.Stat. ch. 820 § 31) without substantive change. Subdivision (b) restated the second sentence of former Civil Code Section 2274 and the second sentence of former Probate Code Section 1122 (repealed by 1986 Cal.Stat. ch. 820 § 31) without substantive change, except that subdivision (b) made clear that the court could reduce the trustee's compensation when appropriate. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (34)

West's Ann. Cal. Prob. Code § 15680, CA PROBATE § 15680

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Chapter 1. Trustees (Refs & Annos)

Article 5. Compensation and Indemnification of Trustees (Refs & Annos)

West's Ann.Cal.Prob.Code § 15681

§ 15681. Compensation not specified

Currentness

If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment

Section 15681 continues Section 15681 of the repealed Probate Code without change. The trustee has authority to fix and pay its compensation without the necessity of prior court review. See Section 16243 (power to pay compensation and other expenses). See also Sections 15682 (court determination of prospective compensation), 17200(b)(9) (petition to fix compensation).

Background on Section 15681 of Repealed Code

Section 15681 was added by 1986 Cal.Stat. ch. 820 § 40. The section continued the third sentence of former Civil Code Section 2274 (repealed by 1986 Cal.Stat. ch. 820 § 7) without substantive change and restated part of the third sentence of former Probate Code Section 1122 (repealed by 1986 Cal.Stat. ch. 820 § 31) without substantive change. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (24)

West's Ann. Cal. Prob. Code § 15681, CA PROBATE § 15681

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Probate Code (Refs & Annos)
Division 9. Trust Law (Refs & Annos)
Part 4. Trust Administration (Refs & Annos)
Chapter 1. Duties of Trustees (Refs & Annos)
Article 3. Trustee's Duty to Report Information and Account to Beneficiaries (Refs & Annos)

West's Ann.Cal.Prob.Code § 16060

§ 16060. Duty to inform

Currentness

The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment

Section 16060 continues Section 16060 of the repealed Probate Code without change. The section is drawn from the first sentence of Section 7-303 of the Uniform Probate Code (1987) and is consistent with the duty stated in prior California case law to give beneficiaries complete and accurate information relative to the administration of a trust when requested at reasonable times. See Strauss v. Superior Court, 36 Cal.2d 396, 401, 224 P.2d 726 (1950). As to the construction of provisions drawn from uniform acts, see Section 2. The trustee is under a duty to communicate to the beneficiary information that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. See Restatement (Second) of Trusts § 173 comment c (1957). Ordinarily, the trustee is not under a duty to furnish information to the beneficiary in the absence of a request for the information. See id. comment d. Thus, the general duty provided in this section is ordinarily satisfied by compliance with Sections 16061 and 16062 unless there are special circumstances requiring particular information to be reported to beneficiaries. However, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee has a duty to communicate material facts in connection with the transaction that the trustee knows or should know. The trustee also has a duty to communicate material facts affecting the beneficiary's interest that the trustee knows the beneficiary does not know and that the beneficiary needs to know for protection in dealing with a third person. See id. During the time that a revocable trust can be revoked, the duty provided by this section is not owed to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 15800. See also Sections 24 ("beneficiary" defined), 16000 (duties subject to control in trust instrument), 16001 (duties of trustee of revocable trust), 16460 (limitations on proceedings against trustee).

Background on Section 16060 of Repealed Code

Section 16060 was a new provision added by 1986 Cal.Stat. ch. 820 § 40. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (15)

West's Ann. Cal. Prob. Code \S 16060, CA PROBATE \S 16060

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Part 4. Trust Administration (Refs & Annos)
Chapter 2. Powers of Trustees (Refs & Annos)
Article 2. Specific Powers of Trustees (Refs & Annos)

West's Ann.Cal.Prob.Code § 16243

§ 16243. Payment of trust expenses

Currentness

The trustee has the power to pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment

Section 16243 continues Section 16243 of the repealed Probate Code without change. The section is the same in substance as Section 3(c)(20) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. For other provisions relating to trustees' compensation, see Sections 15680-15683. See also Section 16202 (exercise of powers is subject to duties).

Background on Section 16243 of Repealed Code

Section 16243 was added by 1986 Cal.Stat. ch. 820 § 40. The section continued subdivision (16) of former Probate Code Section 1120.2 (repealed by 1986 Cal.Stat. ch. 820 § 31) without substantive change, except that the references to reasonable compensation and compensation of employees and agents were new. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (15)

West's Ann. Cal. Prob. Code § 16243, CA PROBATE § 16243

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Chapter 2. Powers of Trustees (Refs & Annos)
Article 2. Specific Powers of Trustees (Refs & Annos)

West's Ann.Cal.Prob.Code § 16247

§ 16247. Hiring persons

Currentness

The trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisers, appraisers (including probate referees appointed pursuant to Section 400), or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991. Amended by Stats.1994, c. 806 (A.B.3686), § 38.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment [Revised Comment]

Section 16247 is the same in substance as part of Section 3(c)(24) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. If the trustee is in doubt concerning the propriety of hiring an agent, the judicial procedure for obtaining instructions is available. See Section 17200(b)(6). An agent with a close relationship with the trustee or an insider may be hired when it is in the best interests of the trust, taking into account the duty of loyalty (see Section 16002) and the duty to avoid conflicts of interest (see Section 16004), and particularly as to routine matters; but in situations involving substantial matters, it is best to hire outside agents. The trustee has a duty to inform certain beneficiaries of agents hired, their relationship to the trustee, if any, and their compensation. See Section 16063(d).

See also Sections 16012 (general duty not to delegate), 16014 (duty to use special skills), 16052 (delegation of investment and management functions), 16202 (exercise of powers is subject to duties), 16401 (trustee's liability to beneficiary for acts of agent). [25 Cal.L.Rev.Comm. Reports 673 (1995)].

Background on Section 16247 of Repealed Code

Section 16247 was a new provision added by 1986 Cal.Stat. ch. 820 § 40. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (25)

West's Ann. Cal. Prob. Code § 16247, CA PROBATE § 16247

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Chapter 3. Uniform Principal and Income Act (Refs & Annos)

West's Ann.Cal.Prob.Code § 16370

Article 6. Allocation of Disbursements During Administration of Trust (Refs & Annos)

§ 16370. Disbursements from income

Effective: January 1, 2000 Currentness

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which paragraph (2) or (3) of subdivision (c) of Section 16340 applies:

- (a) Except as otherwise ordered by the court, one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee.
- (b) Except as otherwise ordered by the court, one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests.
- (c) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest.
- (d) All recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

Credits

(Added by Stats. 1999, c. 145 (A.B. 846), § 5.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1999 Addition

Section 16370 is the same as Section 501 of the Uniform Principal and Income Act (1997), with the addition of the recognition of court orders in subdivisions (a) and (b).

See also Sections 62 ("property" defined), 84 ("trustee" defined), 16324 ("income" defined), 16326 ("income interest" defined). [29 Cal.L.Rev.Comm. Reports 245 (1999)].

Background from Uniform Act

Trustee fees. The regular compensation of a trustee or the trustee's agent includes compensation based on a percentage of either principal or income or both.

Insurance premiums. The reference in [subdivision (d)] to "recurring" premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a principal asset. Title insurance premiums would be a principal disbursement under Section 502(a)(5) [Prob. Code § 16371(a)(5)].

Regularly recurring taxes. The reference to "regularly recurring taxes assessed against principal" includes all taxes regularly imposed on real property and tangible and intangible personal property.

[Adapted from Unif. Principal and Income Act § 501 comment (1997)].

Notes of Decisions (1)

West's Ann. Cal. Prob. Code § 16370, CA PROBATE § 16370

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Chapter 3. Uniform Principal and Income Act (Refs & Annos)
Article 6. Allocation of Disbursements During Administration of Trust (Refs & Annos)

West's Ann.Cal.Prob.Code § 16371

§ 16371. Disbursements from principal

Effective: January 1, 2000 Currentness

- (a) A trustee shall make the following disbursements from principal:
- (1) Except as otherwise ordered by the court, the remaining one-half of the disbursements described in subdivisions (a) and (b) of Section 16370.
- (2) Except as otherwise ordered by the court, all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale.
- (3) Payments on the principal of a trust debt.
- (4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property.
- (5) Premiums paid on a policy of insurance not described in subdivision (d) of Section 16370 of which the trust is the owner and beneficiary.
- (6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust.
- (7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.
- (b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

Credits

(Added by Stats.1999, c. 145 (A.B.846), § 5.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1999 Addition

Section 16371 is the same as Section 502 of the Uniform Principal and Income Act (1997), with the addition of the recognition of court orders in subdivisions (a)(1) and (a)(2).

See also Sections 62 ("property" defined), 84 ("trustee" defined), 16324 ("income" defined). [29 Cal.L.Rev.Comm. Reports 245 (1999)].

Background from Uniform Act

Environmental expenses. All environmental expenses are payable from principal, subject to the power of the trustee to transfer funds to principal from income under Section 504 [Prob. Code § 16373]. However, the Drafting Committee decided that it was not necessary to broaden this provision to cover other expenditures made under compulsion of governmental authority. See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority).

Environmental expenses paid by a trust are to be paid from principal under Section 502(a)(7) [Prob. Code § 16371(a)(7)] on the assumption that they will usually be extraordinary in nature. Environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under Section 403 [Prob. Code § 16352]. In accounting under that Section, environmental costs will be a factor in determining how much of the net receipts from the business is trust income. Paying all other environmental expenses from principal is consistent with this Act's approach regarding receipts—when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries.

Under Sections 504(a) and 504(b)(5) [Prob. Code § 16373(a) & (b)(5)], a trustee who makes or expects to make a principal disbursement for an environmental expense described in Section 502(a)(7) [Prob. Code § 16371(a)(7)] is authorized to transfer an appropriate amount from income to principal to reimburse principal for disbursements made or to provide a reserve for future principal disbursements.

The first part of Section 502(a)(7) [Prob. Code § 16371(a)(7)] is based upon the definition of an "environmental remediation trust" in Treas. Reg. § 301.7701-4(e) (as amended in 1996). This is not because the Act applies to an environmental remediation trust, but because the definition is a useful and thoroughly vetted description of the kinds of expenses that a trustee owning contaminated property might incur. Expenses incurred to comply with environmental laws include the cost of environmental consultants, administrative proceedings and burdens of every kind imposed as the result of an administrative or judicial proceeding, even though the burden is not formally characterized as a penalty.

Title proceedings. Disbursements that are made to protect a trust's property, referred to in Section 502(a)(4) [Prob. Code § 16371(a)(4)], include an "action to assure title" that is mentioned in Section 13(c)(2) of the 1962 Act [former Prob. Code § 16312(d)(2)].

Insurance premiums. Insurance premiums referred to in Section 502(a)(5) [Prob. Code § 16371(a)(5)] include title insurance premiums. They also include premiums on life insurance policies owned by the trust, which represent the trust's periodic investment in the insurance policy. There is no provision in the 1962 Act for life insurance premiums.

Taxes. Generation-skipping transfer taxes are payable from principal under subsection (a)(6).

[Adapted from Unif. Principal and Income Act § 502 comment (1997)].

Notes of Decisions (1)

West's Ann. Cal. Prob. Code § 16371, CA PROBATE § 16371

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Declined to Follow by Heiman v. Mayfield, N.D.Ga., March 17, 2015

182 Cal.App.4th 259 Court of Appeal, Fourth District, Division 3, California.

Patrick S. DONAHUE, Plaintiff and Respondent, v.

Michelle DONAHUE, Defendant and Appellant.

Nos. G040628, G041503. | Feb. 24, 2010.

Synopsis

Background: Former trustee of irrevocable inter vivos trust brought action seeking confirmation and approval of a final accounting and compensation for his service as a trustee. Beneficiary objected. After a court trial, the Superior Court, Orange County, No. A225267, Robert J. Moss, J., overruled objections, and subsequently entered orders charging trust with over \$5 million in past and ongoing attorney fees incurred by former trustee. Beneficiary appealed.

The Court of Appeal, Aronson, J., held that trial court failed to sufficiently determine whether legal expenses had been reasonably expended for the benefit of the trust.

Reversed and remanded.

Attorneys and Law Firms

**725 Law Offices of Marjorie G. Fuller, Marjorie G. Fuller, Fullerton, and Vicki Marolt Buchanan for Defendant and Appellant.

Loeb & Loeb, David C. Nelson and Adam F. Streisand, Los Angeles, for Plaintiff and Respondent.

*262 OPINION

ARONSON, J.

In separate orders, the trial court charged a trust with some \$5 million in past and ongoing attorney fees incurred on behalf of a former trustee in defending against the beneficiary's allegations of self-dealing and conflict of interest. Eight attorneys from three major law firms comprised the former trustee's legal team, with four to five of those attorneys simultaneously appearing at the 14–day court trial.

We reverse the fee awards. While trustees are properly reimbursed for reasonable attorney fees to defend adverse claims against the trust, we cannot *263 determine from the trial court's order whether the fee awards are consistent with applicable legal principles. Long-established principles of trust law impose a double-barreled reasonableness requirement: the fee award must be reasonable in amount and reasonably necessary to the conduct of the litigation, but it also must be reasonable and appropriate

for the benefit of the trust. We remand for the trial court to review the evidence and to assess a fee reimbursement in accordance with these dual criteria.

Ι

Factual and Procedural Background

Appellant Michelle Donahue (Michelle) became involved in litigation with her brother-in-law, respondent Patrick S. Donahue (Patrick), over his administration of an irrevocable inter vivos trust established by her late husband, Daniel W. Donahue (decedent). The trust's assets were highly concentrated in a private REIT (real estate investment trust) that owned and operated numerous shopping centers in the western United States. Patrick filled the roles of director, officer, and shareholder of the REIT. Michelle is a life income beneficiary of the trust; her three daughters are the remainder beneficiaries.

The decedent named Patrick as his successor trustee of the trust. Patrick served as trustee for nearly two years beginning in 2003 until his resignation in October 2004. He was succeeded by his brother, **726 Terence Donahue (Terence)², along with cotrustee Northern Trust Bank of California.³

A. The First Appeal (G040259)

In April 2005, Patrick initiated the instant litigation under Probate Code section 17200 to secure court confirmation and approval of a final accounting and compensation for his service as a trustee.

Michelle objected. She claimed Patrick imprudently sold approximately 40 percent of the trust's interest in the REIT below fair-market value to the REIT, thereby losing about \$20 million in potential appreciation.

*264 The 14-day court trial took place in the fall of 2007. Patrick, as the former trustee, was represented by four attorneys and a paralegal from two major law firms, Loeb & Loeb and Jones Day. In addition, the current trustees retained two attorneys to represent the trust. The minor beneficiaries were represented by minors' counsel.

The court approved the accounting and overruled Michelle's objections. Michelle appealed from the trial court's final ruling on Patrick's accounting and her objections. In *Donahue v. Donahue* (Feb. 11, 2010, G040259), 2010 WL 481226 [nonpub. opn.], we affirmed the judgment on the accounting, concluding substantial evidence supported the trial court's determination that "the Trust received fair value for the options and shares.'"

B. The Second Appeal (G040628)

In November 2007, Patrick petitioned for more than \$5 million in attorney and trustee fees he incurred "to defend himself against unmeritorious allegations that virtually every act undertaken by him as trustee was a breach of trust." Patrick sought reimbursement from the trust for incurring through trial \$4.85 million in attorney fees and \$155,375 for personal compensation. Patrick's fee request included the sum of \$184,453 simply to prepare the fee petitions. Another \$366,000 was spent to prepare an 80–page case chronology and for "case administration." One attorney at Jones Day billed 3,661 hours, for a total of \$1.5 million during his involvement.

Among Patrick's cost requests were \$150,000 in charges billed by DecisionQuest, a trial consulting firm retained to provide "visual planning and development" and "multimedia design, programming & production" during the court trial. Patrick claimed he incurred these audio-visual expenses "in the ordinary course of business of administering the Trust as successor trustee and in the proceedings relating to my activities as successor trustee."

Patrick initially supported his fee claim with a declaration from Adam Streisand, a partner at Loeb & Loeb, who purported to authenticate spreadsheets to break down the attorney fees Patrick incurred through his 45-member legal team from three separate law firms.

In opposing the motion, Michelle requested limited discovery on the amount and necessity of the fees, including the retention of an expert. Michelle explained the basis of her request: "Given the large sum at issue, the number of attorneys involved, and billing rates up to \$690/hour, **727 it is appropriate to allow Beneficiary an opportunity to retain an expert witness in this field and allow that expert sufficient time to review bills, records and supporting documentation for purposes of formulating his opinion and advising the Court." Alternatively, Michelle sought to appoint a referee pursuant to *265 Code of Civil Procedure section 639 to review the time entries and make a recommendation to the court.

In his reply, Patrick explained that he was "predominantly represented" by a four-person legal team at Jones Day from 2005 to early 2007, but he also decided to retain Loeb & Loeb in May 2006 "based on its specialty in trusts and estates litigation to take the lead in the trial." About 86 percent of Patrick's requested attorney fees were billed by eight "key" individuals. Patrick justified the \$1.5 million " 'singlehandedly'" billed by a Jones Day associate as "not surprising" given "Michelle's outrageous and limitless discovery...." According to Patrick, "it was far more cost-effective in this highly complex case to build upon the experience and insight of the lawyers involved in the case up until the point that Loeb & Loeb assumed a lead role." Patrick opposed Michelle's request to consult an expert because each side's experts would contradict the other, explaining, "For every 'expert' Michelle could call upon who might testify that the fees are unreasonable, Patrick could do the same to testify that the fees are reasonable."

At the January 2008 hearing on the fee petition, the trial court denied Michelle's request for discovery, but ordered Patrick to provide admissible evidence to support his claim because "Mr. Streisand does not have personal knowledge of the work done by other firms and cannot supply the foundation for the business record exception to the hearsay rule for firms other than his own."

Patrick thereupon filed supplemental declarations to support the fee request from each of the three law firms that continued to represent him throughout the litigation. Michelle objected to the "excessive duplication of work performed simultaneously between three large law firms...." (Underscoring & capitalization omitted.) She pointed out that Patrick's \$5 million fee claim came after the trust paid another \$3 million in attorney fees to represent the current trustees. In contrast, Michelle argued, she was primarily represented by two attorneys, who billed at the rate of \$375 per hour. Michelle renewed her request for limited discovery, and suggested the appointment of a discovery referee to place appropriate limits on any attorney depositions.

A second hearing on the fee request was held on April 25, 2008. Michelle's counsel argued that the \$150,000 cost item by the DecisionQuest audio-visual technicians itself "approaches what some people could try the case for the three weeks that they were here."

*266 The court issued a minute order on April 29, 2008, directing the current trustees "to reimburse the fees and costs prayed for in the petition with the following exceptions." The court specifically excluded fee charges for 11 named timekeepers, none of whom were attorneys or paralegals, and for indecipherable items on Loeb & Loeb's November 2007 invoices **728 because they "are so severely redacted the court cannot assess the appropriateness of the charges listed." The court deducted about \$42,000 in costs from the \$700,000 cost bill, but otherwise left the cost items untouched.

On July 9, 2008, Michelle filed a timely notice of appeal from the order for attorney fees and costs.

C. The Third Appeal (G041503)

While Michelle's first two appeals were pending, Patrick applied to the court for an additional \$300,000 in past attorney fees and trustee fees from the close of trial in October 2007 through May 2008, and for an order requiring the current cotrustees to pay his future appellate fees.

Patrick's new request included the fees and costs from the Loeb & Loeb invoice that had been redacted, as well as \$58,000 in fees to draft and litigate the statement of decision. About \$195,000 of the new fee request was for researching and drafting the first fee petition, analyzing the billing records of the law firms, reviewing Michelle's opposition, preparing the replies and attending the hearings. Another \$23,000 was for the attorneys' collective time to prepare their billing records and declarations in support of the second fee petition.

Patrick argued that the trust should pay his ongoing defense fees and costs because "it would be unjust to force [him] to continue to sell assets and borrow funds to the financial detriment of his family and him, to fend off Michelle's relentless attacks."

Michelle opposed the second fee petition and requested the court defer any additional fee award until the issues on appeal were adjudicated. Michelle specifically objected to the "duplication of work between the two law firms and multitude of attorneys, paralegals and highly-paid staff that continue to represent [Patrick]."

On November 21, 2008, the trial court, without explanation, ordered the current cotrustees to reimburse Patrick over \$175,000 in attorney fees and an additional \$2,500 in trustee fees. The court also granted Patrick's request for future attorney fees: "The trustees are further ordered to pay, on a monthly basis, Patrick Donahue's future reasonable attorney fees, costs, and trustee *267 fees incurred in connection with this action, subject to final approval by the court at the conclusion of the litigation and reimbursement by Patrick Donahue of any disallowed amounts."

Both sides objected to the trial court's failure to specify how it arrived at the amount of the fees and costs and requested the court to provide reasons for its determination. In his postorder motion for reconsideration, Patrick stated that he "does not know how or for what reason the Court arrived at the precise reimbursement amount of \$175,540.83. If the Court declines to reconsider its ruling, in the alternative, Patrick respectfully asks the Court to clarify its award of attorney fees and costs to Patrick by specifying which fees and/or costs have been denied so that the Court's decision may be understood by the parties." The court declined to reconsider or further clarify its fee order, and Michelle timely filed a notice of appeal.

D. Consolidation Orders

After all three appeals were fully briefed, we severed the second appeal **729 from the first appeal and consolidated it instead with the third appeal to resolve all issues concerning attorney fees in a single opinion.

II

Discussion

A. The Record Is Unclear Whether the Trial Court Exercised Its Discretion to Determine Whether the Requested Fees Reasonably and Appropriately Benefitted the Trust

Even after his resignation as a trustee, Patrick retained the fiduciary responsibility "to complete and defend his accounting until settled by the court." (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 235, 88 Cal.Rptr.3d 494 (*Kasperbauer*).)

Because he acted on the trust's behalf in retaining attorneys to pursue this litigation, Patrick claims the trust is obligated to pay the reasonable attorney fees. "Attorneys hired by a trustee to aid in administering the trust are entitled to reasonable fees paid from trust assets. Preparing the accounting and responding to the beneficiaries' objections to that accounting are aspects of trust administration." (*Kasperbauer, supra,* 171 Cal.App.4th at p. 235, 88 Cal.Rptr.3d 494; *268 Estate of Beach (1975)

15 Cal.3d 623, 644, 125 Cal.Rptr. 570, 542 P.2d 994 (*Beach*) [trustee entitled to reimbursement from trust for reasonable legal expenses incurred in defending trust in capacity as trustee]; *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97, 80 Cal.Rptr.2d 166 (*Hollaway*) [successful defense of allegations against trustee benefited trust by eliminating questions regarding whether the trustee had properly administered trust]; *Estate of Cassity* (1980) 106 Cal.App.3d 569, 574, 165 Cal.Rptr. 88 [former trustee entitled to reimbursement of legal expenses where he successfully defended himself from surcharge for conduct determined to have been proper]; see also Prob.Code § 16247 [trustee has power to retain attorneys to advise or assist the trustee].)

As Patrick points out, Michelle does not disagree with these propositions in the abstract. "Michelle does not dispute that 'attorney fees and litigation costs incurred in the trustee's successful defense of an action brought by the beneficiary are recoverable."

Michelle vigorously challenges, however, the manner in which Patrick exercised his fiduciary responsibilities in retaining multiple sets of attorneys from three major law firms to pursue this litigation. Michelle also contests the reasonableness of their billings, particularly where the current trustees also had retained two additional attorneys to represent the trust in the litigation under a common defense agreement.

Trustees have a duty "to administer the trust solely in the interest of the beneficiaries." (Prob.Code § 16002 subd. (a); see *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 78 Cal.Rptr.3d 838 (*Schwartz*) [trustee imprudently spent \$1.3 million in trust funds to obtain partially collectible judgment of \$700,000].) They should incur and pay expenses, including legal expenses, which are "reasonable" in amount and "appropriate" to the "purposes and circumstances of the trust." (Rest.3d Trust, § 88, p. 256; see also Prob.Code § 15684.) To recover fees and costs, trustees must subjectively believe the expense was necessary or appropriate to carry out the trust's purposes, and they must show their beliefs were objectively reasonable. (See *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1314, 58 Cal.Rptr.2d 299 (*Lefkowitz*).)

Trustees should carefully document any request for reimbursement of attorney **730 fees. "While recordkeeping is important in all aspects of administration, it is imperative to trust litigation that records support the contentions of the trustee and others that the trust should pay the disputed compensation and fees." (1 Cal. Trust Administration, (Cont.Ed.Bar 2d ed. 2009) § 9.49, p. 510.)

We apply an abuse of discretion standard to the trial court's decision granting Patrick's fee requests payable from the trust's assets. (*Kasperbauer*; *269 supra, 171 Cal.App.4th at p. 234, 88 Cal.Rptr.3d 494.) There are limits to the scope of our deference, however. "When the record is unclear whether the trial court's award of attorney fees is consistent with the applicable legal principles, we may reverse the award and remand the case to the trial court for further consideration and amplification of its reasoning. [Citations.]" (*In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052, 2 Cal.Rptr.3d 358 [reversing attorney fee award to putative class members].) "[D]iscretion must not be exercised whimsically, and reversal is appropriate where there is no reasonable basis for the ruling or the trial court has applied 'the wrong test' or standard in reaching its result." (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239, 66 Cal.Rptr.3d 680 [reversing attorney fee award of nearly \$500,000 in sexual harassment lawsuit where no showing the trial court considered threshold factors for fee enhancement].) "A trial court's award of attorney fees must be able to be rationalized to be affirmed on appeal." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101, 100 Cal.Rptr.3d 152 (*Gorman*).)

In *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 98 Cal.Rptr.2d 388, the appellate court considered whether the trial court properly exercised its discretion in applying a multiplier to an attorney fee award. In reversing the order, the court complained that appellate review was "complicated by the terse nature of the trial court's ruling itself, which [gave] virtually no explanation for the basis of the substantially enhanced award of fees and costs...." (*Id.* at p. 624, 98 Cal.Rptr.2d 388.) Lacking a "more complete explanation," the court observed "the order is subject to question regarding the factual basis of the exercise of discretion made." (*Ibid.*; see also *Garcia v. Santana* (2009) 174 Cal.App.4th 464, 477, 94 Cal.Rptr.3d 299 [reversing statutory fee-shifting order in a landlord-tenant dispute because "we are unable to determine whether the court exercised its discretion to balance all of the relevant factors against each other"]; *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th

672, 689, 98 Cal.Rptr.2d 263 [reversing fee award for recalculation by trial court, noting that "blocked-billing entries render it virtually impossible to break down hours on a task-by-task basis"].)

Probate courts have a special responsibility to ensure that fee awards are reasonable, given their supervisory responsibilities over trusts. "Presented with a section 17200 petition to settle an account, 'the probate court has a duty *imposed by law* to inquire into the prudence of the trustee's administration.' "(*Schwartz, supra*, 164 Cal.App.4th at p. 427, 78 Cal.Rptr.3d 838, original italics.) "[A]ttorney fees deriving from probate court litigation are subject to concerns sufficiently unique, we believe, to distinguish them from fees generated in ordinary civil litigation." (*Hollaway, supra*, 68 Cal.App.4th at p. 98, 80 Cal.Rptr.2d 166.) "Thus, ' "[t]he underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and service to the trust." ' **731 *270 (*Lefkowitz, supra*, 50 Cal.App.4th at p. 1314, 58 Cal.Rptr.2d 299.) Because probate courts have wide powers and responsibilities to preserve trusts under their supervision, they should make clear the basis for fee awards and thereby facilitate meaningful appellate review. "All too often this responsibility [to supervise trusts] is abdicated by granting whatever fees are sought in the petition." (*Estate of Nazro* (1971) 15 Cal.App.3d 218, 223, 93 Cal.Rptr. 116 [trustee sought excessive compensation for attorney services].)

In reviewing whether the trial court abused its discretion, "we are mindful that '[t]he underlying principle which guides the court in allowing costs and attorney fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust.' [Citation.]" (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461, 33 Cal.Rptr.3d 603 (*Terry*) [reversing fee award to trustee].) "If litigation is necessary for the preservation of the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust; however, if the litigation is specifically for the benefit of the trustee, the trustee must bear his or her own costs incurred, and is not entitled to reimbursement from the trust." (*Ibid.*)

The trial court's April 29 order granting attorney fees to Patrick is notable for what it does not say. Not only is there no explanation for why the trial court concluded Patrick reasonably incurred attorney fees, but the court did not expressly specify the amount of the fee award. Instead, the court merely stated that it would allow the amount "prayed for in the petition with [several specified] exceptions."

In the particular circumstances here, the trial court's generic order undermines the process of appellate review. Comparing the court's pithy explanation to the size and complexity of the fee request, with the full billing records consuming more than 800 pages of the record on appeal, we cannot tell whether the court exercised its discretion to carefully review the attorney documentation and determine their reasonableness and necessity, particularly in relationship to the trust's interest and purposes.

The November 2008 fee order is equally cryptic. While the trial court did specify the amount of the fee award, even Patrick complained about the court's failure to explain why and how it reached its conclusion. "It is the essence of arbitrariness to make an award of attorney fees that cannot be justified by the plaintiffs' request, the supporting bills, or the defendant's opposition." (*Gorman, supra,* 178 Cal.App.4th at p. 101, 100 Cal.Rptr.3d 152 [reversing fee award *271 in contractual feeshifting case where, "after much puzzlement and frustration," appellate court was unable to determine "any mathematical or logical explanation" for trial court's reasoning in issuing fee award].)⁷

Besides thwarting meaningful appellate review, the lack of detail and explanation in the orders raise the concern the trial court utilized an overly deferential approach to the fee request. A trial court may not rubber stamp a request for attorney fees, but must determine the number of hours *reasonably* expended. "'California courts have consistently held that a **732 computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511.) "The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320, 81 Cal.Rptr.3d 866 (*Christian Research*); see also *Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 816, 5 Cal.Rptr.2d 770 [party seeking attorney fees has the "burden of showing that the fees incurred were 'allowable,' were 'reasonably necessary to the conduct of the litigation,' and were 'reasonable in amount' "].)

Reasonable compensation does not include compensation for "'padding' in the form of inefficient or duplicative efforts...." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131–1132, 104 Cal.Rptr.2d 377, 17 P.3d 735 (*Ketchum*); see also *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 971, 104 Cal.Rptr.3d 710, 224 P.3d 41 [addressing the "amount of time an attorney might reasonably expect to spend in litigating such a claim"].) "A reduced award might be fully justified by a general observation that an attorney overlitigated a case or submitted a padded bill or that the opposing party has stated valid objections." (*Gorman, supra,* 178 Cal.App.4th at p. 101, 100 Cal.Rptr.3d 152.)

In *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 834, 112 Cal.Rptr.2d 284, the Court of Appeal reversed a fee award of \$215,000 in a class action lawsuit because of the "unjustified duplication of work that took place" where numerous attorneys passively appeared on behalf of a single client. While there was no issue regarding the lawyers' honesty in recording their time, "Duplication was, indeed, the hallmark of the coordinated proceeding" with multiple hours spent in correspondence and phone calls *272 between the different law firms representing the parties claiming fees. (*Id.* at pp. 840–841, 112 Cal.Rptr.2d 284.) Under these circumstances, "the *unquestioning* award of generous fees may encourage duplicative and superfluous litigation and other conduct deserving no such favor." (*Id.* at p. 839, 112 Cal.Rptr.2d 284.)

There are no declarations in the record to explain Patrick's decision to retain two major law firms (Loeb & Loeb and Jones Day) to *concurrently* represent him (each with supervising partners and associates) in this court trial. "However, just as there can be too many cooks in a kitchen, there can be too many lawyers on a case." (*Guckenberger v. Boston Univ.* (D.Mass.1998) 8 F.Supp.2d 91, 101.) Even after Loeb & Loeb became lead attorneys for Patrick, Scott Bertzyk at Greenberg Traurig billed some \$171,000, while Jones Day billed more than \$1 million.

Understandably, these law firms brought with them their own supervising, support and administrative infrastructure, but simultaneous representation by multiple law firms posed substantial risks of task padding, over-conferencing, attorney stacking (multiple attendance by attorneys at the same court functions), and excessive research. (See *Christian Research, supra*, 165 Cal.App.4th at p. 1326, 81 Cal.Rptr.3d 866 ["Indeed, the five attorneys [defendant] deployed on the motion appear to have expended [undue] time telephoning, conferencing, and e-mailing each other ... supporting the trial court's conclusion the matter was overstaffed"].)⁸

**733 By contrast to Patrick's large litigation team, two attorneys represented Michelle. A comparative analysis of each side's respective litigation costs may be a useful check on the reasonableness of any fee request. "The court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required." (*Ramos v. Lamm* (10th Cir.1983) 713 F.2d 546, 554.)

Although we cannot tell whether the trial court distinguished between fees expended to protect Patrick's personal interests from those of the trust, it is plausible the court may have decided that Michelle, rather than Patrick, should reap the consequences of the aggressive litigation tactics she had sown. But California has declined to adopt a prevailing party outcome for the award of attorney fees in surcharge actions between trustees and beneficiaries. "A contrary rule would unduly deter contestants such as these from questioning the stewardship of executors and administrators through proceedings *273 brought in good faith." (*Beach, supra,* 15 Cal.3d at p. 645, 125 Cal.Rptr. 570, 542 P.2d 994 [trial court exceeded its authority in ordering that trustee's attorney fees be charged against unsuccessful contestants' trust shares rather than against all property otherwise distributable to the trust].)

At oral argument, Patrick offered a "bet the farm" rationale for his litigation decision to simultaneously retain a legal team of seven to eight lawyers with "primary activity and involvement" from three major law firms. As counsel explained, "This was a 'bet the farm' case where [the beneficiaries] were seeking \$20 to \$25 million from our client—his entire stake could be wiped out if he lost the case." Counsel further explained that Patrick incurred the attorney fees without any assurance he would receive reimbursement from the trust. "Every single dollar that Patrick incurred was at risk and he knew it was at risk."

But that is precisely the point. It was *Patrick's* "farm" that was at stake, not the trust's. Faced with the prospects of ruinous exposure, Patrick may have decided to leave no field unfurrowed and to act without regard to cost in protecting his own personal interests. For example, at oral argument, counsel justified Patrick's decision to retain rather than replace his original attorneys at Jones Day and Greenberg Traurig to preserve "institutional memory." Counsel further explained that while some of Patrick's trial attorneys may have "appeared to do nothing" at trial, they actually served as reserves to cross-examine witnesses that Michelle had placed on her attorney list, but ultimately decided not to call.

Such a spare-no-expense strategy calls for close scrutiny on questions of reasonableness, proportionality and trust benefit. "Consequently, where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust assets." (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1230, 128 Cal.Rptr.2d 742.) Patrick's defense by so many top-flight lawyers may have benefitted Patrick, but was it also reasonable and beneficial to the trust? **734 Did Patrick demand a Rolls Royce defense when a prudent trustee could have arrived at the same destination in a Buick, Chrysler or Taurus?

The Restatement expressly recognizes the need for trustees to incur costs proportional to the trust's objectives. "The comprehensive powers of a trustee (§ 85) include the power to incur and pay expenses in the course of trust administration, but the exercise of this power is subject to the trustee's fiduciary duties (§ 70). *Implicit in a trustee's fiduciary duties is a* *274 *duty to be cost-conscious*." (Rest.3d Trusts, § 88, com. a, p. 256, italics added.) "'Wasting beneficiaries' money is imprudent.' "(*Id.*, reporter's notes, com. b, p. 261.)

Although the veteran jurist here may have had these principles in mind, we find nothing in the fee orders of April and November 2008 to assure us the trial court analyzed these factors. This is not sufficient. The trial court's assessment of reasonableness depends not simply upon what fees were reasonably incurred in representing Patrick, but also upon whether such fees are reasonably and prudently incurred for the trust. We therefore reverse and remand the case to the trial court for further consideration and amplification of its reasoning on the fee awards.

B. The Trial Court Has Yet to Exercise Its Discretion to Review the Reasonableness of Patrick's Ongoing Attorney Fees and Should Do So on Remand

In her last-filed appeal (G041503), Michelle raises two objections to the trial court's award of prospective attorney fees to Patrick on an ongoing basis. The prospective fee award was filed during the pendency of Michelle's appeals in G040259 and G040628.

Michelle contends the trial court lacked jurisdiction to issue this new fee award while her appeals were pending and before these cases are transferred back to the trial court by the issuance of a remittitur.

We disagree. As a probate court with supervisory responsibilities over the trust, the trial court retained the power to make further orders involving the trust. (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 341, 54 Cal.Rptr.3d 185 ["As we were aptly reminded by counsel at oral argument (quoting baseball great Yogi Berra), "It ain't over till it's over" "].) " "[T]he ongoing and changing nature of trust administration" may require ongoing proceedings 'for instructions, to settle accounts, to fix compensation ... [and] to allow, compromise or settle claims." (*Id.* at p. 352, 54 Cal.Rptr.3d 185.)

Michelle also contests Patrick's ability, as a former trustee, to obtain a fee award on a so-called "go-forward" basis. As Michelle argues, "If Patrick is *275 entitled to fees at all, as a former trustee, the court had authority to award retroactive fees to Patrick, but not prospective fees."

We concur with the observation, made by Patrick's counsel at oral argument, that this issue "probably is moot" because the case is "winding up towards its end." Moreover, as Patrick's counsel further emphasized, the trial court has not yet reviewed those portions of the November 21 **735 order directing the current trustees to pay Patrick's prospective attorney fees from trust assets.

As we have explained, the standard is not whether Patrick's fees were reasonably incurred for his own benefit, but whether they were reasonably incurred for the benefit of the trust. "The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust." [Citation.] "(Thomas v. Gustafson (2006) 141 Cal.App.4th 34, 44, 45 Cal.Rptr.3d 639.)

We do not know whether the current trustees have paid any of Patrick's ongoing attorney fees following the fee order of November 2008, although they were ordered to do so on a monthly basis. To the extent they have, Michelle is entitled to put Patrick to his proof on remand, with appropriate discovery and a hearing regarding their reasonableness and whether they were necessarily incurred for the benefit of the trust, or for Patrick's personal benefit.

C. On Remand, the Trial Court Should Revisit Michelle's Request to Engage in Limited Discovery, Including the Retention of an Attorney Fee Expert, on the Appropriate Amount of Attorney Fees for the Benefit of the Trust

Since we remand the attorney fee orders for a new hearing, Michelle should receive an opportunity to renew her request for limited discovery regarding attorney fee issues. Although equivocal ("I'm kind of torn in that regard"), the trial court initially concluded that discovery simply would be too costly given its limited utility: "I just don't know that it will do much good by continuing the bleeding by engaging in further discovery to depose lawyers, perhaps to get another lawyer to look at what they did and say they charged too much. I just don't know how effective that would be."

In City of King City v. Community Bank of Central California (2005) 131 Cal.App.4th 913, 934, 32 Cal.Rptr.3d 384, the trial court denied a bank's request for discovery in connection with a dispositive law and motion hearing on similar grounds, finding that discovery was neither necessary nor helpful. *276 The Court of Appeal found no legal basis to support the trial court's denial of discovery, and overturned the order.

The size and complexity of Patrick's fee requests may merit discovery, particularly expert assistance, which cannot be flatly denied simply on the basis of expediency. "Efficiency cannot be favored over justice." (*Estate of Meeker* (1993) 13 Cal.App.4th 1099, 1106, 16 Cal.Rptr.2d 825; see also *Fatica v. Superior Court* (2002) 99 Cal.App.4th 350, 353, 120 Cal.Rptr.2d 904 [expediency not adequate reason to preclude petitioners "from presenting critical expert opinion testimony"].)

In *Ketchum, supra*, the California Supreme Court rejected an appellant's contention that the trial court "'rubber stamped'" a fee award in an anti-SLAPP case by noting with approval that the trial court permitted deposition testimony and testimony by a fee expert. (24 Cal.4th at p. 1140, 104 Cal.Rptr.2d 377, 17 P.3d 735.) Under these circumstances, the court concluded, "[w]e have no reason to doubt that the superior court conducted an independent assessment of the evidence presented." (*Ibid.*)

It is true that judges themselves are deemed to be experts on the value of legal services, and may rely on their own experience about reasonable and proper fees, without resort to expert testimony. "'In many cases the trial court will be **736 aware of the nature and extent of the attorney's services from its observation of the trial proceedings and the pretrial and discovery proceedings reflected in the file.' "(Martino v. Denevi (1986) 182 Cal.App.3d 553, 559, 227 Cal.Rptr. 354.)

But a judge's litigation experience may not extend to many critical aspects of fee awards pertaining to prudent trust administration, including management of complex litigation, legal auditing, and legal cost control. As one example, Patrick appears to have requested substantial sums (into the six figures) simply to put together the legal invoices. Should some or all of these expenses have been attributable to overhead already covered within the attorney's hourly rates? Is time spent to review or limit excessive attorney bills itself justifiably billable? When multiple law firms are involved in concurrently providing legal representation to a single client, what procedures appropriately guard against duplicative or excessive fee requests?

In this area, the testimony or declaration of fee experts may assist the trial court, on remand, in determining the appropriate amount of reimbursement to Patrick for his efforts, as a former trustee, to benefit the trust. (See also *In re Cendant Corp. Litigation* (D.N.J.1998) 182 F.R.D. 144, 150 ["It is no insult to the judiciary to admit that a court's expertise is rarely at its

most formidable in the evaluation of counsel fees"].) On remand, we leave it to *277 the sound discretion of the trial court to fashion appropriate discovery regarding proper and reasonable levels of legal services for the benefit of the trust.

IV

Disposition

We reverse the orders of April 29, 2008, and November 21, 2008, and remand the matter to the trial court to conduct additional proceedings to determine the amount of attorney fees plaintiff and respondent Patrick Donahue is entitled to receive.

In the interests of justice, costs on appeal on these two consolidated appeals, as well as the appeal in G040259, are awarded to appellant.

WE CONCUR: RYLAARSDAM, Acting P.J., and IKOLA, J.

All Citations

182 Cal.App.4th 259, 105 Cal.Rptr.3d 723, 10 Cal. Daily Op. Serv. 2357, 2010 Daily Journal D.A.R. 2844

Footnotes

- 1 Like the litigants, we use first names to refer to the various persons who share the Donahue surname for ease of reference, not out of disrespect.
- The record contains varying spellings for Terence, but we follow this form because it has been used by both sides in their latest set of briefs.
- In conjunction with her reply brief, Michelle has filed a motion to augment the record to show that Northern Trust Bank was a "captive" cotrustee, rather than an independent fiduciary. We deny the motion as unnecessary to resolve the appeal.
- Patrick incurred legal fees from a third law firm, Greenberg Traurig, when one of his original attorneys at Jones Day, litigation partner Scott Bertzyk, later joined Greenberg Traurig.
- The trust paid approximately \$2 million to Sacks Glazier and an additional \$1 million to Russ Allen to represent the current trustees in the trust litigation.
- The open-ended fee orders preclude a precise accounting of the trust's legal fees to date. According to Michelle's opening brief in the third appeal (G041503), the amount in the original fee order "combined with the amount billed by the current trustees' attorneys and by the trust's attorney, exceeds \$9,000,000, which was charged to the trust's corpus."
- At oral argument, Patrick's counsel speculated that the trial court had stricken Loeb & Loeb's November 2007 invoice from the second fee award believing that the November 2007 invoice should have been included in the first fee petition. If so, then Patrick's own theory would have the trial court awarding the *entirety* of the remaining fee request, without reduction.
- Although we have not engaged in a detailed examination of the billing invoices (a task we leave on remand to the trier of fact, perhaps aided by expert testimony), we note some common entries: "Confer with team," "Prepare for and attend strategy meeting ...," "[C]onferences with co-counsel," "Participated in meeting with litigation team ..." "Telephone conference with [co-counsel]," "Meeting with [co-counsel] at Jones Day in Irvine...."
- Insofar as this litigation involves excessive fee issues, Patrick has not participated "as a neutral trustee to defend the trust and protect its assets"; rather, he has consistently pursued his own interests, to the potential detriment of the trust corpus. (See *Terry, supra*, 131 Cal.App.4th at p. 1464, 33 Cal.Rptr.3d 603; cf. *In re Fidelity/Micron Securities Litigation* (1st Cir.1999) 167 F.3d 735, 738 [awards of attorney fees incurred in litigating the magnitude of attorney reimbursement in common fund cases should "rarely, if ever, be bestowed" because the fee award runs counter to the interests of the fund].)

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Disagreement Recognized by Marshall v. First Nat. Bank Alaska, Alaska, September 3, 2004

226 Cal.App.2d 658, 38 Cal.Rptr. 270

Estate of JOSEPH GILMAKER, Deceased. JOSEPH LOUIS GILMAKER, Contestant and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner and Respondent. (Two Cases.)

Civ. Nos. 27170, 27609.

District Court of Appeal, Second District, Division 3, California.

April 27, 1964.

HEADNOTES

(1a, 1b)

Trusts § 355(3)--Accounting by Trustee--Credits--Attorneys' Fees.

An order authorizing a trustee to pay a fee to its attorneys for legal services rendered during the third accounting period, including representation of the trustee in a hearing of exceptions interposed by the beneficiary to the trustee's second account current, was proper where it appeared that, though an order for attorney's fees was made after the hearing of such exceptions, the amount allowed was identical with that represented to be reasonable in the trustee's petition with respect to legal services rendered during the second account period and obviously did not include compensation for additional services made necessary by the exceptions thereafter filed by the beneficiary.

See Cal.Jur.2d, Trusts, §§ 303, 323; Am.Jur., Trusts (1st ed § 523).

(2)

Trusts § 355(3)--Accounting by Trustee--Credits--Attorneys' Fees.

In examining a prior order authorizing payment of fees to a trustee's attorneys to determine the nature and extent of the services for which compensation was therein allowed, the court was properly guided by the principle that such an order must be construed with relation to the particular matter before the court for adjudication.

(3)

Trusts § 355(3)--Accounting by Trustee--Credits--Attorneys' Fees.

An order for attorneys' fees made after the hearing of exceptions *659 interposed by the beneficiary to the trustee's then current account was not final as to a nonadjudicated matter.

(4)

Trusts § 355(3)--Accounting by Trustee--Credits--Attorneys' Fees.

Where the beneficiary of a trust interposed exceptions to the trustee's second account current, it was not irregular or improper for the trustee to defer presentation of a petition with respect to legal fees for extraordinary services made necessary by such exceptions until the filing of the third account current.

(5a, 5b)

Trusts § 355(3)--Accounting by Trustee--Credits--Attorneys' Fees.

Where it was conclusively established on a prior appeal that petitioner trustee erred in its administration of the trust estate and that it had no sound basis for resisting the beneficiary's petition for its removal, said trustee was not entitled to receive out of the trust estate its expenses of litigation incurred in defending its untenable and partisan position, and the court erred in allowing the trustee credit for costs so incurred and in authorizing payment of attorneys' fees for services rendered on behalf of the trustee with relation to such litigation.

(6)

Trusts § 250--Management of Trust Property--Diligence Required of Trustee.

It cannot be said that it is the exercise of a reasonable judgment for a trustee to assert or defend a position for which no reasonable support can be found in the trust provisions and the governing law.

(7)

Trusts § 250--Management of Trust Property--Diligence Required of Trustee.

One in whom trust is placed, such as a trustee, is duty bound to exercise reasonable diligence for the purpose of ascertaining the nature and extent of his obligations and to be faithful in the performance thereof.

(8)

Trusts § 206--Management of Trust Property--Good Faith of Trustee.

Where it was conclusively determined on a prior appeal that petitioner trustee failed to administer the trust in conformity with its terms and that the prevailing hostility between it and the beneficiary required its removal, it was not reasonable or fair to rely on the element of good faith, standing alone, as the criterion by which to determine whether the trust estate should bear the cost of the trustee's defense of its untenable position.

(9)

Trusts § 222--Management of Trust Property--Acquiescence in Acts.

Where petitioner trustee, in making payment out of trust principal to the beneficiary for expenses he incurred in litigation resulting in the trustee's removal, had acted in compliance with a court order which the beneficiary himself had sought and obtained, the beneficiary was thereafter in no position to object. *660

(10a, 10b)

Trusts § 251--Management of Trust Property--Rights of Trustee--Compensation.

Though it was determined by prior litigation that a trustee failed to administer the trust in conformity with its terms and the prevailing hostility between it and the beneficiary required its removal, it was not error to allow the trustee compensation for ordinary services it rendered to the trust during the period covered by its final account and report.

See Cal.Jur.2d, Trusts § 287 et seq.; Am.Jur., Trusts (1st ed § 525).

(11)

Trusts § 251--Management of Trust Property--Rights of Trustee-- Compensation.

The extent of the allowance of compensation to a trustee for its work in the ordinary administration of the trust estate is a matter for the determination of the trial court in the exercise of a sound discretion. In making such determination, it is within the court's province to consider the conduct of the trustee in the management of the trust property.

SUMMARY

APPEALS from orders of the Superior Court of Los Angeles County authorizing payment of fees to trustee's attorneys and from an order settling fourth and final account and report of trustee and allowing fees to trustee and trustee's attorneys. John F. McCarthy, Judge. One order for payment of attorney's fees affirmed and one order reversed; other order affirmed in part and reversed in part with directions.

COUNSEL

Eric A. Rose for Contestant and Appellant.

Johnson & Johnson and George R. Johnson for Petitioner and Respondent.

FORD, J.

The problems presented on these appeals relate to the controversy which was before the Supreme Court in *Estate of Gilmaker*, 57 Cal.2d 627 [21 Cal.Rptr. 585, 371 P.2d 321]. In the opinion therein it was stated in part (57 Cal.2d, at page 633): "The removal and substitution of a trustee is largely within the discretion of the trial court. [Citations.] It is undisputed, however, that the trustee failed to disperse the surplus cash of \$49,000 and failed to provide a segregated semi-annual accounting. The trustee's only defense, which is insufficient, was that it is not legally obligated to do either. The hostility between the trustee and petitioner has impaired the proper administration of the trust, and *661 therefore requires the removal and substitution of the trustee." The Supreme Court reversed the orders denying removal and substitution of the trustee, and instructing the trustee.

(1a) The first of the two appeals presently before this court relates to two orders. One order authorized and directed the trustee to pay to its attorneys the sum of \$708.75 from the trust estate as fees for legal services rendered during the accounting period of the third account current, including the representation of the trustee in the hearing of the exceptions interposed by the sole life beneficiary, Joseph Louis Gilmaker, to the trustee's second account current, and in preparing, filing and presenting the third account current. The position of the life beneficiary is that the order for attorneys' fees made after the hearing of such exceptions to the second account current included an allowance for the legal services rendered to the trustee during that hearing and that no further allowance could properly be made thereafter.

That the position of the beneficiary, as appellant herein, with respect to the fees in the amount of \$708.75 is without sound basis is apparent from an examination of the record. The second account current was for the period of December 1, 1958, to and including November 30, 1959. The petition of the trustee with respect to legal fees related to "services rendered during the period of this account and report and for the preparation, filing and presentation of this account, report and petition," it being alleged that the sum of \$300 was a reasonable fee for such services. The hearing of the beneficiary's exceptions to the second account current and report was a protracted one. Testimony was taken on each of three days. In the order in which the exceptions were disallowed, which order became final, it was provided that the "trustee is authorized and directed to pay to its attorneys ... the sum of \$300.00 as compensation for their services rendered during the period of the account and report and for the preparation, filing and presentation of the petition." (2) In its subsequent examination of that order for the purpose of determining the nature and extent of the services for which compensation was therein allowed, the court was properly guided by the principle that such an order must be construed with relation to the particular matter before the court for adjudication. (See *Tronslin v. City of Sonora*, 144 Cal.App.2d 735, 738 [301 P.2d 891].) (1b) The amount allowed was identical with that represented to be reasonable in *662 the petition of the trustee with respect to legal fees and obviously did not include compensation for additional services made necessary by the exceptions thereafter filed by the beneficiary to the second account current. (3) The order was not final as to a nonadjudicated matter. (See Estate of Clary, 203 Cal. 335, 340-341 [264 P. 242].) (4) There was nothing irregular or improper in deferring the presentation of a petition with respect to legal fees for extraordinary services made necessary by the beneficiary's exceptions until the filing of the third account current. (See Estate of Griffith, 97 Cal.App.2d 651, 654 [218 P.2d 149].)

(5a) In the first of the two appeals presently before this court, the second order which is challenged by the beneficiary is one which authorized and directed the trustee "to pay from the trust estate the sum of \$3,850.00 to its attorneys, Johnson & Johnson, as fees for legal services in representing the trustee in resisting the motion of Joseph Louis Gilmaker [the sole life beneficiary] for removal and substitution of said trustee, and in presenting said trustee's petition for instructions concerning the investment of trust funds in the Superior Court, the District Court of Appeal and the Supreme Court." The court found a basis for its order in its determination that the legal services were necessarily rendered by the attorneys to the trustee for the benefit of the trust and those interested therein and that the action of the trustee in having recourse to such services was reasonable and was taken in good faith.

The question presented as to the second order must be resolved in the light of the reasoning of the Supreme Court in the earlier appeal. As has been noted, the Supreme Court determined that the trustee had failed in the performance of its duties as delineated in the pertinent provisions of the trust and that the hostility between the trustee and the beneficiary had so impaired the proper administration of the trust as to require the removal of the trustee and the substitution of a new trustee. (*Estate of Gilmaker, supra, 57* Cal.2d 627.) It has thus been conclusively established that the trustee erred in its administration of the estate and that it had no sound basis for its resistance to the beneficiary's petition for its removal. In the light of that determination, the trustee was not entitled to receive out of the trust estate its expenses of litigation, including attorneys' fees, incurred in defending its untenable and partisan position. (See *Moore v. Bowes, 8* Cal.2d 162, 166-167 [64 P.2d 423]; Note, *663 9 A.L.R.2d 1132, 1219; Loring, A Trustee's Handbook (6th ed. 1962) § 65, p. 175; Bogert on Trusts (2d ed.) § 525, p. 344; Nossaman, Trust Administration and Taxation (2d ed. 1963) § 32.07, p. 620.)

The reasoning just expressed is not affected by the trial court's finding that the trustee acted reasonably and in good faith in its litigation with the beneficiary. (6) It cannot be said that it is the exercise of a reasonable judgment to assert or defend a position for which no reasonable support can be found in the trust provisions and the governing law. (7) One in whom trust is placed is duty bound to exercise reasonable diligence for the purpose of ascertaining the nature and extent of his obligations and to be faithful in the performance thereof. (8) There having been a conclusive adjudication in the present case that the trustee failed to administer the trust in conformity with its terms and that the prevailing hostility between it and the beneficiary required its removal, it is not reasonable or fair to rely upon the element of good faith, standing alone, as the criterion by which to determine whether the trust estate should bear the cost of the trustee's defense of its untenable position. (See *Dickerson v. Camden Trust Co.*, 1 N.J. Super. 459 [64 A.2d 214, 218-219]; *In re Drake's Will*, 195 Minn. 464 [263 N.W. 439, 442, 101 A.L.R. 801]; Scott on Trusts (2d ed.) §§ 174.1, 201; Rest. 2d Trusts, § 201, com. a and com. b.)

In the supplement to its fourth and final account and report, filed after the decision of the Supreme Court in the earlier appeal, the trustee set forth that it had expended a total of \$611.28 for clerk's and reporter's transcripts and the printing of briefs, all of which was paid from the principal cash of the trust. It was stated that \$97.70 of that amount was paid during the period of the third account current and was accounted for in that account. The remaining amount of \$513.58 was paid during the accounting period of the fourth account. In addition, by way of a petition by the trustee for allowance of attorneys' fees, it was set forth that the attorneys for the trustee had rendered extraordinary services to the trustee during the accounting period as follows: "said attorneys have represented petitioner, in its representative capacity, before this court in petitioning this court for authority to compensate petitioner's said attorneys for professional services rendered to the trust estate in resisting Joseph Louis Gilmaker's said motion for removal and substitution of trustee and in presenting petitioner's petition for *664 instructions, and in advising and counseling petitioner in the administration of said trust during the period of the third account current, and in presenting said account to the court." It was represented that the reasonable value of all legal services, ordinary and extraordinary, during the pertinent period was the sum of \$1,000. In his written objections and exceptions, the beneficiary contested any allowance to the trustee for the costs of litigation and for attorneys' fees. By its order the trial court ruled in favor of the trustee with respect to such objections and exceptions and authorized and directed the trustee to pay to its attorneys the sum of \$1,000 "as compensation for their services rendered during the period of the account and supplement and report and for the preparation, filing and presentation thereof."

(5b) For the reasons heretofore expressed, the court erred in allowing the trustee credit for its costs expended in the litigation which was finally decided adversely to it in *Estate of Gilmaker, supra,* 57 Cal.2d 627. Such error, however, was in the amount of \$513.58 only, inasmuch as the approval and allowance of \$97.70 embodied in the order with respect to the third account current and report, which had become final, was no longer subject to attack. (See *Security-First Nat. Bank v. Superior Court,* 1 Cal.2d 749, 752 [37 P.2d 69].) There was also error in authorizing and directing payment of attorneys' fees out of the trust estate for services rendered on behalf of the trustee with relation to that litigation. But, since the order for the sum of \$1,000 does not disclose what portion thereof was for legal services for which the trustee could not properly receive payment out of trust funds, that portion of the order must be reversed and the matter remanded for further proceedings in accordance with the applicable law as set forth herein.

(9) The beneficiary also asserts that the trustee must make reimbursement to the trust for expense incurred by the beneficiary in successfully resisting the position of the trustee with respect to the issues ultimately determined by the Supreme Court. In its fourth and final account and report, the trustee showed that, with respect to the beneficiary's costs and counsel fees, it had made payment to the beneficiary and his attorney of sums in the total amount of \$6,713.43 out of the principal of the trust estate. That amount was paid pursuant to an order of the court made on July 24, 1962, in response to the beneficiary's petition. It was an order which the court had jurisdiction to make. (See *Estate of Swanson*, 171 Cal.App.2d 437, 440-441 [*665 340 P.2d 695].) Since the trustee had acted in compliance with an order which the beneficiary himself had sought and obtained, the beneficiary was thereafter in no position to object.

(10a) The beneficiary contends that the trustee should not have been allowed compensation for services during the period covered by the fourth and final account and report. It is to be noted that the trustee made no claim for additional compensation because of the litigation but only sought compensation for its "ordinary and usual duties rendered to the trust." It asked for an allowance of \$3,200 as compensation for its services during the period covered by the account and report. In its order the court allowed that amount. (11) The extent of the allowance of compensation to the trustee for its work in the ordinary administration of the trust estate was a matter for the determination of the court in the exercise of a sound discretion. In making such determination, it was within that court's province to consider the conduct of the trustee in the management of the trust property. (See *Estate of McLellan*, 35 Cal.App.2d 18, 22 [94 P.2d 408]; Rest. 2d Trusts, § 243.) (10b) The services of an ordinary nature rendered by the trustee were of substantial value. The beneficiary, as appellant, has failed to show that there was any abuse of discretion. There was no error.

The order of August 13, 1962 (which was entered on September 24, 1962) authorizing and directing the trustee to pay the sum of \$708.75 to its attorneys is affirmed. The order dated September 24, 1962 (which was entered on October 25, 1962) authorizing and directing the trustee to pay to its attorneys the sum of \$3,850 is reversed.

The order settling the fourth and final account and supplement thereto, and report of trustee, overruling and disallowing exceptions, allowing fees to trustee and trustee's attorneys, and directing distribution to the successor trustee, dated February 25, 1963 (which was entered on March 6, 1963), is reversed as to the following portions thereof only: the portion overruling and disallowing the objections and exceptions of the beneficiary to the items in the total amount of \$513.58 for clerk's and reporter's transcripts and printing of briefs; and the portion authorizing and directing the trustee to pay its attorneys the sum of \$1,000, and, as to such latter portion, the matter is remanded to the superior court for further proceedings in accordance with the views expressed in this opinion. Except as to the specific portions so reversed, the order is affirmed. *666

The beneficiary, as appellant herein, shall recover from the respondent his costs on appeal.

Shinn, P. J., concurred.

Files, J., deeming himself disqualified, did not participate.

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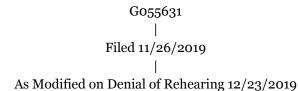
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42 Cal.App.5th 730 Court of Appeal, Fourth District, Division 3, California.

Stephanie A. PLACENCIA, as Cotrustee, etc., Plaintiff, Defendant and Respondent,

v.

Lisa M. STRAZICICH, as Cotrustee, etc., Plaintiff, Defendant and Appellant.



Synopsis

Background: Testator's daughters filed petitions in probate court in their capacity as cotrustees of testator's trust to determine parties' respective rights. The Superior Court, Orange County, No. 30-2010-00356226, David L. Belz, J., ordered trustee to account for funds to the trust. Trustee appealed.

Holdings: The Court of Appeal, Ikola, J., held that:

testator's daughter did not have right of survivorship in testator's bank account, and

testator's interest in multi-party bank account with no right of survivorship became part of his personal estate and was subject to probate proceeding.

Affirmed in part, reversed in part, and remanded.

**730 Appeal from a judgment of the Superior Court of Orange County, David L. Belz, Judge. Affirmed in part, reversed in part and remanded with directions. (Super. Ct. No. 30-2010-00356226)

Attorneys and Law Firms

Bradley R. Kirk & Associates and Bradley R. Kirk, Irvine, for Plaintiff, Defendant and Appellant.

Bidna & Keys, Richard D. Keys and Howard M. Bidna, Newport Beach, for Plaintiff, Defendant and Respondent.

OPINION

IKOLA, J.

*733 **731 Ralph Placencia died, leaving behind, among other things, a will, a trust, and a joint bank account with an express right of survivorship in favor of one of his daughters, appellant Lisa Strazicich. Prior to his death in 2009, Ralph left clear statements in his will that he did not want Lisa to have the right of survivorship; he wanted the proceeds of the account to

go to his trust so it could benefit all three of his daughters. After his death, Lisa refused to relinquish the funds, and both she and respondent Stephanie Placencia, another of Ralph's daughters, both of whom were cotrustees of Ralph's trust, filed petitions in the probate court in their capacity as trustees to determine the parties' respective rights. The court determined that Ralph's intent should prevail and ordered Lisa to account for the funds to the trust. Lisa appealed.

This appeal turns on a close reading of Probate Code sections 5302 and 5303, part of the California Multiple-Party Accounts Law (Prob. Code, § 5100 et seq.; CAMPAL), which governs rights of survivorship in joint accounts. Section 5302, subdivision (a), provides that a joint account entails a right of survivorship "unless there is clear and convincing evidence of a different intent." The commentary to that section makes clear that "the intention to negate survivorship may be shown to have existed after the time of creation of the account." (Cal. Law Revision Com. com., 53 West's Ann. Prob. Code (2009 ed.) foll. § 5302, p. 61, italics added.) On the other hand, section 5303 provides that "rights of survivorship are determined by the form of the account at the death of a party." (Id., subd. (a), italics added.) "Once established, the terms of a multi-party account" including joint tenancies, "can be changed only by one of the following methods" (id., subd. (b), italics added), which generally require a party to file paperwork with the financial institution. (id., subd. (b)(2).) This case presents a difficult question: Ralph clearly expressed the intent to negate survivorship, but the form of the account included a right of survivorship, and Ralph did not employ one of the methods listed in section 5303 to change the terms of the account.

We harmonize the two statutes by recognizing the explicit distinction drawn in CAMPAL between the actual ownership of the beneficial interests in *734 the account, and the express terms of the account. The distinction allows the court to honor the clear intent of the person who established the account while at the same time offering protection to the financial institution which holds the depository account.

The express *terms* of the account bear particular importance for the financial institution that holds the account: CAMPAL contains a safe harbor that immunizes a financial institution for payments it makes in compliance with the express terms of the account. Nonetheless, CAMPAL recognizes that the beneficial interests in the **732 funds may differ from its express terms. Section 5302 concerns the rules to determine the beneficial interests in the account; section 5303 concerns the express terms of the account. Thus, we hold that the financial institution was correct to pay the funds to Lisa pursuant to the express terms of the account, but the beneficial owner of those funds was Ralph at the time of his death, and thus the funds became part of his estate.

We also conclude the court properly relied on Ralph's will as evidence of his intent, notwithstanding section 5302, subdivision (e), which provides that a right of survivorship "cannot be changed by will." That provision merely preserves the nonprobate quality of survivorship rights. The court may still look to the will as an expression of intent to negate survivorship.

However, we reverse on two issues. First, the funds in the bank account were part of Ralph's estate, to be distributed pursuant to his will, which has not been subject to a probate proceeding. It was error for the court to award those funds directly to the trust in the absence of a probate proceeding. Second, in light of that reversal, we remand for the trial court to reassess Stephanie's attorney fees.

FACTS

In 1985, Ralph opened what the parties refer to as the Franklin Fund account with an initial deposit of \$140,000. Lisa was listed as a co-owner. Lisa's counsel states the paperwork submitted to open the account specifies that it is a joint account with right of survivorship, though the copy in the record is almost entirely illegible. Regardless, Stephanie stipulated that the account was opened as a joint tenancy with right of survivorship. Moreover, an account statement from 2009 addressed to Ralph and Lisa bore the acronym "JT WROS," which appears to stand for joint tenants with right of survivorship.

Lisa, who was 23 years old at the time, had no involvement in opening the fund. Ralph told Lisa that he put her on the Franklin Fund, but never had any other discussion with her about it. Lisa never deposited money into the account, all of which, to Lisa's

knowledge, came from Ralph. Lisa never *735 withdrew money from the account during Ralph's lifetime. The account paid dividends, which Ralph took during his lifetime.

Ralph passed away in December 2009. In the months leading up to his death, Ralph had a number of conversations with Henry Rivera, his brother-in-law, which resulted in Henry assisting Ralph to prepare a will and trust, which Ralph executed approximately 11 days before his death. His will left specific directions as to the Franklin Fund account: "Remove Lisa Strazicich as sole beneficiary of my Franklin Fund. I want the beneficiaries to be Lisa Strazicich, Stephanie A. Placencia and Tina R. Placencia, my three daughters. [¶] I want the Franklin Fund to be placed into my trust fund and then be used to pay off the mortgage of my home in Huntington Beach, CA." Henry confirmed that Ralph specifically made these requests in their conversations.

The trust specified that the res would be distributed evenly between Ralph's three daughters, Lisa, Stephanie, and Tina. It specifically disinherited his two sons (one of whom passed away). The trust named Lisa and Stephanie as successor cotrustees after Ralph's death but specified that most important decisions would need Tina's consent as well. At the time of Ralph's death, the trust contained three properties located in California: a residence in Huntington Beach, raw land in Brea, and a residence in Long Beach. Collectively they were valued at approximately \$2,215,000.

**733 In January 2010, about a month after Ralph passed away, Lisa transferred the assets of the Franklin Fund account to an account in her name.

In March 2010, Mark Zavala, one of Ralph's sons, filed a petition seeking to invalidate the trust. Ultimately that petition was denied and the validity of the trust confirmed.

Meanwhile, the sisters' relationship grew contentious; they could not reach a consensus on the proper disposition of the trust assets. Lisa was performing most of the work administering the trust. Stephanie testified that she had not performed any role as trustee for the first four years after her father passed away. However, she was consulting with Lisa and Tina on major decisions related to the trust.

In September 2014, Stephanie filed the first of the underlying petitions in her capacity as cotrustee of the trust. She sought an accounting, damages for breach of fiduciary duty, and to remove Lisa as trustee. In December 2014, Lisa filed a petition in her capacity as cotrustee, seeking, among other things, to remove Stephanie as cotrustee, to recover various costs and fees associated with her work administering the trust, and declaratory relief as to the status of the Franklin Fund account. By the time the petitions were filed, most of the *736 property in the trust had been sold and the funds distributed. Only the Long Beach residence and a small bank account were still held in trust.

The court ultimately trifurcated the trial into three phases. The first phase concerned most of the issues on the merits, including the Franklin Fund issue. The second phase dealt with requests for trustee fees, attorney fees, and other litigation costs. The third phase concerned an accounting of the Franklin Fund account.

In the first phase the court concluded Ralph's will, as confirmed by Henry's conversations with Ralph, amounted to clear and convincing evidence that Ralph intended to revoke Lisa's right of survivorship in the Franklin Fund account at the time of his death. Consequently, the court ordered Lisa to account for the proceeds of the Franklin Fund account, with Lisa's share in the trust to be reduced by the amount she owes the trust from the Franklin Fund account.

Also in the first phase, the court rejected several of Stephanie's claims for relief, including: her request to remove Lisa as trustee, her claim that Lisa breached her fiduciary duty by failing to rent the Long Beach residence, her claim for double damages under section 859 for Lisa's refusal to turn over the Franklin Fund account, and her claim that Lisa violated other fiduciary duties.

As to Lisa's other claims, the court granted her request to sell the Long Beach property and distribute the proceeds, granted her request to remove Stephanie as trustee, and rejected her claim of malfeasance against Stephanie.

In the second phase, the court first concluded that Stephanie was entitled to attorney fees. In reaching that conclusion, the court found that Stephanie was acting on behalf of the trust as a trustee, that she prevailed on the Franklin Fund issue, and that the fees she incurred were expended for the benefit of the trust. After reducing what the court found to be excessive hours spent, the court awarded Stephanie \$138,580 in fees, and \$19,236.46 in costs.

Lisa also sought attorney fees, which the court granted in part and denied in part. The court denied Lisa fees to the extent they were incurred in connection with the Franklin Fund issue, but granted her fees in connection with her successful efforts to remove Stephanie as trustee and to sell **734 the Long Beach property. This resulted in a fee award of \$95,284 to Lisa, which she does not challenge on appeal.

However, Lisa does challenge the amount of trustee fees the court awarded her. The court awarded her \$38,850 for the period of 2009-2017. We discuss the court's ruling in more detail below.

*737 In the third phase, the accounting of the Franklin Fund account, the court found Lisa held a total of \$221,006.44 traceable to the Franklin Fund. Lisa appealed from the final judgment that incorporated the court's rulings from all three phases.

DISCUSSION

The Franklin Fund Account Does Not Belong to Lisa

Lisa first contends the court erred by denying her right of survivorship to the Franklin Fund account. We disagree. In reaching the conclusion that Lisa is not entitled to the funds, we address two aspects of the statutory scheme that, at first blush, seem to support Lisa's position: section 5303 's restrictions on the methods of altering the terms of a multi-party account, and section 5302, subdivision (e) 's restriction on the use of a will to change a right of survivorship.

Sections 5302 and 5303

CAMPAL provides a roadmap for joint accounts, and rights of survivorship in particular. Section 5302, subdivision (a) provides, "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent *unless there is clear and convincing evidence of a different intent.*" (Italics added.) "This section is the same in substance as Section 6-104 of the Uniform Probate Code (1987), except that section 5302 omits the UPC requirement that the intent that there be no rights of survivorship exist *at the time the account is created.*" (Cal. Law Revision Com. com., 53 Wests Ann. Prob. Code, *supra*, foll. § 5302, p. 61, italics added.) Section 5302 omits the italicized language. The commentary to section 5302 draws the logical conclusion that, "under Section 5302, the intention to negate survivorship may be shown to have existed after the time of the creation of the account." (Cal. Law Revision Com. com., 53 Wests Ann. Prob. Code, *supra*, foll. § 5302, p. 61.)

Section 5303, on the other hand, contains the following restrictions: "The provisions of Section 5302 as to rights of survivorship are determined by the form of the account at the death of a party." (Id., subd. (a).) "Once established, the terms of a multiple-party account can be changed only by any of the following methods: [\P] (1) Closing the account and reopening it under different terms. [\P] (2) Presenting to the financial institution a modification agreement that is signed by all parties with a present right of withdrawal. If the financial institution has a form for this purpose, it may require use of the form. [\P] (3) If the provisions of the terms of the account or deposit agreement provide a method of modification of the terms of the account, *738 complying with those provisions. [\P] (4) As provided in subdivision (c) of Section 5405 [payment by the financial institution in accordance with written instructions from a party]." (Id., subd. (b) (1)-(4), italics added.) Section 5303, subdivision (c) further provides that withdrawal of funds from the account eliminates rights of survivorship as to the funds withdrawn.

The question we confront is: What happens when the form of the account includes a right of survivorship, which was not altered by any of the methods listed in section 5303, but the decedent expressed an intent to negate survivorship before passing? The key to harmonizing these **735 statutes lies in the distinction between the express *terms* of the account and the *beneficial interests* in the account.

This distinction is explicitly set forth in section 5201, which provides, "(a) The provisions of Chapter 3 (commencing with Section 5301) concerning *beneficial ownership as between parties* ... are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the *terms* of account contracts. [¶] (b) The provisions of Chapter 4 (commencing with Section 5401) govern the liability of financial institutions who make payments pursuant to that chapter." (*Id.*, italics added.) Sections 5405 and 5402, in turn, provide a safe harbor for financial institutions that pay according to the terms of the account, irrespective of any beneficial ownership interests: "Payment made pursuant to Section ... 5402 ... discharges the financial institution from all claims for amounts so paid *whether or not the payment is consistent with the beneficial ownership of the account as between parties.*" (§ 5405, subd. (a), italics added.) Section 5402 provides, "Any sums in a joint account may be paid, on request and *according to its terms*, to any party"

The distinction between the terms of an account and the ownership of beneficial interests is key to interpreting section 5303 because the principal restriction in section 5303 is that "the *terms* of a multiple-party account can be changed only by" utilizing one of the listed methods. (*Id.*, subd. (b), italics added.) Section 5302, by contrast, concerns the beneficial interests as between the parties to the account: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties *as against the estate of the decedent* unless there is clear and convincing evidence of a different intent." (*Id.*, subd. (a), italics added.) Further evidence that section 5302, subdivision (a), concerns beneficial interests appears a few lines down in subdivision (d). Subdivision (a) concerns joint accounts, subdivision (b) *739 concerns pay on death accounts, subdivision (c) concerns Totten trusts, and subdivision (d) contains the following catchall: "In other cases, the death of any party to a multiparty account has no effect on *beneficial ownership* of the account other than to transfer the rights of the decedent as part of the decedent's estate." (Italics added.) The fact that the catchall is explicitly framed in terms of the ownership of beneficial interests.

The answer to the question we posed above, therefore, is this: The financial institution may pay the surviving party according to the terms of the account, but the funds are part of the decedent's estate, and thus the surviving party holds the funds in constructive trust in favor of decedent's heirs and must account for the funds to the administrator of decedent's estate. This result achieves the dual aims of (1) honoring the actual intent of the decedent as to the disposition of his assets, and (2) ensuring the financial institution has an ascertainable, objective basis upon which to pay out the funds in a manner that does not subject it to liability. Here, it was proper for the financial institution to **736 pay out the funds to Lisa, as the terms of the account listed her as having a right of survivorship, but Lisa held the funds in constructive trust in favor of Ralph's heirs.

The court in *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 116 Cal.Rptr.3d 315 (*Araiza*) reached the same result. There, the decedent had established a checking and savings account naming her stepdaughter as the beneficiary of the account (though without any right of withdrawal during the decedent's lifetime). (*Id.* at p. 1123, 116 Cal.Rptr.3d 315.) Four years later, the decedent established a living trust, expressly transferred the savings account into the trust, and provided that the savings account was to go to someone else upon decedent's death. (*Ibid.*) Upon decedent's death, the trial court awarded the account to the trust beneficiary. (*Id.* at pp. 1123-1124, 116 Cal.Rptr.3d 315.) The stepdaughter appealed, contending that the account was hers because the decedent had not changed the terms of the account pursuant to section 5303. (*Araiza*, at p. 1124, 116 Cal.Rptr.3d 315.)

The Court of Appeal treated the account as a Totten Trust, which is governed by essentially the same rules as a joint account. (*Araiza*, *supra*, 188 Cal.App.4th at pp. 1124-1125, 116 Cal.Rptr.3d 315; § 5302, subd. (c).) The court rejected the stepdaughter's argument concerning section 5303, stating, "This narrow reading of the statute, however, fails to harmonize it with section 5302. *740 Section 5302, subdivision (c)(2) provides that sums remaining on deposit in a Totten trust after the death of the sole

trustee belong to the person named as beneficiary, 'unless there is clear and convincing evidence of a different intent' Here, although the signature card for the savings account named [the stepdaughter] as the beneficiary, there is clear and convincing evidence that [the decedent] had a 'different intent' at the time of her death. She established a living trust that expressly stated her intention to give the savings account to [the trust beneficiary]. The trial court properly relied on the living trust to find that [the decedent] intended to change the beneficiary of her Totten trust from [the stepdaughter] to [the trust beneficiary]." (*Araiza*, at pp. 1125-1126, 116 Cal.Rptr.3d 315.)

The result in *Araiza* is consistent with our analysis here. As between the parties to the account, the decedent's intent prevails.⁴

A Will May Furnish Evidence of Intent

But can a will supply evidence of the intent to negate survivorship? Section 5302, subdivision (e), states, "A right of survivorship ... cannot be changed by will." According to Lisa, if a will could furnish evidence of intent, then a will could effectively change a right of survivorship, nullifying this provision. We disagree.

The purpose of section 5302, subdivision (e), is to preserve the nonprobate quality of rights of survivorship, not to create a firewall between a will and a right of survivorship. Section 5304 makes this policy explicit: "Any transfers resulting from the application of Section 5302 are effective by reason of the account contracts involved and this part *and are not to be considered as testamentary*." (Italics added.) The California Law Revision Commission **737 commentary to that section explains the thinking behind this policy: It "avoids the need for a probate proceeding to accomplish a transfer." (Cal. Law Revision Com. com., 53 West's Ann. Prob. Code, *supra*, foll. § 5304, p. 67.) The declaration that a right of survivorship cannot be changed by a will in section 5302, subdivision (e), simply reflects the policy of section 5304. Survivorship rights represent a nonprobate transfer and thus, by definition, are not determined by a will.

But in assessing the decedent's intent, the court should consider all evidence, including evidence of intent expressed in connection with executing *741 a will. To ignore the will would generate artificial results contrary to the decedent's actual intent. This result would be inconsistent with the modern trend toward favoring the decedent's intent over formalities. In Estate of Duke (2015) 61 Cal.4th 871, 190 Cal.Rptr.3d 295, 352 P.3d 863, for example, our high court abolished the longstanding rule that extrinsic evidence is inadmissible to reform an unambiguous will. (Id. at p. 875, 190 Cal.Rptr.3d 295, 352 P.3d 863.) In reaching that result, the court relied on the principle that "the paramount concern in construing a will is to determine the subjective intent of the testator [citations]." (Id. at p. 890, 190 Cal.Rptr.3d 295, 352 P.3d 863.) Courts have expressed similar sentiments in the context of trusts. (See Morgan v. Superior Court (2018) 23 Cal.App.5th 1026, 1039, 233 Cal.Rptr.3d 647 [describing the testator's intent as "the all controlling factor"].) Here, too, our ultimate aim is to ascertain the Ralph's subjective intent as to the disposition of his assets. To that end, it would be counterproductive to blindfold the trial court to expressions of intent found in a will.

Although case law on this issue is sparse, we find support for our conclusion in *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 26 Cal.Rptr.3d 143 (*Gardenhire*), which addressed an analogous situation. There, the issue was whether a will could revoke a trust notwithstanding section 15401, subdivision (a)(2), which provides that a revocable trust may be revoked "[b]y a writing (*other than a will*) signed by the settlor and delivered to the trustee" (*Gardenhire*, at p. 887, 26 Cal.Rptr.3d 143, italics added.) The trust permitted revocation "by written notice signed by the Trustor and delivered to the Trustee." (*Id.* at p. 886, 26 Cal.Rptr.3d 143.)

The *Gardenhire* court held that, although a will could not revoke the trust as a testamentary act, it could, nevertheless, fulfill the more mundane role of providing written notice. The court's colorful analysis is worth quoting in full: "[A]lthough the dispositional provisions of a will remain inoperative until the trustor's death, it does not necessarily follow that the will cannot separately and effectively have a present and immediate effect upon delivery, such as notice of intent to revoke. For example, suppose a person writes a will and in it states that he loathes his brother and bequeaths to him a bag of garbage. He then gives the will to his brother. Although the bequest is legally inoperative, the will nevertheless immediately and effectively communicates

the person's feelings to his brother. We perceive no logical reason why a will similarly cannot provide immediate and present notice of a trustor's intent to revoke a trust. Indeed, where a trustor unambiguously manifests an intent to revoke, amend, or alter a trust in a will, and where the trustor delivers it to the trustee, who reads it, we believe the trustor's intent must control and be given effect." (*Id.* at p. 891, 26 Cal.Rptr.3d 143.)

*742 Likewise here, while a will cannot change a right of survivorship as a testamentary act, it may, nonetheless, provide **738 evidence of the account holder's intent during his lifetime.

Given the evidence of Ralph's will, it is beyond dispute that, during his life, he intended to negate Lisa's right of survivorship. And it does not matter that Ralph intended to set up a joint account with right of survivorship when the account was created. As we discussed above, section 5302 was specifically crafted to allow a party's intent *after* account creation to negate a right of survivorship. Ralph's intent, expressed through his will, did so here.

The Franklin Fund Account is Subject to a Probate Proceeding

Having negated Lisa's right of survivorship, the question then becomes: What happens to Ralph's interest in the account? The court essentially ordered Lisa to transfer funds directly to the trust. That disposition of the account funds, however, is principally found in Ralph's will, which was never admitted to probate. And in a multi-party account with no right of survivorship, "the death of any party to a multiparty account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate." (§ 5302, subd. (d).) As the commentary to section 5302 explains, "The rule stated in subdivision (d) applies to an account where there is clear and convincing evidence of an intent not to have a right of survivorship" (Cal. Law Revision Com. com., 53 West's Ann. Prob. Code, *supra*, foll. § 5302, p. 62.) Arguably, therefore, upon Ralph's death, his interest in the Franklin Fund account became part of his personal estate, which would need to be probated.⁵

Given this possibility, we invited the parties to provide supplemental letter briefs on the following question: "Assuming for purposes of your analysis that the court correctly determined that the will provided clear and convincing evidence that the decedent intended to revoke Lisa M. Strazicich's right of survivorship in the Franklin Fund account: Did the court err in ordering *743 distribution of the account directly to the trust, instead of through a probate of the decedent's estate, to be thereafter distributed either by will or by intestacy? (See Prob. Code, § 5302(d), subd. (d).)" Lisa and Stephanie both submitted letter briefs. Lisa contends that if the funds are not to go to her by way of survivorship, then probate is the only other possibility.

Stephanie, however, contends that Ralph's oral statements and written intent in his will operated to transfer ownership of the Franklin Fund account to his trust prior to his death. Her argument begins with the language of the trust, which allows property to be added without the need for a writing: "Additional property may be added to the trust estate at any time by the Trustor ... by inter vivos or **739 testamentary transfer. Such additions and title to any property so added may be, *but need not be*, evidenced by ... writings transferring the property to the Trustee." (Italics added.) Moreover, by statute, oral trusts are permitted, provided the oral trust is corroborated and proven by clear and convincing evidence: "(a) The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence. [¶] (b) The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property." (§ 15207, subds. (a), (b).) The California Law Revision Commission commentary to section 15207 states: "Under subdivision (b), a delivery of personal property to another person accompanied by an oral declaration by the transferor that the transferee holds it in trust for a beneficiary creates a valid oral trust. Constructive delivery, such as by earmarking property or recording it in the name of the transferee, is also sufficient to comply with subdivision (b)." (Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (1991 ed.) foll. § 15207, p. 542.)

The problem is, Ralph never did any of that. Indeed, there is not even a mention of an oral trust in our record, or an oral transfer to the trustee, much less corroborating evidence such as physical delivery or earmarking. Instead, *in a will*, in a section entitled "I hereby make the following specific *bequests*" (italics added), Ralph simply bequeathed the funds to his trust. ⁶ In the absence

of any transfer to Ralph's trust prior to his death, the Franklin Fund became part of Ralph's estate (§ 5302, subd. (d)) and is, therefore, subject to probate administration (§ 7001).

And there may well be live issues in any probate proceeding. We note that Lisa's petition originally contained a cause of action to invalidate the will, which she abandoned before trial, but which raises the specter of a will contest. Also, one of Ralph's sons was disinherited, so he clearly has an *744 incentive to invalidate the will. Accordingly, it would be premature for the court to distribute Ralph's personal estate at this time. (See Estate of Hart (1957) 151 Cal.App.2d 271, 280-281, 311 P.2d 605 [where title vests subject to the administration of the estate, the right to possession is deferred until the distribution of the estate and is contingent upon the will not being set aside by a contest after probate].) In doing so, the court erred.

Fees and Costs

Lisa assigns two errors concerning fees and costs: that she was entitled to more trustee fees than the court awarded, and that Stephanie was not entitled to attorney fees paid by the trust.

Trustee Fees

Section 15680 provides that where, as here, the trust provides for a trustee's compensation, "the trustee is entitled to be compensated in accordance with the trust instrument." (*Id.*, subd. (a).) And where, as here, "the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances." (§ 15681.) "'Allowance of compensation rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in absence of a manifest showing of abuse.' "(*Estate of Gump* (1991) 1 Cal.App.4th 582, 597, 2 Cal.Rptr.2d 269.)

**740 Lisa sought trustee fees of \$186,900, which was calculated as 1,068 hours spent between 2010 and 2017 at a rate of \$175 per hour. The court determined her reasonable rate was \$75 per hour, that the amount of hours she claimed was excessive, and that her time sheets were too vague to demonstrate how the time she invested benefited the trust. In its statement of decision, the court awarded Lisa \$40,893.75 "for the period of 2009 to 2017." For reasons that are not clear in the record, in the final judgment the court reduced that amount to \$38,850.

Lisa contends the court abused its discretion by awarding her zero fees from 2015 to 2017. The court never explicitly denied her fees for the period of 2015 to 2017, but she infers the court did so by noting that she claimed exactly \$40,893.75 for the time period of December 2009 through November 2014. And since that is the exact number the court awarded (initially), the court must have only been compensating Lisa through November 2014.

But that is not what the court's statement of decision says. It says the court awarded \$40,893.75 "for the period of 2009 to 2017." We will not infer from the amount the court chose that it was awarding fees for a period less than *745 what it said. We draw all presumptions in favor of the court's ruling, not against it. The court apparently believed that the amount Lisa claimed for a lesser period was a reasonable amount for the entire period. Lisa has not challenged that ruling as an abuse of discretion.

Stephanie's Attorney Fees

In awarding Stephanie her fees, the court first rendered three predicate findings: that Stephanie was acting in her capacity as trustee, that Stephanie prevailed on the Franklin Fund claim (and no other), and that the fees pursuing the Franklin Fund issue were expended for the benefit of the trust. Lisa challenges all three predicates.

Rather than resolve this issue, we deem it prudent to remand the matter to the trial court for another hearing on Stephanie's attorney fees. Her prevailing on the Franklin Fund issue was an essential predicate for awarding her fees. At the time the court made that order, Stephanie had clearly prevailed: the trust was being enriched by over \$200,000. Our ruling here, however, potentially undermines that conclusion. It is less clear that the trust will ultimately get that amount. On the other hand, Stephanie was correct in asserting that Lisa did not have a right of survivorship. In view of these circumstances, the court should have

an opportunity to exercise its discretion in the first instance as to whether, and in what amount, Stephanie is entitled to fees. We express no opinion on the matter.

DISPOSITION

The judgment is reversed as to the ownership of the Franklin Fund account (item 1 of the Final Judgment and Order on Petitions), and the court is instructed to enter a new order declaring that the account became part of Ralph's personal estate at the time of his death, and thus Lisa holds the funds in constructive trust in favor of Ralph's heirs, which are to be determined in a probate proceeding. The judgment is also reversed as to Stephanie's attorney fees (item 4 of the Final Judgment and Order on Petitions). The matter is remanded on those issues for further proceedings consistent with this opinion. In all other respects, the judgment is affirmed. Stephanie shall recover costs incurred on appeal.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

All Citations

42 Cal.App.5th 730, 255 Cal.Rptr.3d 729, 19 Cal. Daily Op. Serv. 11,366, 2019 Daily Journal D.A.R. 11,122

Footnotes

- 1 For purposes of clarity, we use first names because some of the individuals involved share the same last name. No disrespect is intended.
- 2 All statutory references are to the Probate Code.
- 3 "The term Totten trust describes a bank account opened by a depositor in his own name as trustee for another person where the depositor reserves the power to withdraw the funds during his lifetime. If the depositor has not revoked the trust then, upon his death, any balance left in the account is payable to the beneficiary." (*Estate of Fisher* (1988) 198 Cal.App.3d 418, 424, 244 Cal.Rptr. 5.) A Totten trust is a type of multi-party account governed by CAMPAL. (§ 5132.)
- In allowing rights of survivorship to be negated after the creation of the account, our Legislature chose to treat rights of survivorship in much the same way Totten trusts traditionally operated, which could "'be revoked by the depositor at any time during his lifetime, by a manifestation of his intention to revoke the trust. No particular formalities are necessary to manifest such an intention.'" (*Brucks v. Home Federal S. & L. Assn.* (1951) 36 Cal.2d 845, 851, 228 P.2d 545.)
- Ralph's interest consisted of the entire account because all of the money in the account came from him during his lifetime. Probate Code section 5301, subdivision (a) provides, "An account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each, unless there is clear and convincing evidence of a different intent." The California Law Revision Commission commentary explains this is a change from the usual joint tenancy laws: "The presumption under subdivision (a) that an account belongs to the parties during their lifetimes in proportion to the net contributions by each changed the rule under former law. Under former law, if the joint account provided for rights of survivorship, the account was presumed to be a joint tenancy and each joint tenant was presumed to have an equal interest in the account." (Cal. Law Revision Com. com., 53 West's Prob. Code, supra, foll. § 5301, p. 58.) There is nothing in the record that evidences an intent contrary to the rule that, during Ralph's lifetime, ownership was determined by net contribution.
- There is some ambiguity as to whether the funds were bequeathed directly to the daughters or to the trust. We express no opinion on the matter. The parties are free to litigate that issue in any future proceeding.

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WELLS FARGO BANK, N.A., Petitioner,

V.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; VICKIE BOLTWOOD et al., Real Parties in Interest. O'MELVENY & MYERS LLP, Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; VICKIE BOLTWOOD et al., Real Parties in Interest.

> No. So57324. Supreme Court of California Jan. 13, 2000.

SUMMARY

A bank, which was the trustee of a trust, petitioned the trial court to settle its accounts and to approve its resignation as cotrustee. Some of the trust beneficiaries alleged trustee misconduct by the bank and sought production of documents related to the trust. The bank asserted the attorney-client privilege as to documents reflecting confidential communications with its attorneys about the beneficiaries' claims of misconduct. The bank's counsel claimed the protection of the work product doctrine for other documents. The beneficiaries moved to compel production of the withheld documents, and the trial court granted the motion. (Superior Court of Los Angeles County, No. BP18213, Robert M. Letteau, Judge.) The Court of Appeal, Second Dist., Div. Four, Nos. B102332 and B102399, granted the petitions of the bank and counsel for a writ of mandate, vacating the trial court's order compelling production of documents subject to the attorney-client privilege and directing the trial court to examine in camera the documents for which counsel had claimed the protection of the work product doctrine.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that the bank properly asserted the attorney-client privilege against the beneficiaries as to documents reflecting confidential communications with its attorneys about the beneficiaries' claims of misconduct and as to any undisclosed documents reflecting confidential communications with attorneys on the subject of trust administration. The bank's duty to disclose information to the beneficiaries did not take precedence over the attorney-client privilege. Further, although the bank had already disclosed to the beneficiaries some confidential communications with attorneys on the subject of trust administration, it had no obligation to do so, and the bank's disclosure of these privileged communications did not waive its privilege as *202 to the remaining undisclosed communications. The court also held that, under the work product doctrine, the beneficiaries were not entitled to discovery of counsel's work product that was not communicated to the bank. As to work product documents communicated to the bank, the trial court was required to hold an in camera review to determine whether they were protected from disclosure. (Opinion by Werdegar, J., with George, C. J., Kennard, Chin, Brown, JJ., and Haerle, J., *concurring. Concurring and dissenting opinion by Mosk, J. (see p. 215).)

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HEADNOTES

(1a, 1b, 1c)

Discovery and Depositions § 34.2--Protections Against Improper Discovery--Attorney-client Privilege--Communications Between Trustee and Counsel Regarding Claims of Trustee Misconduct and Subject of Trust Administration--Duty to Disclose. In an action against a bank, which acted as trustee of a trust, brought by some of the trust beneficiaries alleging trustee misconduct, the bank properly asserted the attorney-client privilege against the beneficiaries as to documents reflecting confidential communications with its attorneys about the beneficiaries' claims of misconduct and as to any undisclosed documents reflecting confidential communications with attorneys on the subject of trust administration, even though the bank had produced some documents reflecting confidential communications with its attorneys on the subject of trust administration. There is no authority for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter. In this case, the bank's duty to disclose information to the beneficiaries did not take precedence over the attorney-client privilege. Further, although the bank had already disclosed to the beneficiaries confidential communications with attorneys, it had no obligation to do so, and the bank's disclosure under a good-faith mistake of law did not waive its privilege as to the remaining undisclosed communications.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1107 et seq.]

(2)

Evidence § 1--Statutory Privileges--Power of Courts.

The privileges set out in the Evidence Code are legislative creations. The courts have no power to expand them or to recognize implied exceptions. *203

(3)

Attorneys at Law § 10--Attorney-client Relationship--Attorney for Trustee.

The attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee.

(4)

Discovery and Depositions § 34.2--Protections Against Improper Discovery--Attorney-client Privilege--Scope of Privilege. Knowledge that is not otherwise privileged does not become so merely by being communicated to an attorney. A client may be examined on deposition or at trial as to facts of the case, whether or not he or she has communicated them to his or her attorney. Moreover, the forwarding to counsel of nonprivileged records, in the guise of reports, will not create a privilege with respect to such records and their contents where none existed before.

(5)

Estoppel and Waiver § 18--Waiver--Definition.

A waiver is the intentional relinquishment of a known right.

(6)

Estoppel and Waiver § 18--Waiver--Honest Mistake of Law--As Precluding Finding of Waiver.

An honest mistake of law, where the law is unsettled and debatable, both militates against a finding of waiver and offers a possible basis for relief from actions taken in connection with pretrial discovery.

(7)

Discovery and Depositions § 34.2--Protections Against Improper Discovery--Attorney-client Privilege--Ownership of Privilege--Payment of Fees.

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Payment of fees to an attorney does not determine ownership of the attorney-client privilege. The privilege belongs to the client. To the extent the source of a payment has any significance, it is but one factor in determining the existence of an attorney-client relationship and, thus, who holds the privilege.

(8a, 8b)

Discovery and Depositions § 35--Protections Against Improper Discovery--Privileges--Work Product Rule--Trusts--Communications Between Trustee and Counsel Regarding Claims of Trustee Misconduct--In Camera Review.

In litigation brought by certain trust beneficiaries alleging trustee misconduct by a bank, which acted as trustee, the bank's outside trust administration counsel properly claimed the protection of the work product doctrine for certain documents under the work product doctrine, which excludes from discovery any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories. The beneficiaries were not entitled to discovery of counsel's work product that was not communicated to the bank. As to work product documents communicated to the *204 bank, the trial court was required to hold an in camera review to determine whether they were communicated in confidence so as to be protected from disclosure.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1145 et seq.]

(9)

Discovery and Depositions § 35--Protections Against Improper Discovery--Privileges--Work Product Rule--Scope--Exception. Under the work product doctrine, codified in Code Civ. Proc., § 2018, any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable. The sole exception to the literal wording of the statute is under the waiver doctrine, which applies to the work product rule as well as the attorney-client privilege. The attorney's absolute work product protection, however, continues as to the contents of a writing delivered to a client in confidence. This is because the client has an interest in the confidentiality of the work product. So, too, do other attorneys representing that client. The work product doctrine precludes third parties not representing the client from discovery of protected writings.

COUNSEL

White & Case, John A. Sturgeon, James R. Cairns and Carole C. Peterson for Petitioner Wells Fargo Bank, N.A.

O'Melveny & Myers, Robert M. Schwartz, Craig A. Corman, Nancy E. Sussman, Richard D. Beller and Russell G. Allen for Petitioner O'Melveny & Myers.

Christopher Chenoweth; Steefel, Levitt & Weiss, Stephen S. Mayne, Lisa M. Carvalho and Mark Fogelman for California Bankers Association as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Goldstein & Phillips, Goldstein & Musto, Alvin H. Goldstein, Jr., Mark L. Musto and Kelly J. Snowden for Real Parties in Interest.

WERDEGAR, J.

In this action for an accounting, the beneficiaries of a private express trust seek to compel the trustee to disclose its privileged *205 communications with attorneys. We conclude the trustee may assert the attorney-client privilege against the beneficiaries.

I. Facts and Procedural History

William A. Couch established the Couch Living Trust in October 1991. He served as the sole trustee until his death in March 1992. At that time, William's surviving spouse, Rosa Couch, and petitioner Wells Fargo Bank, N.A. (Wells Fargo) became cotrustees pursuant to the trust instrument. The beneficiaries of the trust are William's spouse, children and grandchildren. William's daughter, Vickie Boltwood, and her children (collectively the Boltwoods) are the real parties in interest.

In November 1994, the Boltwoods accused the trustees of a variety of misconduct. The Boltwoods' claims center around allegations that the trustees distributed less money to the Boltwoods than they requested, and that the trustees, over the Boltwoods' objection, decided not to sell certain real property in Anaheim. The Boltwoods also allege that Rosa Couch, shortly

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after her husband's death, removed money and jewelry from a safe deposit box. The other beneficiaries have not joined in the Boltwoods' claims.

In December 1994, Wells Fargo commenced this action by petitioning the probate court to settle its accounts and to approve its resignation as cotrustee. The Boltwoods filed objections to Wells Fargo's accounts and petitioned for removal of Rosa Couch as cotrustee, and for surcharge and damages.

In the course of the litigation, the Boltwoods requested that Wells Fargo produce documents related to the trust. Wells Fargo produced documents reflecting confidential communications with its attorneys on the subject of trust administration. Wells Fargo asserted the attorney-client privilege, however, as to documents reflecting communications with its attorneys about the Boltwoods' claims of misconduct. Wells Fargo's outside trust administration counsel, O'Melveny & Myers (O'Melveny), claimed the protection of the work product doctrine for other documents. For the documents not produced, Wells Fargo and O'Melveny provided a privilege log setting out for each document the privilege asserted and the document's sequential number, general nature, date, author and recipients. According to the log, the documents not produced include communications between Wells Fargo's employees and its attorneys, either in-house or at O'Melveny, and work product of O'Melveny.

The Boltwoods moved to compel production. The superior court granted the motion and ordered Wells Fargo to produce the remaining documents *206 within 30 days. The court did not announce findings of fact or conclusions of law, either orally or in writing. Wells Fargo petitioned the Court of Appeal for a writ of mandate or prohibition and sought a stay of the superior court's order. O'Melveny also sought a stay and extraordinary relief. The Court of Appeal considered the petitions together and granted relief. Specifically, the court vacated the superior court's order compelling production of documents subject to the attorney-client privilege and directed the superior court to examine in camera the documents as to which O'Melveny had claimed the protection of the work product doctrine.

We granted the Boltwoods' petition for review and held the case for *Moeller v. Superior Court* (1997) 16 Cal.4th 1124 [69 Cal.Rptr.2d 317, 947 P.2d 279] (*Moeller*). We now affirm.

II. Discussion

A. The Attorney-client Privilege

(1a) Wells Fargo has already produced to the Boltwoods documents reflecting privileged communications with attorneys on the subject of trust administration. The Boltwoods contend that Wells Fargo must produce additional privileged documents of that type, as well as privileged documents concerning the Boltwoods' claims of misconduct. As will appear, there is no authority in California law for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter.

The Boltwoods contend Wells Fargo must produce privileged communications to fulfill its statutory and common law duties as a trustee to report to the beneficiaries about the trust and its administration. (See Prob. Code, §§ 16060, 16061; *Strauss v. Superior Court* (1950) 36 Cal.2d 396, 401 [224 P.2d 726]; *Union Trust Co. v. Superior Court* (1938) 11 Cal.2d 449, 460-462 [81 P.2d 150, 118 A.L.R. 259].) Wells Fargo's duties as a trustee, the Boltwoods argue, take precedence over its privilege as the client of an attorney. (Evid. Code, § 954.) The argument lacks merit. (2) The privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [20 Cal.Rptr.2d 330, 853 P.2d 496]; see also *Moeller*, *supra*, 16 Cal.4th at p. 1129.) The Boltwoods' argument is nothing more than a plea for an implied exception.

If the relevant sections of the Probate Code imposed duties a trustee literally could not perform without disclosing privileged communications, *207 one might have reason to ask whether the Legislature had, in fact, created an exception to the attorney-client privilege. But the relevant statutes cannot fairly be read to require disclosure of privileged communications. Probate Code section 16060 provides simply that "[t]he trustee has a duty to keep the beneficiaries of the trust *reasonably informed* of the

trust and its administration." (Italics added.) Probate Code section 16061 in pertinent part says only that, "[e]xcept as provided in Section 16064, on reasonable request by a beneficiary, the trustee shall provide the beneficiary with *a report of information* about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust" (Italics added.) Certainly a trustee can keep beneficiaries "reasonably informed" (*id.*, § 16060) and provide "a report of information" (*id.*, § 16061) without necessarily having to disclose privileged communications. The attorney-client privilege is commonly regarded as "fundamental to ... the proper functioning of our judicial system" (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 611 [208 Cal.Rptr. 886, 691 P.2d 642]) and thought to "promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389 [101 S.Ct. 677, 682, 66 L.Ed.2d 584]). If the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork in the interstices of the Probate Code.

Nor does the Boltwoods' argument for limiting the attorney-client privilege find support in *Strauss v. Superior Court*, *supra*, 36 Cal.2d 396. In that decision, we acknowledged the trustee's common law duty to report to beneficiaries, a duty later codified in Probate Code sections 16060 and 16061. More specifically, we held that "[a] trustee has the duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the administration of the trust" (*Strauss v. Superior Court*, *supra*, at p. 401) and that "the trustee's records as to the administration of the trust are deemed a part of the trust estate, and the right of the beneficiaries to an inspection of them stems from their common interest in the property along with the trustee" (*id.* at p. 402). Our earlier decision in *Union Trust Co. v. Superior Court*, *supra*, 11 Cal.2d at pages 460-462, is to the same effect. In neither *Strauss* nor *Union Trust Co.*, however, did we address any question concerning the attorney-client privilege. To attempt to use those decisions as the foundation for an implied *208 exception to the attorney-client privilege would, moreover, be inconsistent with the rule that we have no power to create such exceptions. (See *Roberts v. City of Palmdale*, *supra*, 5 Cal.4th at p. 373.)

In most of the other jurisdictions in which this question has arisen, courts have given the trustee's reporting duties precedence over the attorney-client privilege. (See, e.g., *Hoopes v. Carota* (1988) 142 A.D. 906 [531 N.Y.S.2d 407, 409], affd. (1989) 74 N.Y.2d 716 [544 N.Y.S.2d 808, 543 N.E.2d 73]; *Riggs Nat. Bank of Washington, D. C. v. Zimmer* (Del.Ch. 1976) 355 A.2d 709, 712-714; *United States v. Evans* (9th Cir. 1986) 796 F.2d 264, 265-266; *Washington-Baltimore, etc. v. Washington Star Co.* (D.D.C. 1982) 543 F.Supp. 906, 908-909.) But those courts consider themselves free, in a way we do not, to create exceptions to the privilege. New York's attorney-client privilege, while statutory, is "not absolute." (*Hoopes v. Carota, supra*, 531 N.Y.S.2d at p. 409.) Instead, the courts of that state consider the privilege an "1" obstacle" to the truth-finding process' "that may "yield to a strong public policy requiring disclosure" (*Ibid.*) The law in Delaware evolved at a time when that state recognized the attorney-client privilege solely as a matter of common law. As such, Delaware courts have considered the privilege to be "an exception to the usual rules requiring full disclosure" and have held that "its scope can be limited where circumstances so justify." (*Riggs Nat. Bank of Washington, D. C. v. Zimmer, supra*, 355 A.2d at p. 713.) The federal courts, interpreting their own common law attorney-client privilege (see generally *Upjohn Co. v. United States, supra*, 449 U.S. at p. 389 [101 S.Ct. at p. 682]; *Hunt v. Blackburn* (1888) 128 U.S. 464, 470 [9 S.Ct. 125, 127, 32 L.Ed. 488]), have largely followed *Riggs*. (E.g., *U.S. v. Mett* (9th Cir. 1999) 178 F.3d 1058, 1062-1064; *United States v. Evans, supra*, 796 F.2d at pp. 265-266; *Washington-Baltimore, etc. v. Washington Star Co., supra*, 543 F.Supp. at pp. 908-909.)

Typical of the federal decisions is *U.S. v. Mett, supra*, 178 F.3d 1058. In *Mett*, the Ninth Circuit held that a trustee can invoke the federal common law attorney-client privilege against beneficiaries when the trustee "retains counsel in order to defend herself against the ... beneficiaries," but not when the "trustee seeks an attorney's advice on a matter of [trust] administration and where the advice clearly does not implicate the trustee in any personal capacity" (*Id.* at p. 1064.) Neither of the two reasons the court gave for this conclusion has any validity under California law. (3) The court's suggestion that the trustee "is not the real client" (*id.* at p. 1063) of the attorney retained by the trustee directly contradicts California law, under which "[t]he attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee." (*209 Fletcher v. Superior Court (1996) 44 Cal.App.4th 773, 777 [52 Cal.Rptr.2d 65]; accord, *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 282 [218 Cal.Rptr. 205]; cf. *Moeller, supra*, 16 Cal.4th at p.

1130.) Nor, under California law, could a "fiduciary exception [to the attorney-client privilege] ... be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle." (*U.S. v. Mett, supra*, at p. 1063.) What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification. (*Roberts v. City of Palmdale, supra*, 5 Cal.4th at p. 373.) Furthermore, under California law, the attorney-client privilege "applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened." (*Id.* at p. 371.)

The Boltwoods argue that our recent decision in *Moeller*, *supra*, 16 Cal.4th 1124, compels a different result. It does not. In *Moeller*, we held that a successor trustee, unless the trust instrument otherwise provides, assumes the power to assert the attorney-client privilege as to confidential communications between an attorney and a predecessor trustee on the subject of trust administration, so long as the predecessor was acting in the official capacity of trustee rather than in a personal capacity. (*Id.* at pp. 1130-1135.) The Boltwoods describe *Moeller* as creating "rights of inspection" that should be extended to beneficiaries. This is simply incorrect. In *Moeller*, we did not suggest that anyone other than the current holder of the privilege might be entitled to inspect privileged communications. Nor did we create or recognize any exceptions to the privilege. Instead, without questioning that the communications at issue were privileged, we merely identified the current holder of the privilege.

The Boltwoods also contend that, even if the trustee's communications with attorneys about its potential liability are privileged, a trustee still should enjoy no privilege as against the beneficiary for communications about trust administration. In support of the argument, the Boltwoods again cite *Moeller*, *supra*, 16 Cal.4th 1124, and also *Talbot v. Marshfield* (Ch. 1865) 62 Eng.Rep. 728. Neither decision, however, could justify limiting the attorney-client privilege in the manner the Boltwoods propose. Although in *Moeller* we did distinguish between communications about potential liability and communications about trust administration, we did not draw the distinction in order to narrow the privilege. Instead, our purpose was to determine, as between a successor trustee and a predecessor, which trustee was the current holder of the privilege as to any given communication. More specifically, we explained that "the successor trustee inherits the power to assert the *210 privilege only as to those confidential communications that occurred when the predecessor, in its fiduciary capacity, sought the attorney's advice for guidance in administering the trust. If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds." (*Moeller*, *supra*, 16 Cal.4th at p. 1134, italics omitted.) In this passage we did not suggest that confidential communications about trust administration might not be privileged. We simply determined who, as between the predecessor trustee and the successor, would be the holder of the privilege under the circumstances posited.

Nor would the decision in *Talbot v. Marshfield, supra*, 62 Eng.Rep. 728, justify a California court in limiting the trustee's attorney-client privilege to communications about the trustee's personal liability. We have already explained that courts interpreting common law evidentiary privileges are free, in a way we are not, to recognize exceptions. *Talbot* was such a case. In it, the Court of Chancery required the trustees of a testamentary trust to produce to the beneficiaries an opinion of counsel concerning trust administration that had been prepared before litigation between the trustee and the beneficiaries had commenced. The court did not, however, require the trustees to produce an opinion of counsel prepared after litigation had commenced advising the trustees how to defend themselves. We cited *Talbot* in *Moeller* simply to "articulate[] the distinction between a trustee consulting an attorney as trustee to further the beneficiaries' interests, and a trustee consulting an attorney in his personal capacity to defend against a claim by the beneficiaries" (*Moeller*, *supra*, 16 Cal.4th at p. 1134, fn. 5.) We expressly disclaimed any intention of addressing a trustee's privilege vis-a-vis the beneficiaries. (*Ibid*.)

The Boltwoods suggest that enforcing the trustee's right to assert the attorney-client privilege will permit trustees to shield all deliberations about trust administration, thus entirely frustrating the trustee's statutory reporting duties. (Prob. Code, §§ 16060, 16061.) We discern no good reason to fear such a result. (4) Knowledge that is not otherwise privileged does not become so merely by being communicated to an attorney. "'"Obviously, a client may be examined on deposition or at trial as to facts of the case, whether or not he has communicated them to his attorney. "'"(People ex rel. Dept. of Public Works v. Donovan (1962) 57 Cal.2d 346, 355 [19 Cal.Rptr. 473, 369 P.2d 1].) Moreover, "the forwarding to counsel of nonprivileged records, in the guise of

reports, will not create a privilege with respect to *211 such records and their contents where none existed theretofore." (S.F. Unified Sch. Dist. v. Superior Court (1961) 55 Cal.2d 451, 457 [11 Cal.Rptr. 373, 359 P.2d 925, 82 A.L.R.2d 1156].)²

(1b) As we noted at the outset, Wells Fargo has already disclosed to the Boltwoods confidential communications with attorneys on the subject of trust administration. From the preceding discussion, however, it follows that Wells Fargo had no obligation to do so. This conclusion renders moot the Boltwoods' further contention that the superior court may review in camera the documents Wells Fargo has withheld in order to determine whether they relate to trust administration or to the trustee's personal liability. The Boltwoods are entitled to neither category of documents. We have, therefore, no occasion to discuss their claim that the superior court might properly conduct such a review despite Evidence Code section 915, which provides that "the presiding officer may not require disclosure of information claimed to be privileged ... in order to rule on the claim of privilege"

The Boltwoods argue that Wells Fargo, through disclosures it has already made in discovery, has waived the attorney-client privilege as to the remaining communications not yet disclosed. The argument lacks merit. (5) "[A] waiver is the intentional relinquishment of a known right." (BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal.App.3d 1240, 1252 [245 Cal.Rptr. 682].) (1c) Wells Fargo, in honoring the Boltwoods' demand for privileged communications regarding trust administration, apparently believed in good faith that the law required the disclosures. Although we conclude the trustee's reporting duties do not trump the attorney-client privilege, no controlling authority on point existed at the time Wells Fargo responded to the Boltwoods' discovery request. Decisions in other jurisdictions had gone both ways. (Compare the cases cited ante, at p. 208, with Huie v. DeShazo, supra, 922 S.W.2d 920 [permitting a trustee to assert the attorney-client privilege against a beneficiary].) (6) An honest mistake of law, where the law is unsettled and debatable, both militates against a finding of waiver (BP Alaska Exploration, Inc. v. Superior Court, supra, at p. 1252) and offers a possible basis for relief from actions taken in connection *212 with pretrial discovery (Brochtrup v. INTEP (1987) 190 Cal.App.3d 323, 329 [235 Cal.Rptr. 390]).³

As an independent argument for obtaining access to Wells Fargo's privileged communications, the Boltwoods contend they are joint clients of Wells Fargo's attorneys and, thus, entitled to inspect any privileged communications. The general rule, as already noted, is to the contrary. "The attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee." (*Fletcher v. Superior Court, supra*, 44 Cal.App.4th at p. 777; accord, *Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 278; cf. *Moeller, supra*, 16 Cal.4th at p. 1130 [when a trustee exercises his statutory power under Probate Code section 16247 to consult an attorney, "the trustee, *qua* trustee, becomes the attorney's client"].)

This is not to say that trustees and beneficiaries could not possibly become joint clients. Because no such relationship is implied in law (*Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 278), however, the existence of such a relationship (and its propriety under the rules prohibiting conflicts of interest) would have to be determined on the facts of each individual case. In this case, the Boltwoods assert that a partner of O'Melveny, the firm retained by Wells Fargo to give advice on trust administration, did enter into an attorney-client relationship with the Boltwoods. The record does not support the assertion. The Boltwoods' argument is based on a single sentence in Vickie Boltwood's declaration in support of her motion to compel production of privileged documents: Attorney Leah Bishop, Boltwood avers, "stated to me on one occasion that she represented me as a beneficiary of the [t]rust, and I did not need an attorney" Even were it possible to infer from this evidence alone the existence of an attorney-client relationship, Ms. Boltwood's own declaration negates any such inference with the plain statement that "Ms. Bishop did not deal with me as a lawyer in these instances, but rather as a substitute for and liaison for Ms. Hydar (or Ms. Palumbo) [i.e., Wells Fargo's trust officers]"

The Boltwoods contend they are entitled to inspect Wells Fargo's privileged communications with attorneys for the additional reason that the trust *213 paid for the attorney's advice. Wells Fargo concedes the trust paid for O'Melveny's legal services related to trust administration, but asserts it did not pay for the services either of Wells Fargo's in-house attorneys or White & Case, the firm that represents Wells Fargo in this litigation. It does not matter. (7) Payment of fees does not determine ownership of the attorney-client privilege. The privilege belongs to the holder, which in this context is the attorney's client. (Evid. Code, § 954, subd. (a).) As discussed above, the *trustee*, rather than the beneficiary, is the client of an attorney who gives legal advice

to the trustee, whether on the subject of trust administration (*Moeller*, *supra*, 16 Cal.4th at pp. 1129-1130; *Fletcher v. Superior Court*, *supra*, 44 Cal.App.4th at p. 777; *Lasky*, *Haas*, *Cohler & Munter v. Superior Court*, *supra*, 172 Cal.App.3d at p. 278) or of the trustee's own potential liability (cf. *Moeller*, *supra*, at p. 1135). To the extent the source of payment has any significance, it is but one indicium in determining the existence of an attorney-client relationship (*Lasky*, *Haas*, *Cohler & Munter v. Superior Court*, *supra*, at p. 285) and, thus, who holds the privilege. In any event, the assumption that payment of legal fees by the trust is equivalent to direct payments by beneficiaries is of dubious validity. (See *id.* at pp. 284-285.) Under California law, a trustee may use trust funds to pay for legal advice regarding trust administration (Prob. Code, § 16247) and may recover attorney fees and costs incurred in successfully defending against claims by beneficiaries (*Estate of Beach* (1975) 15 Cal.3d 623, 644 [125 Cal.Rptr. 570, 542 P.2d 994]; *Estate of Ivy* (1994) 22 Cal.App.4th 873, 883 [28 Cal.Rptr.2d 16]; *Conley v. Waite* (1933) 134 Cal.App. 505, 506-507 [25 P.2d 496]; see Prob. Code, § 15684). When the law gives the trustee a right to use trust funds, or to reimbursement, the funds do not in law belong to the beneficiaries. Conversely, if the trustee's expenditures turn out to have been unauthorized, the beneficiaries may ask the probate court to surcharge the trustee. But this question of cost allocation does not affect ownership of the attorney-client privilege. * *214

B. Attorney Work Product Doctrine

- (8a) The Boltwoods have also moved to compel disclosure of documents as to which O'Melveny, Wells Fargo's trust administration counsel, has asserted the protection of the work product doctrine. Here, as in the lower courts, the Boltwoods argue that the documents in question lost their protection when O'Melveny transmitted them to their real client, Wells Fargo, or on Wells Fargo's behalf to White & Case, the trustee's litigation counsel.
- (9) The work product doctrine is codified in Code of Civil Procedure section 2018. Subdivision (c) of the statute, on which O'Melveny relies, provides: "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." (Code Civ. Proc., § 2018, subd. (c).) "The sole exception to the literal wording of the statute which the cases have recognized is under the waiver doctrine[,] which has been held applicable to the work product rule as well as the attorney-client privilege." (BP Alaska Exploration, Inc. v. Superior Court, supra, 199 Cal.App.3d at p. 1254, italics omitted; see 2 Jefferson, Cal. Evidence Benchbook (3d ed. 1997) § 41.14, p. 894 (2 Jefferson).) "[T]he attorney's absolute work product protection," however, "continues as to the contents of a writing delivered to a client in confidence." (BP Alaska Exploration, Inc. v. Superior Court, supra, at p. 1260; see 2 Jefferson, supra, § 41.15, p. 894].) This is because "the client has an interest in the confidentiality of the work product" (2 Jefferson, supra, § 41.15, p. 894.) So, too, do other attorneys representing the client, such as Wells Fargo's litigation counsel, White & Case. "The protection [of the work product doctrine] precludes third parties not representing the client from discovery of [protected] writing[s]." (BP Alaska Exploration, Inc. v. Superior Court, supra, at p. 1260.)
- (8b) The superior court granted the Boltwoods' motion to compel production of O'Melveny's work product without articulating its reasoning. The Court of Appeal reversed as to all work product documents that O'Melveny did not communicate to its client, Wells Fargo. As to work product documents that O'Melveny did communicate to Wells Fargo, the Court of Appeal directed the superior court "to hold an in camera review ... to determine whether they are protected from disclosure because they were communicated in confidence."

The Court of Appeal ruled correctly. The Boltwoods offered no conceivably valid reason for compelling production of O'Melveny's work product *215 except the claim of waiver through nonconfidential disclosure. As O'Melveny recognizes, for the superior court to examine the documents in camera is an appropriate way to determine whether they were, in fact, disclosed in confidence. While a court "may not require disclosure of information claimed to be privileged under [division 8 of the Evidence Code] in order to rule on the claim of privilege" (Evid. Code, § 915, subd. (a)), the work product doctrine is codified in Code of Civil Procedure section 2018. Thus, Evidence Code section 915 does not apply. For this reason, courts have recognized that inspection in camera is an appropriate way of determining whether documents are entitled to protection as work product. (BP Alaska Exploration, Inc. v. Superior Court, supra, 199 Cal.App.3d at p. 1261; Lasky, Haas, Cohler & Munter v. Superior Court, supra, 172 Cal.App.3d at p. 286.)

III. Disposition

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Chin, J., Brown, J., and Haerle, J., *concurred.

MOSK, J.,

Concurring and Dissenting.-I concur in the result, but disagree with the reasoning of the majority that an absolute privilege shields communications between the trustee and the attorney it consulted in its fiduciary capacity on the subject of trust administration.

Wells Fargo Bank, N.A. (Wells Fargo) brought this action for an accounting and approval of its resignation as a trustee of the Couch Living Trust. In response to discovery requests by real parties in interest Vickie Boltwood and her children, as trust beneficiaries, Wells Fargo disclosed attorney-client communications on the subject of administration of the trust; it withheld attorney-client communications regarding claims by the Boltwoods of trustee misconduct. The superior court ordered Wells Fargo to produce the withheld documents; the Court of Appeal vacated the order on the basis that the documents were privileged.

I agree with the majority that the Court of Appeal was correct in holding that communications involving Wells Fargo's potential liability for misconduct were subject to the attorney-client privilege. But I am not persuaded by *216 the majority's conclusion that Wells Fargo was also entitled to assert the privilege with regard to attorney-client communications on the subject of trust administration, which it obtained *on behalf of the beneficiaries and at their expense*.

In my view, the Probate Code required disclosure of those documents, consistent with the fiduciary duties of the trustee, specifically the duty under Probate Code section 16060 to keep the beneficiaries reasonably informed concerning the trust and its administration by providing complete and accurate information with regard to the administration of the trust. On that basis, I would affirm the judgment of the Court of Appeal.

I

Wells Fargo did not doubt that it had an obligation to produce all documents, including attorney-client communications, relating to its administration of the trust. Nor did the Court of Appeal. Adopting the suggestion of amicus curiae California Bankers Association, however, the majority conclude that such documents, too, were subject to the attorney-client privilege. They assert that there is no authority in California law for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter. I disagree. In my view, "the relevant sections of the Probate Code" impose duties "a trustee literally could not perform without disclosing privileged communications." (Maj. opn., *ante*, at p. 206.)

The Probate Code invests the trustee with the power to hire attorneys precisely "to advise or assist the trustee in performance of administrative duties" undertaken subject to its fiduciary duties. (Prob. Code, § 16247.) Exercise of such power is intrinsic to the trustee's general duty of loyalty to the beneficiaries. (See *id.*, § 16202 [trustee's exercise of power is subject to its fiduciary duties].) Moreover, any advice regarding trust administration that was obtained from counsel by the trustee was paid for out of trust funds, i.e., at the beneficiaries' expense. Beneficiaries have an unquestionable interest in such advice obtained by the trustee acting in its fiduciary capacity on their behalf.

Probate Code section 16060 provides: "The trustee has a duty to keep the beneficiaries of the trust *reasonably informed* of the trust and its administration." (Italics added.) Probate Code section 16061 requires the trustee, "on reasonable request," to provide the beneficiary with a report of information about finances of the trusts, acts of the trustee, and "the particulars relating to the administration of the trust relevant to the beneficiary's interest." *217

The Law Revision Commission comment to the 1990 enactment of Probate Code section 16060 explains that the provision "is consistent with the duty stated in prior California case law to give beneficiaries *complete and accurate information relative to the administration of the trust* when requested at reasonable times. [Citation.] ... The trustee is under a duty to communicate to the beneficiary information that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust." (Cal. Law Revision Com. com., 54A West's Ann. Prob. Code (1991 ed.) foll. § 16060, p. 51, italics added.) It cites our holding in *Strauss v. Superior Court* (1950) 36 Cal.2d 396, 401-402 [224 P.2d 726], that "a trustee has the duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the administration of the trust."

The "complete and accurate information" required under Probate Code section 16060 necessarily includes attorney-client communications concerning administration of the trust. I disagree with the majority that trustees may, under the Probate Code provisions, keep beneficiaries only partly informed. Moreover, I fail to see how a report by the trustee systematically excluding all attorney-client communications and legal advice could be said to meet the requirement under Probate Code section 16061 that it inform beneficiaries about "the acts of the trustee" and "particulars relating to the administration of the trust."

Unlike the majority's, my view of the requirement under Probate Code section 16060 is also consistent with the prevailing rule in most jurisdictions that the trustee's fiduciary duty of full disclosure to the trust beneficiaries extends to all contents of the trustee's file concerning trust administration matters affecting the trust interests of the beneficiaries, including legal advice. Thus, Professor Scott summarizes the general law as follows: "The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it.... [] A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust." (2A Scott & Fratcher, The Law of Trusts (4th ed. 1987) § 173, pp. 462-465, fn. omitted; see also Bogert, The Law of Trusts and Trustees (2d rev. ed. 1983) ch. 46, § 961, p. 11 ["The beneficiary ... has a right to obtain and review legal opinions given to the trustee to enable the trustee to carry out the trust, except for such opinions as the trustee has obtained on his own account to protect himself against charges of misconduct"]; IA Nossaman et al., Trust Administration and Taxation (1999) § 27.27[1], pp. 27-149 to 27-151 [describing the right of the beneficiary to obtain "all the information as to the trust and its execution for which he has *218 any reasonable use" as including the right to inspect an opinion of counsel obtained by the trustees concerning their powers in administering the trust]; cf. Rest.2d Trusts, § 173 & com. (b), p. 378 [as an exception to the duty of the trustee to furnish "complete and accurate information as to the nature and amount of trust property," the trustee is "privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection"].)

The doctrine is of long standing, finding its roots in the seminal decision in *Talbot v. Marshfield* (1865 Ch.) 62 Eng.Rep. 728, which we cited with approval in *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1134, footnote 5 [69 Cal.Rptr.2d 317, 947 P.2d 279]. As the Court of Chancery in *Talbot* explained: "[T]he *cestuis que trust* have an interest in the due administration of the trust, and in that sense, it was for the benefit of all, as it was for the guidance of the trustees in their execution of the trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestuis que trust* a right to see the case and opinion [obtained from counsel]." (*Talbot v. Marshfield, supra*, 62 Eng.Rep. at p. 729.)

The majority concede that the overwhelming authority in point is in agreement that beneficiaries are entitled to obtain information concerning attorney advice to the trustee about trust administration. They nonetheless conclude that we are not free to follow such a rule because the attorney-client privilege is a "legislative creation" that must be deemed absolute in this area. (Maj. opn., *ante*, at p. 206.)

I disagree that the Legislature intended by implication to exclude attorney communications from the scope of the duty to furnish information under Probate Code section 16060. It is doubtful that it would have created so detrimental an exception to the trustee's duty under the statute sub silentio; if it had intended to carve out a special rule that attorney-client communications with

regard to trust administration are not part of the *complete and accurate information* owed a beneficiary, it would have done so expressly. In stating that there can be no "implied exception" to the attorney-client privilege under Evidence Code section 952 for communications involving trust administration (maj. opn., *ante*, at p. 206), the majority turn the question on its head. This case does not involve the beneficiaries' right to invoke an *exception* to the Evidence Code provision; rather, because the Probate Code provides that the trustee has a duty to produce all such information, the privilege never adhered to those communications in the first place. *219

Nor does the decision in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [20 Cal.Rptr.2d 330, 853 P.2d 496], which I authored, require a different result. In *Roberts* we addressed the question whether the Public Records Act (Gov. Code, § 6250 et seq.) required public disclosure of a legal opinion of the city attorney distributed to members of the city counsel. (5 Cal.4th at pp. 369-373.) We stressed that although the Public Records Act provides that "every person has a right to inspect any public record," it expressly exempts certain public records from disclosure, including records subject to the attorney-client privilege. (5 Cal.4th at p. 368.) The Probate Code includes no similar exception to the requirement of disclosure under its section 16060.

The majority's rule will permit trustees to conceal deliberations about trust administration, to the detriment of beneficiaries' statutory rights to information. Unlike the majority, I am not sanguine about the implications of such a result. While it is true, as they note, that knowledge not otherwise privileged does not become so merely by being communicated *to* an attorney (maj. opn., *ante*, at p. 210), their holding will privilege all information concerning the nature of advice sought and obtained *from* an attorney on the subject of trust administration. Such undue extension of the attorney-client privilege will operate at the expense of the beneficiaries in a literal as well as legal sense: they must pay for the legal advice that they are barred from reviewing.

II

As we emphasized in *Moeller v. Superior Court*, *supra*, 16 Cal.4th 1124, 1133, a trustee has the equitable obligation to manage property *for the benefit of another*; it acts not in a personal capacity, but as fiduciary for the interests of the beneficiaries. The distinction the Court of Appeal-and Wells Fargo itself-drew between communications regarding administration of the trust on behalf of the beneficiaries and those affecting its own liability was correct. It is consistent with *Moeller* and with the authority cited therein. (See, e.g., *id.* at pp. 1134-1135.) The majority's conclusion is not.

For these reasons I would affirm the judgment of the Court of Appeal solely on the grounds stated therein. *220

Footnotes

- * Associate Justice of the Court of Appeal, First District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
- See the California Law Revision Commission's comment to Probate Code section 16060: "The section is drawn from the first sentence of Section 7-303 of the Uniform Probate Code (1987) and is consistent with the duty stated in prior California case law to give beneficiaries complete and accurate information relative to the administration of a trust when requested at reasonable times. See Strauss v. Superior Court" (Cal. Law Revision Com. com., 54A West's Ann. Prob. Code (1991 ed.) foll. § 16060, p. 51.)
- 2 "This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information." (Huie v. DeShazo (Tex. 1996) 922 S.W.2d 920, 923.)
- The Boltwoods also contend that Wells Fargo waived the attorney-client privilege by failing to maintain the confidentiality of its communications with counsel about its potential liability. The argument lacks merit. Assuming for the sake of argument, as the Boltwoods claim, that Wells Fargo kept communications with counsel about potential liability in the same file as communications with counsel about trust administration, and consulted one of its in-house attorneys on both subjects, still no basis would exist for

- finding a lack of confidentiality. Wells Fargo's communications with its attorneys on both subjects were presumptively privileged and confidential.
- The same principles dispose of the Boltwoods' contention that Wells Fargo's attorney-client privilege has been destroyed by Evidence Code section 956, under which "[t]here is no privilege ... if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." The Boltwoods cryptically suggest that Wells Fargo may have committed fraud by seeking legal advice on its liability to the Boltwoods and paying for that advice with trust funds. The argument lacks merit. As discussed in the accompanying text, a trustee has a right to charge the trust for the cost of successfully defending against claims by beneficiaries. The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining separate counsel with personal funds. (Cf. Moeller, supra, 16 Cal.4th at pp. 1134-1135.) In any event, Wells Fargo has done substantially that. Of the 126 documents withheld as privileged, only 16 reflect communications by trust administration counsel (O'Melveny) about potential claims that were apparently paid for with trust funds. Once the Boltwoods made clear their intention to assert claims, Wells Fargo retained separate litigation counsel (White & Case). These facts do not amount to the prima facie showing of fraud a litigant must make to invoke Evidence Code section 956. (See generally State Farm Fire & Casualty Co. v. Superior Court (1997) 54 Cal.App.4th 625, 643 [62 Cal.Rptr.2d 834]; BP Alaska Exploration, Inc. v. Superior Court, supra, 199 Cal.App.3d at p. 1262.)
- The Boltwoods also contended they were entitled to O'Melveny's work product because they, as beneficiaries, are the true clients of the trustee's attorneys. The attorney, however, rather than the client, is the holder of the work product privilege. (*Lasky, Haas, Cohler & Munter v. Superior Court, supra*, 172 Cal.App.3d at p. 271.) In any event, as shown above, the Boltwoods are not O'Melveny's client.
- * Associate Justice of the Court of Appeal, First District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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KeyCite Yellow Flag - Negative Treatment

Not Followed as Dicta SARAH PLOTT KEY, Plaintiff and Appellant, v. ELIZABETH PLOTT TYLER, Individually and as Trustee, etc., Defendant and Respondent., Cal.App. 2 Dist., August 30, 2021

104 Cal.App.4th 1221, 128 Cal.Rptr.2d 742, 02 Cal. Daily Op. Serv. 12,481, 2002 Daily Journal D.A.R. 14,685

JOYCE L. WHITTLESEY, Plaintiff and Respondent,

V.

DORIAN M. AIELLO, as Trustee, etc., Defendant; TIMOTHY H. STEARNS, Movant and Appellant.

No. Co38739. Court of Appeal, Third District, California. Dec. 27, 2002.

SUMMARY

The trial court denied an attorney's request for attorney fees and costs incurred in representing a trustee in litigation over the validity of a trust amendment. The trustor and his wife had created the trust, naming their niece the primary beneficiary. The wife died, the trustor married again, and the trustor amended the trust to make the new wife and her son the primary beneficiaries. After the trustor died, the niece successfully challenged the amendment to the trust. (Superior Court of Siskiyou County, No. SCCVPB 97-13705, Frank S. Petersen, Judge.*)

The Court of Appeal reversed with directions. The court held that the attorney was not entitled to fees in this litigation regarding the trust, since the litigation was a dispute between beneficiaries of the trust, rather than a challenge to the trust itself. Whether or not the niece's contest prevailed, the trust would remain intact. Because the trust amendment was voided and the niece's status as the primary trust beneficiary was restored, an award of fees to the attorney from the trust would be, in effect, an award from the niece. This would not be equitable. However, the court held that the attorney was entitled to fees for earlier litigation regarding the trust amendment in which the trustee prevailed. (Opinion by Hull, J., with Scotland, P. J., and Blease, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c)

Costs § 13--Attorney Fees--Trust Proceedings--Dispute Between Beneficiaries.

An attorney who represented a trustee in litigation over the validity of a trust amendment was not entitled to attorney *1222 fees. The trustor originally named his niece the primary beneficiary, and later amended the trust to make his new wife and her son the primary beneficiaries. After the trustor died, the niece successfully challenged the amendment. To recover costs and attorney fees incidental to litigation of a trust estate, the litigation must be a benefit and a service to the trust. Otherwise, there is no basis for the recovery of expenses out of the trust assets. In this case, the essence of the litigation was not a challenge to the existence of the trust; it was a dispute over who would control and benefit from it. The niece initiated the litigation to have the amendment voided and to establish her rights in the trust, and the wife defended to retain her competing rights in the trust. Whether or not the niece's contest prevailed, the trust would remain intact. Because the trust amendment was voided and the niece's status as the primary trust beneficiary was restored, an award of fees to the attorney from the trust would be, in effect, an award from the niece. This would not be equitable. Although the trustee was correct in not allowing a default in the litigation,

the trustee should have remained neutral in the dispute between the niece and wife, and the attorney was entitled to seek fees only from the parties who stood to benefit from a successful defense.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 151; Ross & Moore, Cal. Practice Guide: Probate (The Rutter Group 2002) ¶ 16:261 et seq.; West's Key Number Digest, Trusts • 268.]

(2a, 2b)

Judgments § 87--Res Judicata--Matters Concluded.

Res judicata and collateral estoppel did not bar an attorney from seeking fees incurred in representing a trustee in litigation over the validity of a trust amendment. Although the amendment was found to be invalid and this finding was affirmed on appeal, the attorney was seeking fees for continuing litigation, rather than for prior litigation. Further, the issue of attorney fees was never decided on appeal. The propriety of attorney fees was raised in connection with a separate appeal in the same litigation, the appellate court deferred its determination until resolution of the separate appeal, and later the appellate court dismissed that appeal as premature.

(3)

Judgments § 67--Res Judicata--Elements.

The doctrine of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. Three elements must be met: (1) the *1223 issue was decided in the prior adjudication identical with the one presented in the action in question; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party to or in privity with a party to the prior adjudication.

(4)

Judgments § 81--Collateral Estoppel.

A companion doctrine of res judicata is collateral estoppel, under which a prior judgment between the same parties operates as an estoppel as to those issues actually and necessarily decided in the prior action.

(5)

Costs § 13--Attorney Fees--Trust Proceedings.

Among the ordinary powers and duties of a trustee of a private trust are those of doing all acts necessary and expedient to collect, conserve, and protect the property of the trust, to maintain and defend the integrity of the trust for the benefit of the beneficiaries and to employ such assistants as may be necessary for those purposes. Where litigation is necessary for the preservation of the trust, it is both the right and duty of the trustee to employ counsel in the prosecution or defense thereof, and the trustee is entitled to reimbursement for his or her expenditures out of the trust fund. If the trustee acts in good faith, he or she has the power to employ such assistants and to compensate such assistants out of the assets of the trust even though the trustee may not ultimately succeed in establishing the position he or she has taken as trustee. However, these rules presuppose that the litigation was for the benefit of the trust estate. The defense of a lawsuit that has the potential for depleting trust assets would be for the benefit of trust assets would not warrant the trustee to hire counsel at the expense of the trust. Such litigation would be for the benefit of the trustee, not the trust.

(6)

Costs § 35--Appellate Review.

Allowance of litigation expenses rests in the sound discretion of the trial court. That court's ruling will not be disturbed on appeal absent an abuse of discretion.

(7)

Costs § 13--Attorney Fees--Trust Proceedings--Successive Challenges to Amendment to Trust.

An attorney who represented a trustee in aborted litigation over the validity of a trust amendment was entitled to attorney fees, notwithstanding that the amendment was subsequently found invalid when challenged by another party. Although the attorney was representing the interests of one beneficiary over another, rather than defending the trust itself, he prevailed in the earlier litigation. Therefore, he was entitled to compensation from the *1224 trust, as amended. This award was equitable, since, had the subsequent litigation by the other party never been initiated, the amended trust would have remained in effect, and an award of fees from the trust would have been, in effect an award from the prevailing beneficiary.

COUNSEL

Timothy H. Stearns, in pro. per., Movant and Appellant.

Richard L. Kimbell and Lauren E. Leisz for Plaintiff and Respondent.

HULL, J.

Timothy H. Stearns (Stearns) appeals from that portion of a final judgment denying his request for attorney fees and costs incurred in representing the trustee in litigation over the validity of a trust amendment. Stearns contends the court erroneously based its denial on his lack of success in the litigation. We conclude that, because this was a dispute between competing trust beneficiaries and not a challenge to the trust itself, the trial court properly denied litigation expenses. However, we reverse the denial of compensation in connection with earlier litigation in which the trustee prevailed.

Facts and Procedural History

This is the fourth time this matter has come before us. The underlying litigation began as a challenge to a restated and amended trust executed by decedent James Bertram McAdams shortly before his death in June 1996. In 1990, decedent and his then wife, Anna McAdams, created a revocable trust (the trust), which named their niece, petitioner Joyce L. Whittlesey, as the trustee and primary beneficiary. After Anna's death, decedent married Margaret McAdams, née Thomson (Margaret), and amended the trust to confirm a gift to Margaret of \$100,000 as provided in a prenuptial agreement. However, in the weeks leading up to his death, decedent amended the trust to make Margaret and her son, Thomas Thomson (Thomas), the primary beneficiaries.

After decedent's death, Dale E. Carlson, the successor trustee of the trust, initiated a challenge to the amendment. The matter was eventually dismissed for lack of standing, and we affirmed the dismissal. (*Carlson v. McAdams* (Apr. 15, 1997, C024561) [nonpub. opn.].) *1225

In January 1997, Whittlesey initiated her own challenge to the amendment. On April 1, 1997, Margaret died and Dorian M. Aiello became the successor trustee of the amended trust. The matter proceeded to a bench trial, after which the court entered judgment finding the amendment void as a product of undue influence by Margaret and Thomas. On May 25, 2000, we affirmed the judgment. (*Estate of McAdams* (May 25, 2000, C028847) [nonpub. opn.] (case No. C028847).)

Aiello thereafter prepared a complete accounting of the trust assets, and the trial court entered an order which, among other things, surcharged Aiello for potential tax liability and mismanagement of trust property in amounts to be determined later. The court also denied Aiello's request for attorney fees and costs in defending the trust contests. Both Aiello and Thomas appealed. We dismissed this appeal as premature. (*Estate of McAdams* (Oct. 26, 2000, C030809) [nonpub. opn.] (case No. C030809).)

Thereafter, the trial court, Aiello and Whittlesey entered into a settlement that resolved all claims among the parties except "any claims that Timothy H. Stearns, trustee's attorney, may have against The McAdams Trust for attorney services performed on behalf of AIELLO and/or any predecessor trustee of The McAdams [Trust] at the trial court and appellate court levels and/or for litigation costs advanced by Timothy H. Stearns" On May 7, 2001, the court entered an order pursuant to the settlement.

Thereafter, the court entered final judgment, incorporating the settlement agreement and that portion of an August 13, 1998, ruling that read: "The fees requested by Mr. Timothy Stearns for legal services rendered in connection with the administration of the trust estate and the accounting total \$5,350. The Court finds these fees are unreasonable due to the condition [of] the account prompting the surcharge order of Mr. Aiello, the court allows Mr. Stearns the sum of \$2,500.00 for legal services rendered in connection with the administration of the trust estate and the accounting only...."

Discussion

- (1a) Stearns contends the trustee under the amended trust had a fiduciary duty to the beneficiaries to defend against the challenges by Carlson and Whittlesey and, therefore, has a right to reimbursement for expenses incurred in that defense, including reasonable attorney fees. Stearns further contends this duty and right of reimbursement is independent of his success in the litigation.
- (2a) Whittlesey contends most of Stearns's claims are barred by res judicata. Whittlesey points out that in its judgment finding the amendment *1226 invalid, the trial court denied attorney fees, and we affirmed that judgment on appeal. (Case No. C028847.) Therefore, so the argument goes, Stearns is barred from recovering any attorney fees incurred prior to the judgment, which would include all fees connected with the trust litigation. We are not persuaded.
- (3) "The doctrine of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction. [Citation.] 'Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.' "(*Levy v. Cohen* (1977) 19 Cal.3d 165, 171 [137 Cal.Rptr. 162, 561 P.2d 252].) Three elements must be met: "(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudication?" (*Ibid.*) (4) A sister doctrine of res judicata is collateral estoppel, under which a prior judgment between the same parties operates as an estoppel as to those issues actually and necessarily decided in the prior action. (*Rohrbasser v. Lederer* (1986) 179 Cal.App.3d 290, 296-297 [224 Cal.Rptr. 791].)
- (2b) Neither res judicata nor collateral estoppel applies here. Besides the fact Whittlesey is attempting to preclude relitigation of a matter involved in this same litigation rather than a prior proceeding, the issue involved was not decided by this court in case No. C028847. In that appeal, Aiello alleged error in the denial of attorney fees. However, because the same issue was raised in case No. C030809, we deferred its determination until resolution of that matter. Later, we dismissed the appeal in case No. C030809 as premature. Hence, the issue was never decided on appeal, and Stearns is not barred from challenging the denial of attorney fees in this proceeding.
- "A trustee is entitled to the repayment out of trust property for the following: [¶] (a) Expenditures that were properly incurred in the administration of the trust. [¶] (b) To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust." (Prob. Code, § 15684.) (5) "[A]mong the ordinary powers and duties of a trustee of a private trust are those of doing all acts necessary and expedient to collect, conserve and protect the property of the trust, to maintain and defend the integrity of the trust for the benefit of the beneficiaries and to employ such assistants as may be necessary for said purposes." (Evans v. Superior Court (1939) 14 Cal.2d 563, 574 [96 P.2d 107].) "[W]here litigation is necessary for the preservation of the trust, it is both the right and duty of the trustee to employ counsel in the prosecution or defense *1227 thereof, and the trustee is entitled to reimbursement for his expenditures out of the trust fund." (Metzenbaum v. Metzenbaum (1953) 115 Cal.App.2d 395, 399 [252 P.2d 31].) "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." (Evans v. Superior Court, supra, 14 Cal.2d at p. 574.)

The foregoing rules, of course, presuppose that the litigation was for the benefit of the trust estate. (*Metzenbaum v. Metzenbaum*, *supra*, 115 Cal.App.2d at p. 399.) For example, the defense of a lawsuit that has the potential for depleting trust assets would be for the benefit of the trust, justifying the employment of counsel. However, litigation seeking to remove or surcharge a trustee

for mismanagement of trust assets would not warrant the trustee to hire counsel at the expense of the trust. Such litigation would be for the benefit of the trustee, not the trust.

(1b) We have found no reported cases in this state where legal expenses were sought for the unsuccessful defense of a trust amendment that changed the allocation of trust benefits. However, a closely analogous situation may be seen in contests over the validity of a will. In Estate of Hite (1909) 155 Cal. 448 [101 P. 448], the state high court explained that where opposition to a will was sustained and the will was denied probate, counsel for the executor who resisted the will contest was not entitled to litigation expenses, even where the resistance was in good faith. (Id. at p. 455.) While recognizing the executor's right to present the will for probate, the court explained: "[T]here are many cases in which the executor named in the will would not be warranted in engaging in litigation at the expense of the estate for the purpose of establishing the paper offered by him for probate, even though he believed that it should be admitted and that a trial of the contest would so establish. Mr. Woerner says: Whether the executor is entitled to credit for the expenses incurred in the litigation to establish a will depend on circumstances in several directions. In so far as he simply performs a duty, the expenses fairly incurred by him in a contest with the heirs at law are payable out of the estate, whatever be the consequences to the successful contestants; but if he voluntarily assume[s] the burden of a contest which properly belongs to the legatees or devisees, he must look to them, and not to the estate for reimbursement. It is held to be the duty, or at least the privilege, of the person named as executor in a paper purporting to be a last will, to propound the same for probate in the proper court; but the executor is not bound to become a party to an issue of devisavit vel non, unless he be secured for the expenses by the persons interested in the will.... If, therefore, an administrator or executor incur expense at the request or in the *1228 interest of a legatee or devisee, in the fruitless attempt to establish a will, the parties are liable therefor, but not the estate. If the will is established, however, the costs and counsel fees, being chargeable against those who are benefited by the litigation, may be charged against the estate, if it go to the parties so benefited; otherwise, the executor's remedy is by action for contribution.' (2 Woerner on Administration, 2 ed. sec. 517.)" (Estate of Hite, supra, 155 Cal. at pp. 455-456.)

In *Estate of Higgins* (1910) 158 Cal. 355 [111 P. 8], the executor, who was also a beneficiary, opposed the contest of a will that benefited the executor over another beneficiary. The court concluded that under such circumstances, an award of the executor's fees from the estate would be inequitable. The court explained that "[t]o hold otherwise would simply be to enable him by reason of his position as executor to subject the whole estate to such expenses as were incurred by him in litigation defended by him for his own sole benefit as a devisee and legatee under the assailed will." (*Id.* at p. 358.)

In the present matter, a trust was created that named Whittlesey as the trustee and primary beneficiary. Later, an amendment was executed that named Margaret as the trustee and primary beneficiary. The amendment was challenged, and Margaret hired Stearns to defend it. After Margaret died, Stearns was kept on by the successor trustee, Aiello. The essence of the underlying action was not a challenge to the existence of the trust; it was a dispute over who would control and benefit from it. Whether or not the contest prevailed, the trust would remain intact. On one side of this dispute were Margaret and her heirs, on the other, Whittlesey and her heirs. Whittlesey initiated the litigation to have the amendment voided and to establish her rights in the trust. Margaret defended the action to retain her competing rights in the trust.

In support of his claim for attorney fees under the circumstances of this case, Stearns relies primarily on *Estate of Duffill* (1922) 188 Cal. 536 [206 P. 42]. There, the court said, "Unquestionably, when proceedings are commenced attacking the validity of a trust, it is the right ... of the trustee to secure legal assistance, and it is equally beyond doubt that the facilities to command such assistance should not be narrowed, if not entirely destroyed, by any such restriction as that compensation for such assistance is wholly dependent upon, and measured by, the degree of success." (*Id.* at pp. 556-557.)

Stearns's reliance on *Duffill* is misplaced. *Duffill* involved a challenge to a testamentary trust in which the trustee largely prevailed. The court indicated *1229 that the efforts of the attorneys for the trustee "were in this instance directed to the preservation of the trust in its entirety, a duty imposed upon the trustee, whom they represented, irrespective of whether, if upheld or only partially upheld, the result might be more beneficial to some than to others who are interested therein" (*Estate of Duffill, supra,* 188 Cal. at pp. 554-555.) The court continued: "The appellant assailed the validity of the entire trust, against

which attack it was the duty of the trustee to defend, and which it did defend, with the result that though some of [the challenger's] contentions were sustained, the general *scheme* of the trust was nevertheless preserved. Under such circumstances we can see no good reason for holding that the attorneys for the trustee should not be compensated for the entire service." (*Id.* at p. 555.)

In reaching the foregoing conclusion, the court expressly distinguished an earlier decision by the New York Court of Appeals, *Bailey v. Buffalo Loan, Trust & Safe Deposit Co.* (1915) 214 N.Y. 689 [108 N.E. 561], in which attorney fees associated with a trust challenge were denied. The plaintiff, a trust beneficiary, challenged the validity of the trust, and the trustee sided with the other beneficiaries and fought the challenge. After the plaintiff prevailed, the New York high court ruled that the trustee was not entitled to recover its litigation expenses. The court explained that while the trustee had an obligation not to allow a default, "[i]ts interest as trustee would be preserved, had it remained neutral as between the parties, while they sought in good faith a determination of the question of the validity of the trust provision of the will. It chose to join in the litigation, and to defeat the plaintiff, who was a cestui que trust under the terms of the instrument in litigation, while the remaining defendants in their individual behalf sought the same end and purpose. As the plaintiff was finally successful, we determined that the action of the trust company did not justify an award of costs or an allowance to it to be paid by plaintiff, the successful party." (*Id.* at pp. 690-691 [108 N.E. at p. 562].)

In *Duffill*, the court found *Bailey* distinguishable for several reasons. First, in *Bailey* the trust was wholly abrogated; in *Duffill* the trust was preserved. In *Bailey*, because the trust was abrogated, the trust funds passed to the plaintiff under the will; in *Duffill*, the funds remained in the trust, available to be paid as fees. Finally, in *Duffill*, the court explained that the "fundamental difference" between the two cases is, in *Bailey*, the action of defending the trust did not justify an award of expenses to be paid by the plaintiff, the prevailing party, whereas in *Duffill*, the trustee was successful in preserving the trust. (*Estate of Duffill*, *supra*, 188 Cal. at pp. 558-559.)

As the *Duffill* court explained, the fundamental distinction between that case and *Bailey* is that, in the latter, it would have been inequitable to charge *1230 the trust with the defendant's litigation expenses. Because the trust was abrogated and the trust assets passed to the plaintiff under the will, a charge on the trust would have been, in effect, a charge on the prevailing plaintiff. Because the underlying dispute was essentially between trust beneficiaries and the prevailing plaintiff had already been required to incur his own litigation expenses, it would have been unfair to saddle him with the defendants' expenses as well. In *Duffill*, the trust was preserved largely intact after the litigation, such that a charge on the trust was, in effect, a charge on the trust beneficiaries. In other words, the trust beneficiaries were required to foot their own litigation costs, not those of the losing defendants.

(6) Allowance of litigation expenses rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse. (*Estate of Vokal* (1953) 121 Cal.App.2d 252, 260 [263 P.2d 64].) (1c) "The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust." (*Dingwell v. Seymour* (1928) 91 Cal.App. 483, 513 [267 P. 327].) Consequently, where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust assets.

In this instance, because the trust amendment was voided and Whittlesey's status as the primary trust beneficiary was restored, an award of fees to Stearns from the trust would be, in effect, an award from Whittlesey. In other words, Whittlesey would be required to finance her own trust litigation and that of her opponent, despite the fact she prevailed. There can be no equity in that.

Stearns contends he is entitled to compensation for representing the trustee, if the trustee is acting in accordance with his fiduciary duties. According to Stearns, "[t]he trustee acts in accordance with his fiduciary duties where (1) the trustee has subjective good faith and (2) the trustee's decision to participate in the litigation is objectively reasonabl[e] given the facts and circumstances available to the trustee at the time of the decision." Here, according to Stearns, there was ample evidence available at the time of the trust litigation to lead the trustee to believe the trust amendment was valid.

Assuming soundness of the principle of law stated by Stearns, the existence of facts that would have led the trustee to believe the trust amendment was valid does not establish the objective reasonableness of the trustee's defense of the trust amendment. While it would not have been proper for the *1231 trustee to have allowed a default in the litigation, there was no basis for the trustee to have taken other than a neutral position in the contest. As indicated previously, the parties primarily interested in the outcome of the litigation were Whittlesey on the one hand and Margaret, and later Thomas on the other. To the extent Stearns defended the amendment, he was representing the interests of one side of the dispute over the other, not representing the interests of the trust or the trustee.

Stearns contends the conclusion we reach in this matter will result in fewer attorneys being willing to defend a trust for fear of being denied fees if the trust defense is unsuccessful. We disagree. In situations such as that presented here, counsel must seek compensation from the parties who stand to gain from the litigation, not the trust.

(7) Finally, Stearns contends he is at least entitled to the remaining fees unpaid for his defense of the amendment in the aborted litigation initiated by Carlson. We agree. Although, in that litigation, Stearns was again representing the interests of one beneficiary over another, this time he prevailed. Under *Duffill*, he was entitled to compensation from the trust, as amended. Such an award is equitable because, had the litigation by Whittlesey never been initiated, the amended trust would have remained in effect, and an award of fees from the trust would have been, in effect, an award from Margaret, the prevailing beneficiary.

Disposition

The judgment is reversed in part and the matter is remanded to the trial court with directions to enter a new judgment consistent with the views expressed in this opinion. The parties shall bear their own costs on appeal.

Scotland, P. J., and Blease, J., concurred.

Appellant's petition for review by the Supreme Court was denied April 9, 2003. *1232

Footnotes

* Retired judge of the Del Norte Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 736. Florida Trust Code (Refs & Annos)
Part VII. Office of Trustee

West's F.S.A. § 736.0708

736.0708. Compensation of trustee

Effective: October 1, 2020 Currentness

- (1) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances
- (2) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:
- (a) The duties of the trustee are substantially different from those contemplated when the trust was created; or
- (b) The compensation specified by the terms of the trust would be unreasonably low or high.
- (3) If the trustee has rendered other services in connection with the administration of the trust, the trustee shall also be allowed reasonable compensation for the other services rendered in addition to reasonable compensation as trustee.
- (4)(a) An attorney serving as a trustee, or a person related to such attorney, is not entitled to compensation for serving as a trustee if the attorney prepared or supervised the execution of the trust instrument that appointed the attorney or person related to the attorney as trustee, unless the attorney or person appointed is related to the settlor or the attorney makes the following disclosures to the settlor before the trust instrument is executed:
- 1. Unless specifically disqualified by the terms of the trust instrument, any person, regardless of state of residence and including a family member, friend, or corporate fiduciary, is eligible to serve as a trustee;
- 2. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee; and
- 3. Compensation payable to the trustee is in addition to any attorney fees payable to the attorney's firm for legal services rendered to the trustee.

- (b) 1. The settlor must execute a written statement acknowledging that the disclosures required under paragraph (a) were made prior to the execution of the trust instrument. The written statement must be in a separate writing from the trust instrument but may be annexed to the trust instrument. The written statement may be executed before or after the execution of the trust in which the attorney or related person is appointed as the trustee.
- 2. The written statement must be in substantially the following form:
- I, (Name), declare that:

I have designated my attorney, an attorney employed in the same law firm as my attorney, or a person related to my attorney as a trustee in my trust instrument dated <u>(insert date)</u>.

Before executing the trust, I was informed that:

- 1. Unless specifically disqualified by the terms of the trust instrument, any person, regardless of state of residence and including family members, friends, and corporate fiduciaries, is eligible to serve as a trustee.
- 2. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee.
- 3. Compensation payable to the trustee is in addition to any attorney fees payable to the attorney's firm for legal services rendered to the trustee.

(Signature)

(Settlor)

(Insert date)

- (c) For purposes of this subsection:
- 1. An attorney is deemed to have prepared, or supervised the execution of, a trust instrument if the preparation, or supervision of the execution, of the trust instrument was performed by an employee or attorney employed by the same firm as the attorney at the time the trust instrument was executed.
- 2. A person is "related" to an individual if, at the time the attorney prepared or supervised the execution of the trust instrument, the person is:
- a. A spouse of the individual;
- b. A lineal ascendant or descendant of the individual;
- c. A sibling of the individual;
- d. A relative of the individual or of the individual's spouse with whom the attorney maintains a close, familial relationship;

- e. A spouse of a person described in sub-subparagraphs b.-d.;
- f. A person who cohabitates with the individual; or
- g. An employee or attorney employed by the same firm as the attorney at the time the trust instrument is executed.
- 3. An attorney or a person related to the attorney is deemed appointed in the trust instrument when the trust instrument appoints the attorney or the person related to the attorney as trustee, cotrustee, successor, or alternate trustee in the event another person nominated is unable to or unwilling to serve, or provides the attorney or any person related to the attorney with the power to appoint the trustee and the attorney or person related to the attorney was appointed using that power.
- (d) Other than compensation payable to the trustee, this subsection does not limit any rights or remedies that any interested person may have at law or equity.
- (e) The failure to obtain an acknowledgment from the settlor under this subsection does not disqualify a trustee from serving and does not affect the validity of a trust instrument.
- (f) This subsection applies to all appointments made pursuant to a trust agreement:
- 1. Executed by a resident of this state on or after October 1, 2020; or
- 2. Amended by a resident of this state on or after October 1, 2020, if the trust agreement nominates the attorney who prepared or supervised the execution of the amendment or a person related to such attorney as trustee.

Credits

Added by Laws 2006, c. 2006-217, § 7, eff. July 1, 2007. Amended by Laws 2020, c. 2020-67, § 9, eff. Oct. 1, 2020.

West's F. S. A. § 736.0708, FL ST § 736.0708

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Brigham v. Brigham, Fla.App. 3 Dist., May 31, 2006
100 So.2d 807
Supreme Court of Florida.

WEST COAST HOSPITAL ASSOCIATION, a Florida nonprofit corporation, Appellant,

V.

The FLORIDA NATIONAL BANK OF
JACKSONVILLE, a national banking
corporation, andPaul F. Randolph,
as surviving Trustees of Trust under
Will of Mary S. Morrow,Deceased,
and Chester B. McMullen, Jr.,
as Executor of the Estate of M.
A.McMullen,Deceased, Trustee, Appellees.

Feb. 28, 1958.

Synopsis

Declaratory judgment action. The Circuit Court for Pinellas County, John Dickinson, J., rendered judgment favorable to plaintiff, and defendant appealed. The Supreme Court, Drew, J., held that the amount of fees awarded by chancellor to corporate trustee found support in record, but that total amount awarded to both the corporate trustee and the individual trustees could not be sustained; and held that since the questions tried in lower court had been neither novel nor complicated an allowance of \$6,875 for attorney's fees had not been justified.

Affirmed in part and reversed in part and remanded with directions.

Thomas, Acting C. J., dissented.

West Headnotes (14)

[1] Trusts - Counsel Fees and Costs

Where declaratory judgment action brought by trustees was precipitated by beneficiary, which served ultimatum that it would bring suit unless trustees agreed to pay reduction, rules allowing trustee to recover his attorneys' fees in defending suit brought against him were applicable.

[2] Trusts & Application of General Rules of Construction

In construction of testamentary trusts, it is duty of courts to ascertain and give effect to the intention of testator.

5 Cases that cite this headnote

[3] Trusts Compensation of Trustees and Attorneys and Cost of Administration

Costs and expenses of administering trust are, in absence of statute or instructions in trust instrument or other writing to the contrary, allocable, in proper cases, between principal and income upon rational basis.

[4] Trusts Compensation of Trustees and Attorneys and Cost of Administration

Courts having jurisdiction of trust have some latitude in determining whether trustees' compensation shall be paid in whole or in part from corpus of estate.

3 Cases that cite this headnote

[5] Trusts — Constitutional and Statutory Provisions

Trust accounting law would be inapplicable where will and codicils creating trust were dated prior to effective date of such law. F.S.A. § 737.01 et seq.

[6] Trusts ← Compensation of Trustees and Attorneys and Cost of Administration

Where it was manifest intent of creator that corpus of trust should be kept intact, and income therefrom was ample to provide for effective administration of trust and payment of all expenses in connection therewith, all fees and expenses involved should in proceeding for declaratory judgment as propriety of trustees' fees and method of payment of same, have been ordered paid out of income.

1 Cases that cite this headnote

[7] Trusts 🦫 Amount

When not agreed upon or fixed in trust indenture or other instrument, amount to be awarded trustee for services is matter resting largely in sound discretion of chancellor under whose jurisdiction trust falls.

[8] Trusts \hookrightarrow Amount

Where no express contract exists in indenture or by separate instrument and where no statute exists fixing amount due as trustees' compensation, amount of award should be such as, under all of circumstances, will be reasonable remuneration for services performed.

[9] Evidence 🕪 Value

Expert testimony is not conclusive as to amount of compensation to be awarded to trustee, and court may, under proper circumstances, disregard such testimony.

[10] Trusts \leftarrow Cotrustees

Where there are two or more trustees, total amount of compensation is ordinarily the same as if there were only single trustee, unless it is otherwise provided by terms of trust or by statute, or particular or specialized services were required.

1 Cases that cite this headnote

[11] Trusts 🤛 Amount

Trust should pay reasonable compensation for its efficient administration, but is not required to pay more.

[12] Trusts \leftarrow Cotrustees

Allocation of compensation between those who participate in management of trust is matter to be decided by them on basis of services rendered by each, but where such agreement cannot be reached, it may be determined by court in proper proceedings. F.S.A. §§ 734.01(d), 737.01 et seq.

[13] Trusts \hookrightarrow Counsel Fees and Costs

Costs and counsel fees may be allowed a faithful trustee in litigation relating to trust, and such fees should be allowed in those cases where trustee, in good faith, institutes or defends action or incurs legal expense in connection with his duties and responsibilities as trustee; but amount of such fees, and whether they should be allowed, are matters within sound discretion of trial court.

8 Cases that cite this headnote

[14] Trusts \leftarrow Counsel Fees and Costs

In action brought by trustees for a declaratory judgment with regard to fees they had paid themselves and propriety of allocating a portion thereof to corpus, trust was properly chargeable for reasonable fees and costs incurred; but questions tried being neither novel nor complicated, allowance of \$6,875 for attorneys' fees was not justified, even though trust was large and impressive.

Attorneys and Law Firms

*808 Marshall & Rives, Clearwater, and Fowler, White, Gillen, Yancey & Humkey, Miami, for appellant.

Mann, Harrison, Roney, Mann & Masterson, St. Petersburg, for appellees.

Opinion

DREW, Justice.

Mary S. Morrow died January 9, 1950, leaving a last will and testament in which The Florida National Bank of

Jacksonville, Paul F. Randolph and M. A. McMullen were named as executors and trustees. At the conclusion of the administration of the estate, on or about April 1, 1952, the executors distributed to themselves as trustees of a trust created by said will government bonds of the approximate value of \$800,000. The will directed Mrs. Morrow's estate to be liquidated and directed her executors to purchase 'United States of America Government Bonds, the kind and issue of said United States of America Government Bonds which shall be purchased I leave to the discretion of my executors provided, however, all the property referred to in this item of my Will must be sold and the proceeds used for the purchase of said Bonds.' It is then directed in the will:

'After my executors have purchased said bonds, I direct them to assign, transfer and set over unto my trustees *809 hereinafter named said bonds, in trust nevertheless, for the following uses and purposes:

'(a) The corpus of said trust to be held intact except as and when said bonds are called by the government of the United States of America, or when it is necessary to exchange said bonds for other United States government bonds by reason of any regulation of the United States Government. Then and in that event I direct my trustees, from the proceeds of any sale, to re-purchase bonds issued by the United States Government, or exchange for bonds issued by the United States Government, and to continue to hold the same in accordance with the provisions herein contained.

'(b) All of the net income derived from the corpus of the trust hereby created I direct my trustees to pay in semiannual instalments to the West Coast Hospital Association, (a nonprofit charitable corporation) of Clearwater, Florida, which Association operates the Morton F. Plant Hospital in Clearwater, Florida, and I direct that the said West Coast Hospital Association shall use the net income from my trust estate so created for such uses and purposes as Dr. M. E. Black, of Clearwater, Florida, in his sole judgment and discretion shall direct and the direction for the use and application of said net income shall in nowise be questioned nor shall he be interfered with by the then constituted and acting Board of Directors of said Association. Upon the death or inability of the said Dr. M. E. Black to act, then and in that event only I direct the West Coast Hospital Association to use the income from my trust estate for such uses and purposes as my trustees or the survivors of my trustees, in their judgment and discretion, shall direct. This bequest is made in memory of my deceased husband, George K. Morrow.'

Between April 10, 1952 and January 10, 1955, the trustees collected a total of \$54,951.15 as income from the various government securities which they held as trustees. During the same period of time the trustees paid themselves \$19,993.78 in fees and claimed \$3,506.60 in addition for such period of time, making an aggregate of \$23,500.38 claimed as reasonable compensation for their services as trustees under the trust created by Mrs. Morrow's will. During such period the trustees distributed to the Hospital Association net income of \$45,344.83. A portion of the fees claimed by and paid to the trustees was allocated to and charged against the corpus of the trust rather than the income.

The Hospital Association objected to the amount of fees which the trustees had paid themselves as well as the allocation of a portion thereof to corpus, but they were unable to reach any agreement with reference to the dispute, whereupon the Hospital Association notified the trustees that unless a proposal with reference to reduced fees, which had been previously submitted, was accepted by them within twenty days, they would institute suit for the purpose of securing a determination of the matter. Before the expriation of the twenty day ultimatum by the Hospital Association, the trustees brought this action for declaratory judgment, and secured a decree in the lower court favorable to their contention. Under these circumstances the rules allowing a trustee to recover his attorneys' fees in defending a suit brought against him are applicable because the litigation was precipitated by the beneficiary. See Powell v. Cocowitch, infra. Moreover, the Hospital Association asserts in its brief 'The trustees only applied to the Court when suit by the beneficiary against them was imminent.'

In this appeal from the decree, three principal points are urged for reversal. First, the Hospital Association contends that the lower court erred as to the amount of fees awarded and in authorizing the *810 trustees to charge a portion of said fees to the corpus of the trust. Second, it argues that it was error to fix annual fees on an arbitrary percentage of the corpus and income instead of a reasonable compensation for the services performed to the trust and to approve said formulae for future years; and, third, it says that the court erred in awarding attorneys' fees payable out of the corpus of the trust for the services of the trustees' attorneys in said cause. No error is assigned to the award of fees to the attorneys for the Hospital Association.

[2] [3] [4] [5] In the construction of testamentary trusts, it is the duty of the courts to ascertain and give effect to the intention of the testator. This is an elementary proposition.

Cartinhour v. Houser, Fla. 1953, 66 So. 2d 686; Morgenthaler v. First Atlantic National Bank, Fla. 1955, 80 So. 2d 446. That it was the intention of the testator to hold the corpus intact is quite obvious. The word has a well defined meaning, is one easily understood and commonly used in instruments of this kind. The significance of the word, however, must be considered in the light of well settled principles of law regulating the administration of trust estates, one of the most firmly established being the rule that the cost and expenses of administering a trust are, in the absence of a statute or instructions in the trust instrument or other writing to the contrary, in proper cases allocable between principal (corpus) and income on some rational basis. Many services of the trustees relate to preservation and protection and enhancement of principal and others to collecting, disbursing and protection and enhancement of income. Courts having jurisdiction of the trust have, necessarily, and by virtue of the very nature of the thing, some latitude in determining whether such compensation shall be paid in whole or in part from the corpus of the estate. Dunscombe v. Smith, 1937, 127 Fla. 797, 174 So. 38; Campbell v. Vining, 1931, 101 Fla. 939, 133 So. 555; Vol. 4 Bogert on Trusts & Trustees, Sec. 802, pages 112, 116. There is no statute in this State regulating the subject. Chapter 737, Florida Statutes 1955, F.S.A. is inapplicable because the will and codicils of Mrs. Morrow were dated prior to the effective date of such Chapter. Such awards are controlled by the decisions of this Court and applicable general law.

[6] The record shows the income from the trust to be ample to provide for the effective administration of the trust and the payment of all expenses in connection therewith. This fact, coupled with the manifest intent of the creator that the corpus should be kept intact-and our duty to give effect to this purpose if it may reasonably be done-leads us to the conclusion that all of the fees and expenses involved in these proceedings should have been paid out of income. The discretion of the chancellor, therefore, was improperly exercised and in this respect the decree is reversed with instructions that all of the charges involved in these proceedings and ultimately awarded shall be charged against income.

The decree of the lower court approved an annual fee to the Florida National Bank of Jacksonville as corporate trustee which was equivalent to and based upon 1/4th of 1% of the principal (paid from income) and 1/4 of 1% of the principal (paid from corpus), said payments from principal not to exceed 6% of said principal. Thus the court

approved an arrangement whereby the Florida National Bank of Jacksonville, as corporate trustee, was to receive in each year for a period of twenty-four years 1/4th of 1% of principal to be paid out of the principal or corpus and a like amount paid from income during the entire period of this perpetual trust. The lower court approved fees based upon the above formula, one fee payable to the corporate trustee and an amount equal to the corporate trustee's fee payable to the individual trustees in equal shares.

[7] A trustee carries on a fiduciary service requiring faithful and efficient administration *811 of the trust and a conservation of its assets. For such services a trustee is entitled to be paid reasonable compensation. When not agreed upon or fixed in the trust indenture or other instrument, the amount of said award is a matter resting largely in the sound discretion of the chancellor under whose jurisdiction the trust falls. Kay v. Bostwick, 1922, 83 Fla. 308, 91 So. 112.

[8] [9] Where no express contract exists in the indenture or by separate instrument and where no statute exists fixing the amount of compensation, the amount of the award should be such that, under all the circumstances, would be a reasonable remuneration for the service performed. We approve as a standard in determining reasonable compensation the following observation from Bogert, Trusts and Trustees, s 976, viz.:

'If the compensation of the trustee has not been fixed by statute or direction of the settlor, the amount of the award rests in the discretion of the court having jurisdiction, which is ordinarily the court receiving the account of the trustee.

'The following factors may be influential in enabling the court to reach a conclusion as to the appropriate amount of pay which should be granted the trustee in a given case: The amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the cestuis to the trustee and intended to be applied toward his compensation.'

While the evidence is conflicting as to the reasonableness of the total compensation awarded the corporate trustee, the amount fixed by the learned chancellor below is within the figures testified to by the various witnesses who testified as experts. This testimony is not conclusive of the matter, however, and may, under proper circumstances, be disregarded by the lower court or this Court. Powell v. Cocowitch, infra. Subject to the qualifications hereafter imposed by us on the award we conclude that while the evidence shows it to be larger than that which would have been charged by institutions of a like quality, it should be affirmed as to the amount awarded to the corporate trustee as reasonable compensation for its service for the period of the accounting.

While we agree that the total amount of fees awarded by the chancellor to the corporate trustee finds support in the record. the total amount awarded to both the corporate trustee and the individual trustees cannot be sustained. There is no evidence that the total awards are reasonable, and, even if there was evidence tending to establish such to be true, the total amount of compensation goes far beyond what this court considers to be reasonable in the light of the income received, the simple nature of the trust corpus and the minimum management and supervisory duties involved. The trust instrument defines and limits the authority of the trustee with reference to investments to bonds of the United States government. True, there are various classes of bonds issued by the United States government but it is crystal clear that so long as the trustee invests in the decribed obligations, it has performed its duty and discharged its responsibility *812 concerning the nature of the investment. The remaining duties of the trustees are primarily ones of accounting and bookkeeping. It would be difficult to conceive of a trust less involved than the one here under consideration.

[10] [11] [12] It is well settled that where there are two or more co-trustees the total amount of compensation is ordinarily the same as if there were a single trustee unless it is otherwise provided by the terms of the trust or by statute, or because of particular or specialized services required by the nature of assets of the trust itself. This trust is not of the latter category. A trust is created for the beneficiaries named and not for the purpose of paying fees to the trustees. The trust should pay reasonable compensation for its efficient administration but is required to pay no more than that. The allocation of such compensation between those who participate in the management of the trust is a matter to be decided by them on the basis of services rendered by each. Where such agreement

cannot be reached, it may be determined by the court in proper proceedings. A.L.I. Restatement of the Law of Trusts, Sec. 242, page 749; 54 Am.Jur., Trusts, Sec. 533, page 421. Section 734.01(d), F.S.A., provides for the payment of reasonable compensation and a division among multiple representatives or estates according to services rendered by each. The same rule should apply to trustees of a testamentary trust.

That portion of the questioned decree awarding compensation to the individual trustees is hereby reversed, with directions to the lower court upon seasonable application to consider the matter of an equitable division of the fees allowed the corporate trustee and hereby approved between the corporate and individual trustees in proportion to the services and responsibilities of each for the accounting period.

We now direct our attention to the question of attorneys' fees awarded the attorneys representing the various parties in this litigation. The decree awarded \$2,500 to the attorneys for the corporate trustee, \$1,250 to the attorney for the surviving individual trustee, \$625 to the attorney for the executor of a deceased individual trustee and \$2,500 to the attorneys for the West Coast Hospital Association, the principal beneficiary of the trust, and directed that all of the costs and expenses, including attorneys' fees, be paid out of the corpus.

[14] Costs and counsel fees may be allowed a faithful trustee in litigation relating to the trust. Such fees should be allowed in those cases where a trustee, in good faith, institutes or defends an action or incurs legal expense in connection with his duties and responsibilities as trustee. The amount of such fees and whether they should be allowed are matters within the sound discretion of the trial court. See Powell v. Cocowitch, Fla.1957, 94 So.2d 589. While not pertinent to our conclusion here, it is worthy to note-in this connectionthat the new trust accounting law (Ch. 737, F.S.A.) provides for attorneys' fees for a trustee for services 'incurred by him in the management of the trust estate'. 'Good faith' is the basic consideration in reaching a conclusion as to whether fees should be awarded. In determining whether liability for fees were incurred in good faith the court could consider, among other things, whether the issue giving rise to the liability was genuine and whether a reasonable, prudent man would have incurred such expense had he been dealing with his personal business affairs. Am.Jur., Trusts, paragraphs 513, 523, 636. No charge of bad faith is made here nor does the record establish a lack of good faith. Under the circumstances disclosed by the record, viz. the absence of any contract on the subject, any statute fixing such fees or any indication of a basis for fixing the amount in the trust indenture and a

dispute as to what would constitute reasonable compensation for the trustees, we think the trust is properly chargeable for reasonable fees and *813 costs incurred in this litigation and that it was not an abuse of discretion to order them paid out of the trust estate. For the reason, however, that we have directed that the fees of the trustees be paid out of income, we hereby direct that the attorneys' fees be likewise so paid.

The reasonableness of the fees, however, are another matter. Long ago the Supreme Court of the United States held, in a case arising in this State, that large and extravagant fees should not be allowed and ordered paid out of trust funds under the control of the courts. Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527, 26 L.Ed. 1157. See also Am. Jur., Trusts, paragraph 523, supra. The principal of this trust is large and impressive but the questions tried in the lower court are neither novel nor complicated. The record does not convince us that fees totalling \$6,875 are justified. No error is assigned to the allowance of fees to the Hospital Association and we, therefore, cannot, at this stage of the proceedings, pass upon it but, as to the remaining fees allowed, those allowed the individual trustees are set aside and the lower court is authorized and empowered on a reconsideration of this cause to allocate the fee of \$2,500 allowed the attorneys for the corporate trustee in an

equitable manner between its attorneys and the attorneys for the individual trustees. The trial court is also authorized to reconsider the amount of the award to the attorneys for the Hospital Association upon the principles hereby pronounced when this case goes back to him on this opinion and the mandate of this Court.

Insofar as trustees' fees are concerned, this opinion is not to be construed as approving the formulae followed by the trustee in arriving at its fee for a period of 24 years or for any other period of time. We determine only the question that the trustees' fees hereby approved are reasonable under the evidence for the services from April 10, 1952 to January 10, 1955. The reasonableness of fees for future years will be dicided in such years and for such services as may be required in such period.

Affirmed in part and reversed in part and remanded for further consideration.

ROBERTS, THORNAL and O'CONNELL, JJ., concur.

THOMAS, Acting Chief Justice, dissents.

All Citations

100 So.2d 807

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198 So.3d 685
District Court of Appeal of Florida,
Second District.

ROBERT RAUSCHENBERG FOUNDATION, Appellant,

v.

Bennet GRUTMAN, Bill Goldston, and Darryl Pottorf, as trustees of the Robert Rauschenberg Revocable Trust, Appellees.

> No. 2D14-3794. | Jan. 6, 2016. | Rehearing Denied Feb. 24, 2016.

Synopsis

Background: Sole remainder beneficiary of trust sought review of order entered by the Circuit Court, Lee County, Jay B. Rosman, J., which awarded fees to trustees for their services.

Holding: The District Court of Appeal, Silberman, J., held that, in calculating a trustee's reasonable compensation, court should apply factors set forth in Supreme Court's opinion *West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*.

Affirmed.

West Headnotes (1)

[1] Trusts 🤛 Amount

In calculating a trustee's reasonable compensation under statute when the trust is silent as to the trustee's fees, court should apply factors set forth in Supreme Court's opinion West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville rather than apply the lodestar method; such factors include the amount of capital and income received and disbursed by

the trustee, the wages or salary customarily granted to agents for performing like work in the community, the success or failure of the administration of the trustee, and the time consumed in carrying out the trust. West's F.S.A. § 736.0708(1).

1 Cases that cite this headnote

*686 Appeal from the Circuit Court for Lee County; Jay B. Rosman, Judge.

Attorneys and Law Firms

Robert W. Goldman of Goldman Felcoski & Stone, P.A., Naples, and James R. George of Greenberg Traurig, P.A., Ft. Lauderdale, for Appellant.

James A. McKee and Benjamin J. Grossman of Foley & Lardner LLP, Tallahassee, Michael Gay of Foley & Lardner LLP, Orlando, and Ted B. Edwards of Law Office of Ted B. Edwards, P.A., Winter Park, for Appellees.

Opinion

SILBERMAN, Judge.

The Robert Rauschenberg Foundation, as sole remainder beneficiary of the Robert Rauschenberg Revocable Trust, seeks review of an order awarding \$24,600,000 to trustees Bennet Grutman, Bill Goldston, and Darryl Pottorf for their services. We affirm the award in its entirety. We write only to explain why the trial court correctly refused to calculate fees using the lodestar method.

This case stems from the administration of the considerable estate of iconic and prolific artist and philanthropist Robert Rauschenberg. Rauschenberg devised his residuary estate to the Trust, and the Trust's sole remainder beneficiary was the Foundation. The Trustees managed the Trust assets for several years after Rauschenberg's death while its assets were being transferred to the Foundation. During this time period, the value of the Trust assets increased from \$605,645,595 to \$2,179,000,000.

The Trust does not contain a provision addressing trustee's fees, and the major disagreement between the parties was the methodology to be used to calculate the fees. The Trustees requested between \$51,000,000 and \$55,000,000 in

fees based on the factors set forth in *West Coast Hospital Ass'n v. Florida National Bank of Jacksonville*, 100 So.2d 807 (Fla.1958). The Foundation asserted that the Trustees were only entitled to \$375,000 in fees based on the lodestar method set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla.1985), *modified, Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla.1990). Both parties presented expert testimony applying their methodology.

In *West Coast*, the Florida Supreme Court addressed the calculation of trustee's fees in a case in which the testamentary trust did not contain a provision specifying compensation. 100 So.2d 807. The trial court had awarded annual trustee's fees payable to the corporate and individual trustees based on a percentage of the trust principal and income. *Id.* at 810. *687 The supreme court rejected this percentage approach and approved a standard under which the court would consider several factors to determine "reasonable compensation." *Id.* at 811.

Those factors included:

The amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the cestuis to the trustee and intended to be applied toward his compensation.

Id. (quoting Bogert on Trusts & Trustees, § 976).

Almost thirty years later, the supreme court issued *Rowe* to establish "objectivity and uniformity in court-determined reasonable *attorney* fees" by adopting the lodestar method. 472 So.2d at 1149 (emphasis added). The court calculated the lodestar figure by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Id.* at 1151. In determining the reasonable number of hours and reasonable hourly rate, the court considered factors similar to the *West Coast* factors. *Id.* at 1150–51.

The supreme court subsequently applied the lodestar method from Rowe in a case involving "reasonable compensation" for attorneys and personal representatives in probate actions. See In re Estate of Platt, 586 So.2d 328, 336 (Fla.1991), superseded by statute, ch. 93-257, § 4, at 2503, Laws of Fla. In rejecting attorney's fees based on a percentage of the estate, the court looked to the legislative history of the statute and determined that the lodestar method was more consistent with that intent. Id. at 331-36. The court emphasized the legislature's use of the word "reasonable" to determine the scope of fees. *Id.* at 335–36. The court concluded that it would not be "reasonable" to "allow one judge to set reasonable fees in an estate proceeding solely on the basis of a percentage value of the estate, a second judge to set attorney's fees in a similar estate proceeding based on the lodestar method, and a third judge to set attorney's fees in a similar estate proceeding by using a combination of both." Id. at 336.

Approximately fifteen years after *Platt* issued, the Florida Legislature enacted a trustee fee statute that similarly provides for an award of trustee's fees that are "reasonable under the circumstances" when the trust does not specify compensation. *See* § 736.0708(1), Fla. Stat. (2007). The statute does not set forth a methodology for calculating "reasonable" trustee's fees or otherwise explain which "circumstances" should be considered.

The Foundation argues that the use of the term "reasonable" in section 736.0708(1) without further elucidation suggests a legislative intent to adopt the lodestar method set forth in *Rowe*. The Foundation asserts that the lodestar method, which the *Rowe* court applied to calculate *attorney's* fees, is equally applicable to *trustee's* fees. The Foundation points to the supreme court's application of the lodestar *688 method in *Platt* to "reasonable compensation" for attorneys and personal representatives in probate actions.

However, the legislative history of section 736.0708(1) indicates an intent to apply the *West Coast* factors. Specifically, the Senate Staff Analyses in support of the bill reference section 736.0708(1) and explain, "On the factors to be taken into account in determining a reasonable compensation, see *West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*, 100 So.2d 807 (Fla.1958) citing with favor Bogert, Trusts and Trustees, s.976." Fla. S. Comm. on Banking & Ins., CS for SB 1170 (2006) Staff Analysis 18 n. 258 (Mar. 21, 2006); Fla. S. Comm. on Jud., CS for SB 1170 (2006) Staff Analysis 19 n. 255 (Mar. 10, 2006). And

there is no indication of legislative intent to apply the lodestar method in any manner. Thus, we conclude that the lodestar method set forth in *Rowe* does not apply to trustee's fees.

Affirmed.

Accordingly, the trial court correctly refused to calculate the Trustees' fees using the lodestar method. The court properly applied the *West Coast* factors, and the court's findings regarding those factors and the reasonable fee amount are supported by the evidence presented at trial.

ALTENBERND and NORTHCUTT, JJ., Concur.

All Citations

198 So.3d 685, 41 Fla. L. Weekly D87

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306 So.3d 224 District Court of Appeal of Florida, Third District.

Marshal Glenn SPEAR, Appellant,

v.

Lawrence J. DENMARK, et al., Appellees.

No. 3D18-2068 | Opinion filed June 10, 2020

Synopsis

Background: Trustee moved for award of fees and costs arising from work she performed relating to trust, in dispute between beneficiary of trust and trustee pertaining to trust's termination. The Circuit Court, 11th Judicial Circuit, Miami-Dade County, Celeste H. Muir, J., granted award of trustee's fees and costs in amount of \$8,419.31. Trustee appealed.

Holdings: The District Court of Appeal held that:

- [1] trial court did not abuse its discretion in reducing number of compensable hours performed by trustee's expert;
- [2] court's calculation of award based on expert's incorrect hourly fee required recalculation as to that portion of award; and
- [3] balance of award was supported by competent, substantial evidence.

Affirmed in part, reversed in part, and remanded for recalculation.

West Headnotes (5)

[1] Appeal and Error - Costs and Fees

The appellate court reviews the award of trustee's fees and costs for an abuse of discretion.

[2] Appeal and Error - Costs and Fees

When reviewing an award of trustee's fees and costs issued by the lower court, while the court's legal conclusions are reviewed de novo, its factual findings are assessed for competent, substantial evidence.

[3] Trusts - Counsel fees and costs

Record reflected competent, substantial evidence that expert, who was hired by trustee to review legal documents and testify in evidentiary hearing pertaining to award of trustee's fees and costs, performed less compensable hours of work than number of hours for which trustee sought recovery, and thus trial court did not abuse its discretion in reducing number of expert's compensable hours in its award of \$8,419.31 rendered in dispute between beneficiary of trust and trustee regarding trust's termination; expert's fee was for reviewing legal documents, time expert spent reviewing documents was unrelated to expert's two accountings of trust, which were the only compensable services, and many parts of expert's testimony in evidentiary hearing were irrelevant.

[4] Trusts & Counsel fees and costs

Trial court's calculation of award of trustee's fees and costs in amount of \$8,419.31, rendered in dispute pertaining to trust's termination between beneficiary of trust and trustee, who hired expert to review legal documents and testify during evidentiary hearing on award, based on expert's rate of \$400 per hour, rather than the expert's correct hourly rate of \$450 per hour, required recalculation as to that portion of the award.

[5] Trusts 🐎 Evidence

Competent, substantial evidence supported overall balance of trial court's award of trustee's fees and costs in amount of \$8,419.31, in dispute between beneficiary of trust and trustee regarding termination of trust, even though portion of that award was calculated erroneously based on expert's incorrect hourly rate; judge made findings based on factors of amount of time

and value of services provided by trustee, and fact that those two factors happened to match exact method for calculating attorney's fees, which was inapplicable to calculation of trustee's fees, was not indicative that court actually applied that inapplicable method of calculation.

*225 An Appeal from the Circuit Court for Miami-Dade County, Celeste Hardee Muir, Judge. Lower Tribunal No. 10-2358

Attorneys and Law Firms

Jonathan H. Green & Associates, P.A., and William Jay Palmer, for appellant.

Douglas H. Stein, P.A., and Douglas H. Stein, for appellees.

Before SCALES, HENDON and LOBREE, JJ.

Opinion

PER CURIAM.

Marshal Glenn Spear (the "trustee") appeals the trial court's award of trustee's fees and costs of \$8,419.31, where she originally sought \$82,887.73 for work performed on behalf of the Irving J. Denmark Trust (the "trust") and Lawrence J. Denmark (the "beneficiary"), mainly upon a determination that much of the alleged work performed by the trustee was neither necessary nor authorized. We reverse in part, holding that the trial court erred in calculating the hourly rate for the trustee's expert witness. However, because the trial court did not otherwise abuse its discretion or err as a matter of law in its award of the trustee's fees and other costs, we affirm the balance of the award ¹

We decline to address the trustee's remaining arguments.

Factual Background

The dispute between the parties spans almost a decade and four appeals, including the present case. In 1988, Irving Denmark (the "settlor"), created the trust for the beneficiary, his brother, and their spouses. It required that, upon the death of both the settlor and his wife, Evelyn Denmark, the property be split in two, creating two separate trusts. In 2007, the prior trustee resigned, and the settlor's wife arranged for the trustee

to take over. The settlor's wife died that same year, while the settlor died in 2009.

Between January and June 2010, seeking the termination of the trust pursuant to its terms, the beneficiary asked the trustee to make a distribution, resign, and forgo a full, final accounting, insisting that the beneficiary's counsel would instead review all the raw data. The trustee made three partial accountings of the trust in January, March, and June 2010. However, he refused to resign unless the beneficiary released him from all liability. The beneficiary refused and brought suit. Since the *226 last appeal, the trustee moved for fees and costs that pertained to the three accountings performed, a number of hours spent by the trustee's counsel in defending against the suit brought by the beneficiary below, as well as on appeal, and the number of hours spent by the trustee's expert witness in preparation for the evidentiary hearing on the award.

Standard of Review

[1] [2] We review the award of trustee's fees and costs for an abuse of discretion. See West Coast Hosp. Ass'n v. Fla. Nat'l Bank of Jacksonville, 100 So. 2d 807, 811 (Fla. 1958) ("If the compensation of the trustee has not been fixed by statute or direction of the settlor, the amount of the award rests in the discretion of the court having jurisdiction, which is ordinarily the court receiving the account of the trustee."). While the lower court's legal conclusions are reviewed de novo, its factual findings are assessed for competent, substantial evidence. See Musi v. Credo, LLC, 273 So. 3d 93, 95-96 (Fla. 3d DCA 2019); Ashear v. Sklarey, 247 So. 3d 574, 577 (Fla. 3d DCA 2018).

Analysis

Calculation of the Trustee's Expert Witness Fee

[3] The trustee argues that the trial court erred both in finding that fewer hours than spent by her expert in preparation for the evidentiary hearing were compensable and necessary and in calculating those hours deemed compensable, relying on an hourly rate different from that testified to by the expert. The record does not lack competent, substantial evidence for the lower court's reduction of the number of hours to be compensated, given both the legal nature and sometimes irrelevance of the expert's testimony. Moreover, the trial court did not abuse its discretion in making such finding.

Here, the trial court found—and the record supports—that the expert's fee was for reviewing legal documents and testifying, the expert gave his opinion as to the law governing the calculation of trustee fees, and most of the expert's time spent on the review of documents or testimony did not relate to the trustee's preparation of the first two accountings, the only compensable services. The court determined that only ten of the sixty hours claimed pertained to work necessary to assist the court and to the benefit of the trust. Because it cannot be said that no reasonable judge would agree with this allocation based on this record, the trial court did not abuse its discretion. See Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980) ("We acknowledge that reasonable persons might differ as to what is an appropriate sum for permanent periodic alimony in this cause, but we find it is within the parameters of reasonableness; therefore, there can be no finding of an abuse of discretion."); Craig v. Chung, 751 So. 2d 192, 193 (Fla. 4th DCA 2000) (reversing award of fees for abuse of discretion in reduction but observing that, "[i]f the trial court had, as a result of concluding that some of the work of the CPA was unnecessary, made a reasonable reduction, we would have affirmed").

[4] The trustee is correct, however, that the only evidence in the record was that the expert's hourly rate was \$450, not the \$400 used to calculate the award. Because the \$400 rate is both unsupported and contradicted by the record, we reverse this portion of the award and remand for entry of an order reflecting a correct calculation based on the \$450 hourly rate.

See Smith v. Sch. Bd. of Palm Beach Cty., 981 So. 2d 6, 10 (Fla. 4th DCA 2007) ("We find the trial court erred in awarding Smith's attorney \$200.00 an hour as opposed to *227 \$300.00 an hour, as this award is not supported by competent and substantial evidence and reverse for entry of a new order awarding the appropriate hourly rate.").

Application of the West Coast Test

[5] The trustee argues that the lower court either failed to apply or actually misapplied the governing West Coast factors test in making the award, since it relied on the number and value of hours spent by the trustee in performing services, two factors characteristic of the lodestar method for calculating attorney's fees and inapplicable to trustees. See West Coast, 100 So. 2d at 812; Robert Rauschenberg Found. v. Grutman, 198 So. 3d 685, 688 (Fla. 2d DCA 2016) (concluding trial court correctly refused to calculate trustees' fees using lodestar method set forth in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), which does not apply to trustee's fees).

The record, however, does not indicate that the trial court applied the lodestar method, or failed to apply (or misapplied) the West Coast factors. Based partly on testimony from the trustee's own expert, the trial judge considered and inevitably made findings as to the amount of time spent and value of services provided by the trustee, two of several factors that the Florida Supreme Court has found to control such an award. West Coast, 100 So. 2d at 812 (describing as factors amount of capital and income received, customary wages and salary, success or failure of trustee's administration, unusual skill or experience possessed by trustee, trustee's loyalty or disloyalty, amount of responsibility assumed by trustee, time consumed by trustee in serving trust, and customary charges by trust companies for similar work).

The record before the trial court presented it with evidence almost exclusively of these two factors, not others. West Coast does not, and cannot, require evidence of all factors. See West Coast 100 So. 2d at 812 (observing that trial court "may" consider any combination of factors). The mere fact that the only two factors for which there was either sufficient or credible evidence in this case are the two that coincidentally happen to be used in the lodestar method, and that the trial court did not expressly assert its application of the West Coast test does not mean that it failed to apply it as far as the evidence allowed it. See, e.g., Elliot v. Elliot, 648 So. 2d 137, 138-39 (Fla. 4th DCA 1994) (reminding practitioners that absence of written opinion or statement by court specifically addressing argument or principle of law does not imply that court failed to consider arguments presented and rely on governing law).

Conclusion

Because the trial court purported, but failed, to calculate the trustee's expert witness' hourly rate based on the only hourly rate testified to at the evidentiary hearing, that component of the award lacks competent, substantial evidence. We reverse for entry of a new award reflecting the correct calculation. However, because the balance of the award rests on competent, substantial evidence and the trial court did not abuse its discretion in awarding substantially less than the trustee sought, we affirm the trial court's award as to the trustee's fees and other costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

All Citations

306 So.3d 224, 45 Fla. L. Weekly D1397

End of Document

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 736. Florida Trust Code (Refs & Annos)
Part VIII. Duties and Powers of Trustee (Refs & Annos)

West's F.S.A. § 736.0802

736.0802. Duty of loyalty

Effective: July 1, 2021 Currentness

- (1) As between a trustee and the beneficiaries, a trustee shall administer the trust solely in the interests of the beneficiaries.
- (2) Subject to the rights of persons dealing with or assisting the trustee as provided in s. 736.1016, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
- (a) The transaction was authorized by the terms of the trust;
- (b) The transaction was approved by the court;
- (c) The beneficiary did not commence a judicial proceeding within the time allowed by s. 736.1008;
- (d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with s. 736.1012;
- (e) The transaction involves a contract entered into or claim acquired by the trustee when that person had not become or contemplated becoming trustee;
- (f) The transaction was consented to in writing by a settlor of the trust while the trust was revocable;
- (g) The transaction is one by a corporate trustee that involves a money market mutual fund, mutual fund, or a common trust fund described in s. 736.0816(3); or
- (h) With regard to a trust that is administered by a family trust company, licensed family trust company, or foreign licensed family trust company operating under chapter 662, the transaction is authorized by s. 662.132(4)-(8).

(3)(a) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be
affected by a conflict between personal and fiduciary interests if the sale, encumbrance, or other transaction is entered into by
the trustee with:

- 1. The trustee's spouse;
- 2. The trustee's descendants, siblings, parents, or their spouses;
- 3. An officer, director, employee, agent, or attorney of the trustee; or
- 4. A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.
- (b) This subsection does not apply to a trust being administered by a family trust company, licensed family trust company, or foreign licensed family trust company operating under chapter 662 if the sale, encumbrance, or other transaction is authorized by s. 662.132(4)-(8).
- (4) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
- (5)(a) An investment by a trustee authorized by lawful authority to engage in trust business, as defined in s. 658.12(20), in investment instruments, as defined in s. 660.25(6), that are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, is not presumed to be affected by a conflict between personal and fiduciary interests provided the investment otherwise complies with chapters 518 and 660 and the trustee complies with the requirements of this subsection.
- (b) A trustee who, pursuant to this subsection, invests trust funds in investment instruments that are owned or controlled by the trustee or its affiliate shall disclose the following to all qualified beneficiaries:
- 1. Notice that the trustee has invested trust funds in investment instruments owned or controlled by the trustee or its affiliate.
- 2. The identity of the investment instruments.
- 3. The identity and relationship to the trustee of any affiliate that owns or controls the investment instruments.
- (c) A trustee who, pursuant to this subsection, invests trust funds in investment instruments with respect to which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee shall disclose to all qualified beneficiaries, the nature of the services provided by the trustee or its affiliate, and all compensation, including, but not limited

- to, fees or commissions paid or to be paid by the account and received or to be received by an affiliate arising from such affiliated investment.
- (d) Disclosure required by this subsection shall be made at least annually unless there has been no change in the method or increase in the rate at which such compensation is calculated since the most recent disclosure. The disclosure may be given in a trust disclosure document as defined in s. 736.1008, in a copy of the prospectus for the investment instrument, in any other written disclosure prepared for the investment instrument under applicable federal or state law, or in a written summary that includes all compensation received or to be received by the trustee and any affiliate of the trustee and an explanation of the manner in which such compensation is calculated, either as a percentage of the assets invested or by some other method.
- (e) This subsection shall apply as follows:
- 1. This subsection does not apply to qualified investment instruments or to a trust for which a right of revocation exists.
- 2. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, which expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate.
- 3. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, that are not described in subparagraph 2. and to irrevocable trusts created prior to July 1, 2007, only as follows:
- a. Such paragraphs shall not apply until the statement required in paragraph (f) is provided and a majority of the qualified beneficiaries have provided written consent. All consents must be obtained within 90 days after the date of delivery of the written request. Once given, consent shall be valid as to all investment instruments acquired pursuant to the consent prior to the date of any withdrawal of the consent.
- (I) Any qualified beneficiary may petition the court for an order to prohibit, limit, or restrict a trustee's authority to make investments under this subsection. The burden shall be upon the petitioning beneficiary to show good cause for the relief sought.
- (II) The court may award costs and attorney's fees relating to any petition under this subparagraph in the same manner as in chancery actions. When costs and attorney's fees are to be paid out of the trust, the court, in its discretion, may direct from which part of the trust such costs and fees shall be paid.
- b. The consent of a majority of the qualified beneficiaries under this subparagraph may be withdrawn prospectively by written notice of a majority of any one of the class or classes of the qualified beneficiaries.
- (f) 1. The trustee of a trust as defined in s. 731.201 may request authority to invest in investment instruments described in this subsection other than a qualified investment instrument, by providing to all qualified beneficiaries a written request containing the following:

- a. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information.
- b. A statement that the investment or investments cannot be made without the consent of a majority of each class of the qualified beneficiaries.
- c. A statement that, if a majority of each class of qualified beneficiaries consent, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, that such investment instruments may include investment instruments sold primarily to trust accounts, and that the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.
- d. A statement that the consent may be withdrawn prospectively at any time by written notice given by a majority of any class of the qualified beneficiaries.

A statement by the trustee is not delivered if the statement is accompanied by another written communication other than a written communication by the trustee that refers only to the statement.

- 2. For purposes of paragraph (e) and this paragraph:
- a. "Majority of the qualified beneficiaries" means:
- (I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(19)(c), at least a majority in interest of the beneficiaries described in s. 736.0103(19)(a), at least a majority in interest of the beneficiaries described in s. 736.0103(19)(b), and at least a majority in interest of the beneficiaries described in s. 736.0103(19)(c), if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority in number of each such class; or
- (II) If there is no beneficiary as described in s. 736.0103(19)(c), at least a majority in interest of the beneficiaries described in s. 736.0103(19)(a) and at least a majority in interest of the beneficiaries described in s. 736.0103(19)(b), if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority in number of each such class.
- b. "Qualified investment instrument" means a mutual fund, common trust fund, or money market fund described in and governed by s. 736.0816(3).
- c. An irrevocable trust is created upon execution of the trust instrument. If a trust that was revocable when created thereafter becomes irrevocable, the irrevocable trust is created when the right of revocation terminates.
- (g) Nothing in this chapter is intended to create or imply a duty for the trustee to seek the application of this subsection to invest in investment instruments described in paragraph (a), and no inference of impropriety may be made as a result of a trustee electing not to invest trust assets in investment instruments described in paragraph (a).

- (h) This subsection is not the exclusive authority under this code for investing in investment instruments described in paragraph (a). A trustee who invests trust funds in investment instruments described in paragraph (a) is not required to comply with paragraph (b), paragraph (c), or paragraph (f) if the trustee is permitted to invest in such investment instruments pursuant to subsection (2).
- (i) This subsection does not apply to a trust administered by a family trust company, licensed family trust company, or foreign licensed family trust company operating under chapter 662.
- (6) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.
- (7) This section does not preclude the following transactions, if fair to the beneficiaries:
- (a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
- (b) A payment of reasonable compensation to the trustee;
- (c) A transaction between a trust and another trust, the decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;
- (d) A deposit of trust money in a regulated financial service institution operated by the trustee; or
- (e) An advance by the trustee of money for the protection of the trust.
- (8) This section does not preclude the employment of persons, including, but not limited to, attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee, or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and to pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust; to act without independent investigation on their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.
- (9) The court may appoint a special fiduciary to act with respect to any proposed transaction that might violate this section if entered into by the trustee.
- (10) Unless otherwise provided in this subsection, payment of costs or attorney fees incurred in any proceeding may be made by a trustee from assets of the trust without the approval of any person and without court authorization, as provided in ss. 736.0816(20) and 736.1007(1).

- (a) As used in this subsection, the term "pleading" means a pleading as defined in Rule 1.100 of the Florida Rules of Civil Procedure.
- (b) If a trustee incurs attorney fees or costs in connection with a claim or defense of breach of trust which is made in a filed pleading, the trustee may pay such attorney fees or costs from trust assets without the approval of any person and without any court authorization. However, the trustee must serve a written notice of intent upon each qualified beneficiary of the trust whose share of the trust may be affected by the payment before such payment is made. The notice of intent does not need to be served upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.
- (c) The notice of intent must identify the judicial proceeding in which the claim or defense of breach of trust has been made in a filed pleading and must inform the person served of his or her right under paragraph (e) to apply to the court for an order prohibiting the trustee from using trust assets to pay attorney fees or costs as provided in paragraph (b) or compelling the return of such attorney fees and costs to the trust. The notice of intent must be served by any commercial delivery service or form of mail requiring a signed receipt; the manner provided in the Florida Rules of Civil Procedure for service of process; or, as to any party over whom the court has already acquired jurisdiction in that judicial proceeding, in the manner provided for service of pleadings and other documents by the Florida Rules of Civil Procedure.
- (d) If a trustee has used trust assets to pay attorney fees or costs described in paragraph (b) before service of a notice of intent, any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may have been affected by such payment is entitled, upon the filing of a motion to compel the return of such payment to the trust, to an order compelling the return of such payment, with interest at the statutory rate. The court shall award attorney fees and costs incurred in connection with the motion to compel as provided in s. 736.1004.
- (e) Upon the motion of any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may be affected by the use of trust assets to pay attorney fees or costs as provided in paragraph (b), the court may prohibit the trustee from using trust assets to make such payment and, if such payment has been made from trust assets after service of a notice of intent, the court may enter an order compelling the return of the attorney fees and costs to the trust, with interest at the statutory rate. In connection with any hearing on a motion brought under this paragraph:
- 1. The court shall deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. If the court finds there is a reasonable basis to conclude there has been a breach of trust, the court may still deny the motion if it finds good cause to do so.
- 2. The movant may show that such reasonable basis exists, and the trustee may rebut any such showing by presenting affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.
- (f) If a trustee fails to comply with an order of the court prohibiting the use of trust assets to pay attorney fees or costs described in paragraph (b) or fails to comply with an order compelling that such payment be refunded to the trust, the court may impose such remedies or sanctions as the court deems appropriate, including, without limitation, striking the defenses or pleadings filed by the trustee.
- (g) Notwithstanding the entry of an order prohibiting the use of trust assets to pay attorney fees and costs as provided in paragraph (b), or compelling the return of such attorney fees or costs, if a claim or defense of breach of trust is withdrawn, dismissed,

or judicially resolved in the trial court without a determination that the trustee has committed a breach of trust, the trustee is authorized to use trust assets to pay attorney fees and costs as provided in paragraph (b) and may do so without service of a notice of intent or order of the court. The attorney fees and costs may include fees and costs that were refunded to the trust pursuant to an order of the court.

(h) This subsection does not limit proceedings under s. 736.0206 or remedies for breach of trust under s. 736.1001, or the right of any interested person to challenge or object to the payment of compensation or costs from the trust.

Credits

Added by Laws 2006, c. 2006-217, § 8, eff. July 1, 2007. Amended by Laws 2007, c. 2007-153, § 3, eff. July 1, 2007; Laws 2008, c. 2008-4, § 159, eff. July 1, 2008; Laws 2008, c. 2008-76, § 2, eff. July 1, 2008; Laws 2009, c. 2009-115, § 20, eff. July 1, 2009; Laws 2013, c. 2013-172, § 18, eff. Oct. 1, 2013; Laws 2014, c. 2014-97, § 38, eff. Oct. 1, 2015; Laws 2016, c. 2016-189, § 5, eff. July 1, 2016; Laws 2021, c. 2021-183, § 41, eff. July 1, 2021.

West's F. S. A. § 736.0802, FL ST § 736.0802

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

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Proposed Legislation

West's Florida Statutes Annotated

Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)

Chapter 736. Florida Trust Code (Refs & Annos)

Part X. Liability of Trustee and Rights of Persons Dealing with Trustee

West's F.S.A. § 736.1008

736.1008. Limitations on proceedings against trustees

Effective: July 1, 2021 Currentness

- (1) Except as provided in subsection (2), all claims by a beneficiary against a trustee for breach of trust are barred as provided in chapter 95 as to:
- (a) All matters adequately disclosed in a trust disclosure document issued by the trustee or a trust director, with the limitations period beginning on the date of receipt of adequate disclosure.
- (b) All matters not adequately disclosed in a trust disclosure document if the trustee has issued a final trust accounting and has given written notice to the beneficiary of the availability of the trust records for examination and that any claims with respect to matters not adequately disclosed may be barred unless an action is commenced within the applicable limitations period provided in chapter 95. The limitations period begins on the date of receipt of the final trust accounting and notice.
- (2) Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee or a trust director of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.
- (3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in chapter 95 and accrues when the beneficiary has actual knowledge of:
- (a) The facts upon which the claim is based, if such actual knowledge is established by clear and convincing evidence; or
- (b) The trustee's repudiation of the trust or adverse possession of trust assets.

Paragraph (a) applies to claims based upon acts or omissions occurring on or after July 1, 2008. A beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for breach of trust based

upon the failure to provide a trust accounting required by s. 736.0813 or former s. 737.303 and does not commence the running of any period of limitations or laches for such a claim, and paragraph (a) and chapter 95 do not bar any such claim.

- (4) As used in this section, the term:
- (a) "Trust disclosure document" means a trust accounting or any other written report of the trustee or a trust director. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.
- (b) "Trust accounting" means an accounting that adequately discloses the information required by and that substantially complies with the standards set forth in s. 736.08135.
- (c) "Limitation notice" means a written statement of the trustee or a trust director that an action by a beneficiary for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: "An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee or a trust director may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney."
- (5) For purposes of this section, a limitation notice applies to a trust disclosure document when the limitation notice is:
- (a) Contained as a part of the trust disclosure document or as a part of another trust disclosure document received within 1 year prior to the receipt of the latter trust disclosure document;
- (b) Accompanied concurrently by the trust disclosure document or by another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document;
- (c) Delivered separately within 10 days after the delivery of the trust disclosure document or of another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document. For purposes of this paragraph, a limitation notice is not delivered separately if the notice is accompanied by another written communication, other than a written communication that refers only to the limitation notice; or
- (d) Received more than 10 days after the delivery of the trust disclosure document, but only if the limitation notice references that trust disclosure document and:
- 1. Offers to provide to the beneficiary on request another copy of that trust disclosure document if the document was received by the beneficiary within 1 year prior to receipt of the limitation notice; or
- 2. Is accompanied by another copy of that trust disclosure document if the trust disclosure document was received by the beneficiary 1 year or more prior to the receipt of the limitation notice.

- (6)(a) Notwithstanding subsections (1), (2), and (3), all claims by a beneficiary against a trustee are barred:
- 1. Upon the later of:
- a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends if the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary throughout the 10-year period; or
- b. Twenty years after the date of the act or omission of the trustee that is complained of if the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary throughout the 20-year period; or
- 2. Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.
- (b) When a beneficiary shows by clear and convincing evidence that a trustee actively concealed facts supporting a cause of action, any existing applicable statute of repose shall be extended by 30 years.
- (c) For purposes of sub-subparagraph (a)1.b., the failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established by this subsection.
- (d) This subsection applies to claims based upon acts or omissions occurring on or after July 1, 2008.
- (7) Any claim barred against a trustee or trust director under this section is also barred against the directors, officers, and employees acting for the trustee or trust director.
- (8) This section applies to trust accountings for accounting periods beginning on or after July 1, 2007, and to written reports, other than trust accountings, received by a beneficiary on or after July 1, 2007.

Credits

Added by Laws 2006, c. 2006-217, § 10, eff. July 1, 2007. Amended by Laws 2007, c. 2007-153, § 5, eff. July 1, 2007; Laws 2008, c. 2008-76, § 3, eff. July 1, 2008; Laws 2018, c. 2018-35, § 7, eff. July 1, 2018; Laws 2021, c. 2021-183, § 9, eff. July 1, 2021.

West's F. S. A. § 736.1008, FL ST § 736.1008

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document

45 So.3d 499 District Court of Appeal of Florida, Fourth District.

COVENANT TRUST COMPANY, Appellant,

v.

The GUARDIANSHIP OF Lillian IHRMAN, Appellee.

Nos. 4D09–4283, 4D09–4551. | Sept. 15, 2010. |

Rehearing Denied Nov. 3, 2010.

Synopsis

Background: Ward's guardian filed petition to remove non-resident trustee for trust under which ward was beneficiary, alleging that trustee breached its fiduciary duties, and requested an order compelling trustee to pay guardian's attorney fees. Trustee filed motion to dismiss based on lack of jurisdiction. The Seventeenth Judicial Circuit Court, Broward County, Mark A. Speiser, J., denied motion, and ordered trustee to expend no further funds and to pay \$10,000.00 to guardian's attorney. Trustee appealed.

Holdings: The District Court of Appeal, Gates, Michael L., Associate Judge, held that:

- [1] trial court was required to hold a limited evidentiary hearing to determine if trustee had minimum contacts to expect to be haled into a Florida court;
- [2] trial court could not prohibit trustee from paying its attorney further fees; and
- [3] trial court was without authority to order trustee to remove trust assets to pay guardian's attorney.

Reversed and remanded.

West Headnotes (12)

[1] Appeal and Error 🄛 Personal jurisdiction

The standard of review for personal jurisdiction over a foreign corporation is de novo.

[2] Courts ← Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

District Court of Appeal is required to strictly construe Florida's long-arm statute.

[3] Constitutional Law Mon-residents in general

Courts \leftarrow Allegations, pleadings, and affidavits

To determine jurisdiction over a non-resident defendant, the court must conduct a two-part analysis: first, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute, and if it does, the next inquiry is whether sufficient minimum contacts are demonstrated to satisfy due process requirements; to exercise personal jurisdiction over a non-resident defendant, both parts must be met. U.S.C.A. Const. Amend. 14.

[4] Courts Allegations, pleadings, and affidavits

Determination that complaint alleges sufficient jurisdictional facts to bring action against a non-resident defendant within the ambit of the long-arm statute requires examining the four corners of the complaint to determine if the pleadings sufficiently allege a basis for jurisdiction; the plaintiff may satisfy this burden either by alleging the language of the statute without pleading supporting facts, or by alleging specific facts that indicate that the defendant's actions fit within one of the sections of Florida's long arm statute.

[5] Courts Allegations, pleadings, and affidavits

Although guardian's petition to remove non-resident trustee was poorly constructed, it alleged sufficient facts indicating trustee's actions fit within long-arm statute, as required to support finding of in personam jurisdiction over trustee. West's F.S.A. § 736.0201(1); West's F.S.A. RCP Rule 1.070(h).

[6] Courts ← Determination of questions of jurisdiction in general

Where the affidavits in support of and in opposition to the exercise of personal jurisdiction over a nonresident cannot be reconciled, the trial court should hold a limited evidentiary hearing to determine the jurisdictional issue.

[7] **Courts** • Determination of questions of jurisdiction in general

Affidavits in support of and in opposition to the exercise of personal jurisdiction over nonresident trustee could not be reconciled in action to remove trustee, and thus, trial court was required to hold a limited evidentiary hearing to determine if trustee had required minimum contacts to expect to be haled into court in Florida.

[8] Trusts - Proceedings

Trial court could not prohibit trustee from paying its attorney fees from trust assets to defend against action seeking its removal as trustee, where no evidence was provided or proffered to show that trustee had breached the trust. West's F.S.A. § 736.0802(10)(b).

4 Cases that cite this headnote

[9] Trusts - Diligence and good faith of trustee

A breach of trust is a trustee's violation of either the trust's terms or the trustee's general fiduciary obligations.

6 Cases that cite this headnote

[10] Trusts 🔑 Jurisdiction

A court must have personal jurisdiction over a trustee in order to enter a ruling affecting the corpus of the trust.

[11] Trusts & Proceedings

In guardian's action seeking removal of trustee of trust of incapacitated beneficiary, trial court was without authority to order trustee to remove trust assets to pay guardian's attorney, where trustee's financial discretion under trust did not provide for payment of attorney fees, but allowed trustee to make payments in its discretion for beneficiary's best interests, and there was no evidence that trustee acted arbitrarily.

7 Cases that cite this headnote

[12] Trusts - Power to remove

In the absence of proof that a trustee has failed to perform, or has performed arbitrarily, a court is without authority to remove trust assets from control of the trustee to be administered by the court or other guardian.

1 Cases that cite this headnote

Attorneys and Law Firms

*500 Joseph G. Young of the Law Office of Joseph G. Young, Fort Lauderdale, for appellant.

No appearance for appellee.

Opinion

GATES, MICHAEL L., Associate Judge.

This is a consolidated appeal from non-final orders denying Covenant Trust Company's (Covenant) Motion to Quash Service of Process; an order directing Covenant to expend

no further funds; and an order requiring Covenant to pay \$10,000.00 to guardian's attorney, whereby Covenant argues the probate court erred in finding that it had *in personam* jurisdiction over Covenant and in directing expenditures of trust funds by Covenant. The appellant argues, among other things, that the trial court erred in denying the motion to dismiss without an evidentiary hearing. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Dolores Irhman is the Guardian of the ward Lillian Ihrman ("Guardian").

In January 2009, Guardian removed Lillian from Covenant Village of Florida and placed her in Bayview Retirement Home, due to concerns with Covenant Village's health care. The Guardian then filed a *501 Petition to Order Payment of Monthly Cost of Care/Petition to Remove Covenant as Trustee. The petition, alleging Covenant breached its fiduciary duties, requested the court enter an order compelling Covenant to pay Lillian's expenses, order a trust accounting, and remove Covenant as trustee. The petition and notice of hearing were sent by U.S. Mail to Covenant in Illinois.

Covenant objected to Guardian's petition, and moved the court to dismiss and adjudicate that process and service of process had not been effected. Covenant further argued that section 736.0205, Florida Statutes, requires the action to be brought in Illinois.

At the April 2009 hearing, Covenant argued it administers the trust in Illinois, there had been no service of process, and therefore, the court did not have personal jurisdiction. Guardian's counsel admitted that Covenant was not properly served. The court entered an order giving the guardian 30 days to effectuate service of process of the petition to remove trustee. The court reserved ruling on the 736.0205 objection.

On May 22, 2009, Covenant filed its motion to quash process and service of process, renewed objection to the petition, and motion to dismiss, along with supporting affidavits controverting that sufficient contacts existed to invoke long-arm jurisdiction. Guardian, in response to Covenant's motion to quash service, filed an affidavit to establish that Covenant did in fact do business within the State of Florida.

On September 25, 2009, the trial court entered an order prohibiting Covenant from expending trust funds without

court order. Covenant appealed this order contending the court erred because it lacked *in personam* jurisdiction over Covenant, or, alternatively, because no evidence was offered to support the breach of trust required by section 736.0802(10).

On October 21, 2009, a hearing was held on Covenant's second motion to quash process and service of process, motion to dismiss, and renewed objection to the petition. Covenant argued the petition did not allege *in personam* jurisdiction over Covenant because it failed to set forth the elements to establish long-arm jurisdiction and the necessary minimum contacts. Thus, the service of process was invalid.

The trial court found that while the petition was not artfully drawn, it was sufficient to survive a motion to dismiss. The motion to dismiss was denied and Covenant was directed to file a responsive pleading. Covenant also appealed this order.

On October 28, 2009, the trial court held a hearing on Guardian's motion for additional retainer, and entered an order granting the motion requiring Covenant to pay the additional retainer. Covenant appealed this order.

ANALYSIS

[1] [2] "The standard of review for personal jurisdiction over a foreign corporation is de novo." *Buckingham, Doolittle & Burroughs, LLP v. Kar Kare Auto. Grp., Inc.,* 987 So.2d 818, 821 (Fla. 4th DCA 2008). "Additionally, we are required to strictly construe Florida's long-arm statute." *Greystone Tribeca Acquisition, LLC v. Ronstrom,* 863 So.2d 473, 475 (Fla. 2d DCA 2004).

Covenant argues the trial court did not have *in personam* jurisdiction over Covenant Trust Company, an Illinois company, because the petition failed to properly allege a basis for jurisdiction under the long-arm statute.

Section 736.0201(1), Florida Statutes (2009), provides that trust proceedings *502 "shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure." Florida Rule of Civil Procedure 1.070(h) states that "[w]hen service of process is to be made under statutes authorizing service on nonresidents of Florida, it is sufficient to plead the basis for service in the language of the statute without pleading the facts supporting service."

[3] To determine jurisdiction over a non-resident defendant, the court must conduct a two-part analysis, as set forth in *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla.1989): "First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements." "*Buckingham, Doolittle*, 987 So.2d at 821. To exercise personal jurisdiction over a non-resident defendant, both parts must be met. *Id.* (citing *Am. Fin. Trading Corp. v. Bauer*, 828 So.2d 1071, 1074 (Fla. 4th DCA 2002)).

[4] Satisfying the first prong requires examining the four corners of the complaint to "determine if the pleadings sufficiently allege a basis for jurisdiction." *Id.* The plaintiff may satisfy this burden "'either by alleging the language of the statute without pleading supporting facts, or by alleging specific facts that indicate that the defendant's actions fit within one of the sections of Florida's long arm statute, section 48.193." Biloki v. Majestic Greeting Card Co., 33 So.3d 815, 819 (Fla. 4th DCA 2010) (quoting Becker v. Hooshmand, 841 So.2d 561, 562 (Fla. 4th DCA 2003)) (emphasis added).

[5] Here, the first prong of the *Venetian Salami* analysis was met, because although the petition was poorly constructed, it alleged sufficient facts indicating Covenant's actions fit within the long-arm statute.

[6] Next, to contest the complaint's allegations or to contest the existence of minimum contacts, a defendant must file an affidavit supporting his argument. *Buckingham, Doolittle,* 987 So.2d at 821 (citing *Venetian Salami,* 554 So.2d at 502–03). The burden then shifts to the plaintiff to prove by affidavit on which basis jurisdiction may be obtained. *Id.* (citing *Venetian Salami,* 554 So.2d at 502–03). If the affidavits can be reconciled, then the court may make a decision based on the undisputed facts; however, if they cannot be reconciled, then the court should conduct a limited evidentiary hearing to determine the issue of jurisdiction. *Id.* (citing *Venetian Salami,* 554 So.2d at 502–03).

[7] Here, Guardian's and Covenant's affidavits cannot be reconciled, as Guardian attested Covenant conducted business in Florida, and Covenant denied this. The trial court only held hearings and decided the issue based on the attorneys' arguments. *See Ralph v. McLaughlin*, 756 So.2d 240, 241 (Fla. 2d DCA 2000) (where trial court only heard the

arguments of counsel before deciding the motions to dismiss based on lack of personal jurisdiction, the Second District, pursuant to Venetian Salami, reversed and remanded the case so the trial court could hold a limited evidentiary hearing on the minimum contacts issue to resolve the conflicting affidavits); Sonson v. Hearn, 17 So.3d 745, 747 n. 1 (Fla. 4th DCA 2009) (citing Leon Shaffer Golnick Adver., Inc. v. Cedar, 423 So.2d 1015, 1017 (Fla. 4th DCA 1982)) (unsworn statements by an attorney at a hearing do not establish facts upon which the trial court can rely). Therefore, the trial court erred by not conducting a limited evidentiary hearing to determine if Covenant had the required minimum contacts *503 to expect to be haled into court in Florida. See Golant v. German Shepherd Dog Club of Am., Inc., 26 So.3d 60, 62–63 (Fla. 4th DCA 2010) (with regard to minimum contacts, due process is met if a non-resident defendant would reasonably anticipate being haled into a Florida court).

Assuming the trial court has the requisite *in personam* jurisdiction, Covenant argues section 736.0205 requires this action be brought in Illinois, unless all parties could not be bound by litigation in the courts where the trust is registered.

Section 736.0205, Florida Statutes (2009) (emphasis added), states in pertinent part that "[o]ver the objection of a party, the court shall not entertain proceedings under s. 736.0201 for a trust registered, or having its principal place of administration, in another state unless all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration." Section 736.0108, Florida Statutes (2009), controls the determination of the trust's principal place of administration. The Ihrman trust states that "[t]his instrument and the disposition under it shall be construed and regulated and their validity and effect shall be determined by the laws of the State of Illinois." However, this does not designate the "principal place of administration." See § 736.0108(1). If the trust does not specify, then the principal place of administration is the trustee's usual place of business. § 736.0108(2). According to the senior trust administrator's affidavit, Illinois is the usual place of business.

It is not clear from the record if "all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration." Thus, if the trial court determines it has *in personam* jurisdiction, it will next need to determine if the interested parties could be bound by litigation in Illinois. See Meyer v. Meyer, 931 So.2d 268, 269–70 (Fla. 5th DCA

2006) (trust administered in New York where trustee resided; no parties had any connections with Florida; trial court should have applied section 737.203 (predecessor to section 736.0205); thus, it "reverse[d] the order denying the motion to dismiss and remand[ed] for the purpose of allowing the trial court to determine whether all interested parties could be bound by litigation in New York"). We reverse and remand the case to the trial court with directions to hold an evidentiary hearing on the issue of jurisdiction over Covenant.

Covenant next contends the trial court erred in entering its September 25, 2009 order (a) because the court assumed *in personam* jurisdiction over Covenant, which it lacked, or alternatively (b) because no evidence was offered in support of the breach of trust as required under section 736.0802(10).

If the trial court determines it lacked *in personam* jurisdiction, then the court erred in assuming it had the required jurisdiction and thus it lacked power over Covenant. *Springbrook Commons, Ltd. v. Brown,* 761 So.2d 1192, 1194 (Fla. 4th DCA 2000) ("If the court is to exercise its power over a person it must have jurisdiction over that individual."). However, if the trial court does have the required *in personam* jurisdiction, it must next be determined if the court could properly enter its September 25 order.

[8] Guardian filed her motion to prohibit payment pursuant to section 736.0802, arguing she was not provided written notice as required by section 736.0802(10)(a) and requesting the court enter an order pursuant to section 736.0802(10)(b) prohibiting further payment of attorney's fees out of the trust.

***504** Section 736.0802(10) (emphasis added) provides in pertinent part:

- (10) Payment of costs or attorney's fees incurred in any proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (b).
- (a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. ... If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee

pays attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).

(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded

[9] A breach of trust is "[a] trustee's violation of either the trust's terms or the trustee's general fiduciary obligations." Black's Law Dictionary 201 (8th ed. 2004).

Here, Guardian's counsel argued at the hearing that Covenant failed to provide notice to Guardian concerning attorney's fees that were being paid, as required under section 736.0802(10) (a). To obtain an order prohibiting Covenant from paying any more attorney's fees from the trust assets, section 736.0802(10)(b) states that the "party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust." No evidence was provided or proffered showing a breach of trust. Guardian's counsel argued that six months before the September hearing, the trust had approximately \$130,000, and as of September 11, the corpus was about \$67,000; although some of this went to pay for Lillian's monthly maintenance, most of it went to pay attorney's fees and costs. The trust provisions do not prohibit the payment of attorney's fees, and section 736.0802(10) states that attorney's fees may be made by the trustee without any approval, although subsection (10)(a) requires the trust company send notice when the proceedings involve a breach of trust, which Covenant apparently did not do.

During the hearing, the court did not explicitly decide whether the trustee breached the trust. *505 Section 736.0802(10) (b) states that "[i]f the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded." Accordingly, the trial court erred in entering this order without making any such finding of breach of trust.

Lastly, Covenant contends the trial court erred in entering its October 28, 2009 order for an additional retainer (a) because it lacked *in personam* jurisdiction over Covenant, or alternatively (b) because this was "an order for the immediate possession of property," which it argues "must be reversed where no basis in law or fact is provided by the guardian to support such order."

[10] The court must have personal jurisdiction over the trustee "in order to enter a ruling affecting the corpus of the trust." Thus, if the trial court does not have the requisite *in personam* jurisdiction over Covenant, then the trial court erred by entering the October 28, 2009 order directing Covenant to pay the additional retainer from the trust. However, if the trial court does have jurisdiction, it must next be determined if the court could properly enter its October 28, 2009 order.

[11] Covenant argues the trial court erred in requiring it to pay \$10,000 to Guardian's attorney. The trust provides as follows:

2.01 During the lives of the Grantors, or the survivor of them, the Trustee [Covenant] shall pay so much or all the net income of the trust to the Grantors, or the survivor of them, as they direct in writing, and the Trustee shall pay any part of the principal of the trust as the Grantors, or the survivor of them, direct in writing. However, during any period in which the Grantors, or the survivor of them, are in the opinion of a licensed physician incapable of managing their own affairs, the Trustee may in its discretion pay to or use for the benefit of the Grantors or the survivor of them, so much of the income and principal of the trust as the Trustee determines to be required for their health, support and maintenance, in their accustomed manner of living, or for other purposes the Trustee determines to be for their best interests. Any excess income shall be added to principal at the discretion of the Trustee.

Here, Lillian was adjudicated incapacitated and Guardian was appointed as her plenary guardian. This was enough to bring Lillian within the language of this trust provision, as Lillian is unable to manage her own affairs. Thus, the trust requires Covenant to act in its discretion to pay to Lillian that which she needs for her health, support, and maintenance, and for any other purposes within her best interests.

[12] In Cohen v. Friedland, 450 So.2d 905, 906 (Fla. 3d DCA 1984) (citing White v. Bacardi, 446 So.2d 150, 155 n. 5 (Fla. 3d DCA 1984)), the Third District explained that "[a] trustee, in the strictest sense, holds legal title to property which he administers for the named beneficiary in accordance with the terms of the instrument creating the trust." The trust agreement provided that the beneficiary would receive the trust income and the trustees had sole discretion to invade the trust principal for the beneficiary's maintenance, comfort, and welfare. Id. But "[i]n the absence of proof that the trustee has failed to perform, or has performed arbitrarily, a court is without authority to remove trust assets *506 from control of the trustee to be administered by the court or other guardian."

In *Giglio v. Perretta*, 493 So.2d 470, 470 (Fla. 4th DCA 1986), we held the "trial court erred in requiring the trustee to use trust assets to reimburse the guardian of the trust beneficiary for guardianship administration expenses, attorneys fees, and other costs." We explained that although paying some of these costs may have been allowed, in the trustee's discretion, these payments were "not legally mandated by the trust provisions," so the court had "no authority to compel the trustee to make such payments," nor any authority for the attorney's fees award. *Id.* (citing *Cohen*, 450 So.2d 905).

Further, in *Johnson v. Guardianship of Singleton*, 743 So.2d 1152, 1153 (Fla. 3d DCA 1999), the Third District, citing *Cohen*, held that there was "no statutory or other satisfactory legal justification for the award" of legal expenses, where the trial court ordered the trustee "to pay from trust assets the legal expenses incurred" by the guardian.

Here, Covenant, as trustee, was granted, within the trust provision, the discretion to make payments from the trust assets. There was no evidence that Covenant acted arbitrarily. Therefore, the court lacked the authority to order Covenant to remove trust assets. As explained in *Giglio*, these payments were not legally mandated in the trust terms. Further, as in *Johnson*, there was no statutory or other legal authority for the court to order the payments. Because the trust did not provide

for the payment of attorney's fees, and Covenant could make payments in its discretion for Lillian's best interests, the court was without authority to order Covenant to pay Guardian's attorney \$10,000 from the trust assets.

This case is reversed and remanded for the trial court to conduct an evidentiary hearing consistent with this opinion.

Reversed and Remanded.

POLEN and MAY, JJ., concur.

All Citations

45 So.3d 499, 35 Fla. L. Weekly D2074

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

West's Florida Statutes Annotated

Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)

Chapter 736. Florida Trust Code (Refs & Annos)

Part X. Liability of Trustee and Rights of Persons Dealing with Trustee

West's F.S.A. § 736.1005

736.1005. Attorney fees for services to the trust

Effective: July 1, 2015 Currentness

- (1) Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust. The attorney may apply to the court for an order awarding attorney fees and, after notice and service on the trustee and all beneficiaries entitled to an accounting under s. 736.0813, the court shall enter an order on the fee application.
- (2) If attorney fees are to be paid from the trust under subsection (1), s. 736.1007(5)(a), or s. 733.106(4)(a), the court, in its discretion, may direct from what part of the trust the fees shall be paid.
- (a) All or any part of the attorney fees to be paid from the trust may be assessed against one or more persons' part of the trust in such proportions as the court finds to be just and proper.
- (b) In the exercise of its discretion, the court may consider the following factors:
- 1. The relative impact of an assessment on the estimated value of each person's part of the trust.
- 2. The amount of attorney fees to be assessed against a person's part of the trust.
- 3. The extent to which a person whose part of the trust is to be assessed, individually or through counsel, actively participated in the proceeding.
- 4. The potential benefit or detriment to a person's part of the trust expected from the outcome of the proceeding.
- 5. The relative strength or weakness of the merits of the claims, defenses, or objections, if any, asserted by a person whose part of the trust is to be assessed.
- 6. Whether a person whose part of the trust is to be assessed was a prevailing party with respect to one or more claims, defenses, or objections.

- 7. Whether a person whose part of the trust is to be assessed unjustly caused an increase in the amount of attorney fees incurred by the trustee or another person in connection with the proceeding.
- 8. Any other relevant fact, circumstance, or equity.
- (c) The court may assess a person's part of the trust without finding that the person engaged in bad faith, wrongdoing, or frivolousness.
- (3) Except when a trustee's interest may be adverse in a particular matter, the attorney shall give reasonable notice in writing to the trustee of the attorney's retention by an interested person and the attorney's entitlement to fees pursuant to this section. A court may reduce any fee award for services rendered by the attorney prior to the date of actual notice to the trustee, if the actual notice date is later than a date of reasonable notice. In exercising this discretion, the court may exclude compensation for services rendered after the reasonable notice date but before the date of actual notice.

Credits

Added by Laws 2006, c. 2006-217, § 10, eff. July 1, 2007. Amended by Laws 2015, c. 2015-27, § 7, eff. July 1, 2015.

West's F. S. A. § 736.1005, FL ST § 736.1005

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document

227 So.3d 165 District Court of Appeal of Florida, Second District.

IN RE GUARDIANSHIP OF Leon BLOOM, an incapacitated person. Marshall Bloom, individually, Appellant, v.

Dorothy B. Bloom, individually, and Robert M. Elliot, as Trustee of the Leon Bloom Revocable Living Trust u/a/d 11/18/1988, as Restated on 10/22/2009. Appellees.

Case No. 2D16–2985 | Opinion filed May 24, 2017

Synopsis

Background: Beneficiary of decedent's estate, who was also estate's former personal representative, moved for attorney fees based on his successful motion to disqualify the trustee of decedent's trust. The Circuit Court, Sarasota County, Charles E. Williams, J., denied motion. Beneficiary appealed.

Holdings: The District Court of Appeal, Lucas, J., held that:

- [1] Court's previous order that awarded beneficiary appellate attorney fees in connection with the then-trustee's unsuccessful certiorari petition regarding guardianship proceeding pending at decedent's death did not entitle beneficiary to a fee award on the motion to disqualify trustee;
- [2] trial court did not abuse its discretion in refusing to award attorney fees under a "common fund" theory of recovery; but
- [3] trial court's failure to apply the statute that allowed an attorney who rendered services to a trust to be awarded reasonable compensation from the trust necessitated reversal and remand.

Affirmed in part, reversed in part, and remanded.

West Headnotes (5)

[1] Appeal and Error \leftarrow Relating to costs Guardian and Ward \leftarrow Appeal and error

An order denying attorney fees or costs for an interested person is an appealable order under rule on appeal proceedings in probate and guardianship cases. Fla. R. App. P. 9.170.

[2] Guardian and Ward 🤛 Removal

The District Court of Appeal's order that awarded beneficiary of decedent's estate appellate attorney fees in connection with the then-trustee's unsuccessful certiorari petition regarding the propriety of beneficiary's substitution as the petitioner in the guardianship proceeding that was pending at decedent's death did not entitle beneficiary to an award of attorney fees on his successful later motion to disqualify the trustee of decedent's trust, despite argument that the order was the law of the case; the scope of the Court's mandate in the certiorari proceeding extended no further than the fees that were incurred in litigating the issues that were presented in that proceeding.

[3] Attorneys and Legal Services Specific Services and Particular Cases

Trial court did not abuse its discretion in refusing to award attorney fees under a "common fund" theory of recovery to beneficiary of decedent's estate who successfully moved to disqualify the trustee of decedent's trust; it was within the trial court's discretion to find whether or to what extent beneficiary's efforts in removing trustee actually conferred a benefit of any appreciable value to the trust, and beneficiary did not explain how the trial court abused its discretion.

[4] Appeal and Error • Verdict, findings, and judgment

Trial court's failure to apply the statute that allowed an attorney who rendered services to a trust to be awarded reasonable compensation from the trust necessitated reversal of trial court's order denying motion by beneficiary of decedent's estate for attorney fees in connection with his successful motion to disqualify trustee of decedent's trust, and thus remand was required, where the trial court's order stated only that there was no statutory or contractual basis for attorney's fees. Fla. Stat. Ann. § 736.1005.

[5] Trusts - Counsel fees and costs

An applicant for attorney fees under statute allowing for fees for an attorney's services to a trust must serve an application for attorney fees to the parties identified in the statute contemporaneously with the filing of the application with the court. Fla. Stat. Ann. § 736.1005.

*166 Appeal from the Circuit Court for Sarasota County; Charles E. Williams, Judge.

Attorneys and Law Firms

James L. Essenson, Barbara J. Welch, and Matthew J. Kelly of Law Firm of James L. Essenson, Sarasota, for Appellant.

Allan F. Baily of Law Offices of Baily & Baily, P.A., Sarasota, for Appellee Dorothy B. Bloom.

No appearance for Appellee Robert M. Elliott, as Trustee of the Leon Bloom Revocable Living Trust u/a/d 11/18/1988, as Restated on 10/22/2009.

Opinion

LUCAS, Judge.

Marshall Bloom, a beneficiary and former personal representative of the late Leon Bloom's estate, challenges the circuit court's order denying his motion to recover his attorney's fees. The circuit court correctly construed the limits of our mandate from an earlier appeal and rejected Marshall's "common fund rule" argument for recovery of his fees but then erroneously concluded that his fee motion asserted no

statutory basis for the court to consider. In fact, it did. Thus, while we can affirm most of the determinations the circuit court has thus far made, we must reverse the circuit court's order so that the court may rule on the remaining argument presented in the fee motion.

Solely for ease of reference, we will refer to the various Bloom family members in this opinion by their first names, rather than their common surname.

I.

In 1988, Leon executed a trust naming his wife, Dorothy Bloom, as a secondary beneficiary and Robert Johnson as the trust's trustee. When he began to sense that Leon's health and acuity may have been in decline, Mr. Johnson filed a guardianship proceeding in 2014, in which he sought to have Leon's nephew, Marshall, appointed as emergency temporary guardian of Leon's person and property. Both Leon and Mr. Johnson passed away in 2015 while Leon's guardianship proceeding was still pending. At the time of Leon's death, Dorothy had pending in the guardianship proceeding an unresolved claim for reimbursement from Leon's trust for funds she alleged she had used to care for her husband. From this claim, a flurry of litigation ensued between Leon's family members and their attorneys, mostly revolving around who could represent what and whom.²

It does not appear from the record before us that Dorothy's claim has ever been resolved.

After Mr. Johnson's death, Marshall, as the personal representative of Leon's estate, moved to be substituted in the guardianship proceeding as the petitioner in order to challenge Dorothy's claim. The circuit court granted Marshall's motion for *167 substitution on October 23. 2015. Marc J. Soss, Esq., the successor trustee of Leon's trust, then filed a petition for writ of certiorari with this court on November 11, 2015, seeking to quash the order granting the substitution of Marshall as the petitioner. On March 23, 2016, in case number 2D15-4864, this court issued a per curiam order dismissing Mr. Soss's certiorari petition. In re Guardianship of Bloom, 189 So.3d 769 (Fla. 2d DCA 2016) (table decision). In addition to dismissing the petition, our court also granted Marshall's motion for appellate attorney's fees in case number 2D15-4864. While granting entitlement, our order remanded the matters of the amount and appropriate source of those fees for the circuit court's ultimate determination.

Shortly before Mr. Soss began pursuing this unsuccessful certiorari petition, Marshall, through his attorney, James L. Essenson, Esq., filed a motion in the circuit court to disqualify Mr. Soss as trustee and appoint an independent trustee over Leon's trust.³ The circuit court agreed with Marshall and granted the motion to disqualify Mr. Soss as trustee on April 7, 2016. Attorney Robert Elliott was then appointed in Mr. Soss's stead as the trustee of Leon's trust.

There was no argument advanced below or on appeal that the guardianship proceeding was an improper forum to resolve this trust dispute.

Thus, in these early rounds of litigation, Marshall had two preliminary successes: the first, this court's order dismissing the certiorari petition challenging his substitution in Leon's guardianship proceeding; the second, the circuit court's order disqualifying the trustee of Leon's trust. Marshall then sought an award of his attorney's fees for the latter victory by filing a motion and a memorandum of law in the circuit court in which he posited three bases for recovery. First, Marshall argued that this court's prior fee award in the dismissed certiorari petition somehow constituted a finding that Mr. Essenson's services had benefitted Leon's estate, which, somehow, encompassed his efforts to disqualify Mr. Soss as trustee. As Marshall put it in his memorandum before the circuit court, since this court granted his entitlement to fees in the certiorari proceeding, a proceeding which enabled Mr. Essenson to maintain an objection to Mr. Soss's service as trustee, then "a fortiori, the Essenson firm is entitled to fees and costs for prosecuting" the disqualification motion, "which [was] clearly a benefit to the trust." According to Mr. Essenson, our prior determination of entitlement to appellate fees in the certiorari proceeding became "the law of the case," so that all of Mr. Essenson's work going forward must be deemed a benefit to Leon's trust. Second, Mr. Essenson posited that he should be awarded his fees under the "common fund" theory of recovery, a common law claim for attorney's fees found in equitable jurisprudence. As his third basis, Mr. Essenson argued that he was entitled to attorney's fees under section 736.1005(1), Florida Statutes (2015), which provides that "[a]ny attorney who has rendered services to a trust may be awarded reasonable compensation from the trust."

On June 8, 2016, the circuit court denied Marshall's motion for fees associated with disqualifying Mr. Soss. In its order denying the motion, the circuit court dispensed with Mr. Essenson's first argument out of hand: "the Essenson Firm's argument [is] unavailing, as the Essenson Firm reads the

Second District's mandate much broader than the narrow issue on appeal." In apparent reference to Marshall's common fund argument, the circuit court "decline[d] to award attorney's fees as a matter of equity." Finally, the court determined *168 that there was no statutory basis for Mr. Essenson to recover his fees.

Marshall now appeals this order.

II.

Our jurisdiction to review the probate order before us is a preliminary point we must address. On January 1, 2012, Florida Rule of Appellate Procedure 9.170 took effect. Subsection (b) of the rule begins:

Except for proceedings under rule 9.100 and rule 9.130(a), appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine a right or obligation of an interested person as defined in the Florida Probate Code.

The subsection continues by listing those orders that finally determine a right or obligation, which "include, but are not limited to," twenty-four separately described categories. Amongst the twenty-four categories of final, appealable orders listed in the rule, we find (b)(23), orders that "award attorneys' fees or costs." Here, however, the circuit court's order denied Marshall's motion for attorney's fees and so is, quite obviously, not one that could be fairly read to "award" anyone's fees or costs. See, e.g., Award, Black's Law Dictionary (10th ed. 2014) (defining the verb "award" as "[t]o grant by formal process or by judicial decree"). Other provisions within subsection (b) provide for review of orders that, for example, "determine a motion," or "grant or deny" a petition, making the selection of the word "award" in (b)(23) all the more conspicuous by its contrast.

[1] Nevertheless, we are satisfied that an order denying attorney's fees or costs for an interested person remains an appealable order following the passage of rule 9.170. Rule 9.170 generally describes appealable probate and guardianship orders as those "that finally determine a right or obligation of an interested person" under the probate code. This language mirrors the defining language that was in the rule's predecessor, rule 9.110(a)(2), which itself was merely a restatement of former Florida Rule of Probate Procedure 5.100—a deliberate repetition, according to the Florida Appellate Court Rules Committee's 1996 amendment

note, because rule 9.110(a)(2) was "not intended to change the definition of final order for appellate purposes." Fla. R. App. P. 9.110 committee notes (1996 amend.). Thus, the traditional rule that a probate order is sufficiently final for appellate review when "judicial labor" has ended as to the issue the order addresses appears to remain intact following rule 9.170's passage, just as it had when rule 9.110 was enacted. See Dempsey v. Dempsey, 899 So.2d 1272, 1273 (Fla. 2d DCA 2005) ("Rule 9.110(a)(2) 'does not abrogate prior case law holding that a party's right of appeal arises when there is a termination of judicial labor on the issue involved as to that party.' " (quoting In re Estate of Walters, 700 So.2d 434, 435 n.1 (Fla. 4th DCA 1997))); see also Armstrong v. Exceptional Child Ctr., Inc., — U.S. ——, 135 S.Ct. 1378, 1386, 191 L.Ed.2d 471 (2015) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute' is presumed to incorporate that interpretation." (quoting Bragdon v. Abbott, 524 U.S. 624, 645, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998))); State v. Losada, 175 So.3d 911, 914 (Fla. 4th DCA 2015) (applying the prior-construction canon of interpretation). While the inclusion of a list of appealable probate and guardianship orders was a novel development when rule 9.170 was enacted, it must be remembered that the list's prefatory text, "include, but are not limited to," signals a nonexclusive listing. See *169 Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC, 986 So.2d 1244, 1257 (Fla. 2008) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." (alteration in original) (quoting Fed. Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 100, 62 S.Ct. 1, 86 L.Ed. 65 (1941))); Carrithers v. Cornett's Spirit of Suwannee, Inc., 93 So.3d 1240, 1241 (Fla. 1st DCA 2012) (observing that rule 9.170 "provides a nonexclusive list of 24 categories of probate and guardianship orders that are appealable"). In itself, then, this list of categories merely illustrates the kinds of probate and guardianship orders that are considered appealable; the rule's text leaves in place what had been the traditional formulation of finality for appealable orders in probate and guardianship proceedings.

Applying that construction of rule 9.170, we conclude that the order denying attorney's fees here ended the judicial labor needed to adjudicate that issue. See Fabing v. Eaton, 941 So.2d 415, 417 (Fla. 2d DCA 2006) ("Generally, an order denying a motion for attorney's fees is a final, appealable order when that order ends the judicial labor as to that portion of the case."). And it is beyond dispute that Marshall was

an interested party as defined under the probate code, both as a former personal representative at the time the fees were incurred and as a current beneficiary of Leon's estate. See § 731.201(23), Fla. Stat. (2014); Wheeler v. Powers, 972 So.2d 285, 287–88 (Fla. 5th DCA 2008); Carvel v. Godley, 939 So.2d 204, 208 (Fla. 4th DCA 2006). Accordingly, we have jurisdiction to consider the appeal of this order, an order we review de novo. See Country Place Cmty. Ass'n, Inc. v. J. P. Morgan Mortg. Acquisition Corp., 51 So.3d 1176, 1179 (Fla. 2d DCA 2010) ("[W]here ... the circuit court's determination of entitlement to attorney's fees is based on a conclusion of law concerning the interpretation of a statute or contractual provision, we employ a de novo standard of review.").

Our jurisdictional conclusion would also appear to align with recent decisions that have addressed the substantive merits in appeals of orders denying motions or petitions to recover guardians' fees. See, e.g., In re Guardianship of Beck, 204 So.3d 143, 153 (Fla. 2d DCA 2016) (reviewing the denial of petitions to recover attorney's fees and costs); Karr v. Vitry, 135 So.3d 372, 373 n.1 (Fla. 5th DCA 2014) (concluding that an order denying a ward her guardian's fees was appealable under rule 9.170).

III.

A.

[2] Marshall asserted three potential bases for recovery of his attorney's fees in connection with the disqualification of Mr. Soss as the trustee of Leon's trust. We can dispense with two of them in short order. First, with regard to this court's prior order awarding attorney's fees in connection with Mr. Soss's unsuccessful certiorari petition, the circuit court put it well when it rejected Marshall's assertion that his victory in that prior matter entitled to him to an award of fees in a subsequent matter: Marshall simply read this court's mandate in the prior proceeding "much broader than the narrow issue on appeal" actually was. The scope of this court's mandate —and its award of attorney's fees—in case number 2D15-4864 extended no further than the fees that were incurred in litigating the issues that were presented in that proceeding (which, again, revolved around the propriety of Marshall's substitution in Leon's guardianship proceeding). Cf. FL-Carrollwood Care, LLC v. Gordon, 72 So.3d 162, 165 (Fla. 2d DCA 2011) ("[A] trial court lacks authority to deviate from the terms of the appellate court's instructions on remand.").

The circuit court was prohibited from extending *170 the reach of our order and mandate beyond those issues, and so we can readily affirm that aspect of the circuit court's order without further discussion. Cf. Marine Midland Bank Cent. v. Cote, 384 So.2d 658, 659 (Fla. 5th DCA 1980) (holding that the trial court erred by entering order awarding attorney's fees beyond scope of mandate and stating that "[w]hen a case is appealed and the appellate court acts by issuing its mandate, the trial court must follow the dictate of the mandate and should not stray from it").

[3] As to the second argued basis, Marshall's contention that he is entitled to compensation of his attorney's fees under a "common fund" theory of recovery, here as well, we find no cause to disturb the circuit court's ruling. Whether or to what extent Marshall's efforts removing Mr. Soss as the trustee actually conferred a benefit of any appreciable value to the trust was, as the circuit court observed in its order, "within the court's discretion to find." It found he was not entitled to recover his attorney's fees on that basis. Marshall has not explained, and we fail to see, how that discretion was in any way abused here, and so we affirm that ruling in the order as well.

See, e.g., Shriner v. Dyer, 462 So.2d 1122, 1124 (Fla. 4th DCA 1984) (holding that beneficiaries of a trust were entitled to recover their attorney's fees and costs for successfully removing a trustee who had mismanaged the trust's assets under the "common fund rule," and explaining that "[t]he common fund rule serves to award attorney's fees 'from a fund or estate which has been benefitted by the rendering of legal services' " (quoting Estate of Hampton v. Fairchild–Fla. Constr. Co., 341 So.2d 759, 761 (Fla. 1976))).

[4] There is, however, one remaining basis Marshall asserted as a potential avenue for recovering his attorney's fees in seeking Mr. Soss's disqualification as the trustee of Leon's trust, section 736.1005 of the Florida Statutes. On this point, the circuit court's order stated only that there was "no statutory or contractual basis for attorney's fees." That is incorrect. Section 736.1005 states: "Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust." Since the probate court assumed jurisdiction over the trust and this underlying dispute concerning the trust's trustee, the statute was applicable here and could have provided a basis for Marshall to recover his attorney's fees. We express no opinion about whether such an award would be proper under section 736.1005. That, of course, will be a matter within the circuit court's discretion to first decide.

Cf. Saints in Christ, Temple of Holy Ghost v. Fowler, 448 So.2d 1158, 1159 (Fla. 1st DCA 1984) ("[W]e do not imply that an award of attorney's fees is proper in this case On remand, the trial judge shall determine entitlement as well as the amount of any attorney's fees, subject, of course, to appropriate review by this court if sought."). We hold only that the circuit court should have considered and ruled upon this argument before it denied Marshall's motion. See Boykin v. Garrison, 658 So.2d 1090, 1090 (Fla. 4th DCA 1995) ("The law is well settled that a trial court must exercise its discretion where discretion has been provided" (citing Glosson v. Solomon, 490 So.2d 94 (Fla. 3d DCA 1986))). On that basis, we are constrained to reverse the circuit court's order so that the court can now make a ruling on Marshall's statutory argument for fees.

B.

Having concluded that Marshall's statutory argument to recover his fees requires further consideration by the circuit court, we pause to address a notification issue concerning his motion, as there was disagreement below about this issue and *171 some clarification may be beneficial to the circuit court and the parties on remand. Section 736.1005(1) includes the following somewhat awkwardly crafted sentence regarding notice:

The attorney [who has rendered services to a trust] may apply to the court for an order awarding attorney fees and, after notice and service on the trustee and all beneficiaries entitled to an accounting under s. 736.0813, the court shall enter an order on the fee application.

While ultimately denying Marshall's motion for attorney's fees, the circuit court observed during the hearing that the trustee and approximately forty named beneficiaries of Leon's trust should have been provided prior notice of the hearing under this provision of the statute. Marshall disagreed with the circuit court's reading. Instead, he posits that he need not have provided notice at the time he filed his motion, only sometime before the court entered its order on his motion —a view ostensibly supported by the compound-complex structure of this statute's sentence and the presence of a dependent, adverbial clause ("after notice and service") that, grammatically, would seem to relate only to the independent clause it precedes ("the court shall enter an order on the fee application"). Cf. Fla. Hurricane Protection & Awning, Inc. v. Pastina, 43 So.3d 893, 900-01 (Fla. 4th DCA 2010) (Farmer, J., dissenting) ("The subordinate clause functions adverbially,

laying down the condition under which the independent clause will have effect."). Thus, as Marshall would have it, the court's entry of an order on his fee application would be the operative deadline that implicates the statute's requirement to furnish notice of that application.

[5] That is a rather peculiar way to read a notice provision. It also elides the real query—the precise ambiguity, if you will —that this section holds. Neither the statute's sentence's text, its structure, nor the rules of grammar provide a definitive answer to the temporal question: When, exactly, does notice under this statute have to be provided to these parties? We must look to rules of statutory construction for guidance. Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla. 2000) ("[I]f the language of the statute is unclear, then rules of statutory construction control." (citing Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984))). Here, the principle of reading the notice provision in pari materia directs us to other parts of this compound-complex sentence that a grammatical convention, strictly applied, would otherwise avoid. See O'Hara v. State, 964 So.2d 839, 843 (Fla. 2d DCA 2007) (observing that statutory language ought not to be read in isolation, but "taken in context, so that its meaning may be illuminated in the light of the statutory scheme of which it is a part" (citing Thompson v. State, 695 So.2d 691, 692 (Fla. 1997))); see also Wagner v. Botts, 88 So.2d 611, 613 (Fla. 1956) ("We deem it proper to adhere to what now appears to be the better rule which is to treat the rules of punctuation on a parity with other rules of interpretation."). Within this very

sentence, in the first independent clause, a precise point in time to utilize as a reference point is apparent—the attorney's application for fees—a point that coincides precisely with when notices of hearings are ordinarily required. See Stevens v. Nationstar Mortg., LLC, 133 So.3d 628, 629 (Fla. 5th DCA 2014) (observing that the requirement that all filed pleadings and papers in court proceedings be served on each party or their counsel "is to satisfy the constitutional requirement of due process"); see also Fla. R. Jud. Admin. 2.516(a). That is how we construe this provision. Reading this statute's sentence as a whole, in pari materia, we hold that an applicant for attorney's fees *172 under section 736.1005 must serve an application for attorney's fees to the parties identified in the statute contemporaneously with the filing of the application with the court.

Accordingly, we reverse the circuit court's order to the extent that the court did not rule upon Marshall's statutory argument to recover his fees. In all other respects, we affirm the decision below.

Affirmed in part; reversed in part; and remanded.

KHOUZAM and SALARIO, JJ., Concur.

All Citations

227 So.3d 165, 42 Fla. L. Weekly D1153

End of Document

West's Florida Statutes Annotated

Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)

Chapter 736. Florida Trust Code (Refs & Annos)

Part VIII. Duties and Powers of Trustee (Refs & Annos)

West's F.S.A. § 736.0805

736.0805. Expenses of administration

Effective: July 1, 2007 Currentness

In administering a trust, the trustee shall only incur expenses that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

Credits

Added by Laws 2006, c. 2006-217, § 8, eff. July 1, 2007.

West's F. S. A. § 736.0805, FL ST § 736.0805

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document

813 So.2d 1051 District Court of Appeal of Florida, Fourth District.

Steven SHEAFFER, Appellant,

V.

Diane Millman TRASK and Dorothy R. Millman Sheaffer, Appellees.

No. 4D01-343. | April 17, 2002.

Synopsis

Trustee of revocable trust appealed from order of the Fifteenth Judicial Circuit Court, Palm Beach County, John D. Wessel, J., requiring him to distribute sole asset of trust to beneficiaries. The District Court of Appeal, Polen, C.J., held that trustee could not be required to distribute assets of trust before provision was made for debts, funeral expenses, and administrative expenses of settlor's estate.

Reversed and remanded.

West Headnotes (3)

[1] Trusts 👄 Expenditures

Trustee could not be required to distribute assets of trust before provision was made for debts, funeral expenses, and administrative expenses of settlor's estate.

1 Cases that cite this headnote

[2] Trusts 🐎 Expenditures

A trustee is entitled to receive payment of his reasonable expenses in managing a trust from the assets of that trust.

[3] Trusts 🐎 Expenditures

Trusts \hookrightarrow Taxes and assessments

Although a trust instrument directs termination of the trust and the distribution of the principal

to the beneficiaries upon the settlor's death, the trustee cannot make complete distribution until provision has been made for all the expenses, claims and taxes the trust may be obligated to pay, and certainly not before these amounts have been fully ascertained.

Attorneys and Law Firms

*1051 Morris G. (Skip) Miller of Adorno & Zeder, P.A., Boca Raton, for appellant.

No brief filed, for appellees.

Opinion

POLEN, C.J.

Steven Sheaffer, as trustee of the Franklin M. Millman and Dorothy R. Millman Revocable Trust ("Trust"), timely appeals after the trial court, following a nonevidentiary hearing, ordered him to distribute the sole asset of the Trust to Diane Millman Trask. As set forth below, we reverse.

The Millmans created the instant Trust in which they served as co-trustees. *1052 Franklin Millman died in 1992. Several months later, Dorothy executed an amendment to the Trust in which she resigned as co-trustee and named her daughter, Trask, as sole trustee.

Dorothy later remarried. In 1996, she executed a second amendment to the Trust in which she replaced Trask as sole trustee with her new husband, Sheaffer. She executed a codicil to her will in which she devised the remainder of her estate to the Trust. The sole asset of the Trust now was the Millman family house.

In October, 1996, a petition was filed to determine Dorothy's incapacity. In November, 1996, Trask filed a petition in which she objected to her removal as trustee and the appointment of Sheaffer as successor trustee. She sought to void the second amendment to the Trust on the ground that Dorothy was incapacitated when she amended it.

In December, 1996, Dorothy was declared incapacitated. She died in October, 2000. Later in October, Sheaffer filed a petition for administration of her estate as her surviving spouse. This petition was assigned a different case number

than that assigned to Trask's petition, even though both cases were in probate.

In December, in her pending action, Trask moved the court to distribute the assets of the Trust (the house) to her and her brother, the beneficiaries of the Trust. At a subsequent nonevidentiary hearing, the court ordered Sheaffer to distribute the assets of the Trust. Sheaffer appeals from this order.

Sheaffer argues the court should not have distributed the assets of the Trust without first authorizing payment to Sheaffer of his reasonable expenses in managing the Trust. Alternatively, he argues the court's order precludes him from complying with the terms of the Trust insofar as he is now unable to pay the debts, funeral expenses, and administrative expenses of Dorothy's estate. He also argues the court lacked jurisdiction to enter the order.

[1] [2] [3] A trustee is entitled to receive payment of his reasonable expenses in managing a trust from the assets of that trust. *First Union Nat'l Bank v. Jones*, 768 So.2d 1213, 1214 (Fla. 4th DCA 2000) (citations omitted). In fact, "[a]lthough a trust instrument directs termination of the trust and the distribution of the principal to the beneficiaries upon the settlor's death, the trustee cannot make complete distribution until provision has been made for all

the expenses, claims and taxes the trust may be obligated to pay, and certainly not before these amounts have been fully ascertained." *Id.* at 1215. *Jones* further held that "when the trust is the beneficiary of the grantor's probate estate and is charged with the duty to pay the expenses, claims, and taxes imposed on the probate estate, the trustee cannot make complete distribution of the trust until the probate proceeding has been substantially concluded...." *Id.*

Part of the confusion seems to be attributable to the different case numbers assigned to Trask's action and Sheaffer's petition to administer the estate. Still, under *Jones*, we hold it was premature for the court to have ordered distribution of the Trust. We, therefore, reverse. On remand, the court may determine any fees and/or expenses due to Sheaffer, as well as any other collateral matters that may affect the probate proceeding, prior to distributing the sole trust asset.

REVERSED and REMANDED for further proceedings in accordance with this opinion.

Government Works.

STONE and GROSS, JJ., concur.

All Citations

813 So.2d 1051, 27 Fla. L. Weekly D889

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340 So.2d 548 District Court of Appeal of Florida, First District.

Charles BARNETT, Appellant,

v.

William R. BARNETT, Appellee.

Rehearing Denied Jan. 13, 1977.

Synopsis

After relinquishing jurisdiction to allow trial court to make specific rulings on evidentiary matters, 304 So.2d 482, the District Court of Appeal, 336 So.2d 1213, affirmed trial court's judgment in litigation involving claimants of trust. The Circuit Court for Duval County, Henry F. Martin, J., then awarded attorney's fees to the trustee and trust beneficiary appealed. The District Court of Appeal held that although trustee, in fiduciary capacity, was required to do something more than sit on the sidelines and watch while claimants litigated their entitlement to the trust, was not the duty of the trustee to take a partisan stance and argue on the side of one or more of the claimants and trustee thus was not entitled to attorney's fees for time spent by the trustee's attorneys in arguing in favor of certain of the claimants.

Remanded.

West Headnotes (3)

[1] Trusts 🐎 Evidence

When a trustee seeks to charge a trust corpus with expenses incurred by him, including attorney fees, the burden of proof is upon the trustee to demonstrate that the expense is reasonably necessary and that such expense was incurred for the benefit of the trust and not for the trustee's own benefit or the benefit of others.

4 Cases that cite this headnote

[2] Trusts - Counsel Fees and Costs

Trustee was not entitled to have paid from the trust estate attorney's fees for services rendered by the trustee's attorney to other parties to proceedings which sought determination as to whether one person was a beneficiary under the trust.

5 Cases that cite this headnote

[3] Trusts - Counsel Fees and Costs

Although trustee, in fiduciary capacity, was required to do something more than stand on the sidelines and watch proceedings which resolved question whether one particular person was a beneficiary under the trust, it was not the duty of the trustee to take a partisan stance and argue the side of one or more of the claimants so that trustee was not entitled to attorney's fees for time spent by the trustee's attorneys arguing on behalf of certain of the beneficiaries.

5 Cases that cite this headnote

Attorneys and Law Firms

*548 Raymond, Wilson, Karl, Conway & Barr, Tallahassee, Bedell, Bedell, Dittmar & Zehmer, Jacksonville, for appellant.

George L. Hudspeth, Jack F. Wayman, Jacksonville, for appellee.

Opinion

PER CURIAM.

By this interlocutory appeal, appellant, a trust beneficiary, challenges the amount of attorneys' fees awarded by the trial judge to the attorneys for the trustee, appellee, incident to a dispute and ensuing litigation among the trust beneficiaries. The factual background may be found in two prior opinions of this Court, Barnett v. Barnett, Fla.App.1st 1974, 304 So.2d 482 and Barnett v. Barnett, Fla.App.1st 1976, 336 So.2d 1213. By our first above-mentioned opinion, we temporarily relinquished jurisdiction to the trial court with directions that it enter a further order making specific rulings or each objection to evidence which the judge took under advisement during the course of the trial. While

jurisdiction was relinquished, the trial judge entered the order here interlocutorily appealed. During the pendency of this interlocutory appeal, we have rendered our opinion on the merits in the primary case. (Our second opinion above cited.)

Under the terms of the trust, the surviving blood issue of William L'Engle Barnett is entitled to a share of the income and corpus of the trust of which William R. Barnett is trustee. Following the death of *549 William L'Engle Barnett in April of 1968, Charles Barnett, appellant here, through his attorney, notified the trustee that he (Charles) was entitled to benefits from the trust as surviving blood issue of William. The trustee promptly engaged the services of the law firm of Mahoney, Hadlow & Adams and notified the other trust beneficiaries who soon announced their intention to dispute Charles' claim. A settlement attempt arranged by attorney Hadlow in September of 1968 failed. Up to that time, the law firm had devoted a total of 53 hours to the case. On January 20, 1970, the trustee filed a declaratory judgment action seeking resolution of the conflicting claims. Up to that time, said firm had devoted an additional 112 hours, or a total of 165 hours to the case. From January to August, 1970, the firm, then representing the trustee and other defendants in the case, 1 took three depositions and moved to strike one of the defenses contained in Charles' answer. During the latter period, the firm devoted an additional 141 hours to the case. In August of 1970, the other alleged beneficiaries, being the other defendants in the case, employed other attorneys to represent their respective interests. From August, 1970 through February, 1972, the firm representing the trustee expended an additional 481 hours incident to the case. The trial of the case which commenced on February 21, 1972, consumed nine days. As recited in our prior opinion,² the basic issue before the trial court was whether or not Charles was the blood issue of William under a construction of Section 731.29(1), F.S.1973. The trial judge found adversely to Charles, whose motions for rehearing and new trial were denied on June 13, 1972. From the beginning of the trial until disposition of the post-trial motions, the law firm employed by the trustee expended an additional 160 hours.

Conflict of interest is not urged by appellant. Indeed, during the hearing before the trial judge, appellant's attorney stated: 'Now it just happens to be a fact that for eight months the other beneficiaries relied on this firm, the Hadlow-Hudspeth firm to represent them in the case here. I don't fault anybody for that. I'm—I don't mean to say there was such conflicts of interest that it created any problem.'

2 Barnett v. Barnett, Fla. App. 1st 1976, 336 So. 2d 1213.

At the hearing on the petition for attorneys' fees which is the genesis of this appeal, a member of the firm filed an affidavit dated February 6, 1975, alleging 'that your affiant has examined the time records for attorneys as kept by Mahoney, Hadlow, Chambers & Adams to determine the amount of time its members and associates have devoted to this case from April, 1968, to the present, and those records reflect' a total of 1008.7 hours. Two affidavits from eminent attorneys were also filed stating that in their opinion such legal services justified a fee of \$42,500 and \$46,400, respectively. The trial judge awarded a fee of \$42,500.

While conceding that the trustee is entitled to receive reasonable attorneys' fees for necessary legal services, and that the hourly amount awarded by the trial judge is reasonable, appellant argues that the only services shown to have been necessary were those involved in the initial 165 hours expended by the law firm in getting the case filed in the court where the conflicting claims of the real parties in interest could be judicially determined plus approximately 90 hours, or 10 hours a day, for the nine day trial. In support of that argument, appellant quotes a recitation in the trustee's one page brief filed in this Court incident to the primary appeal wherein he said '* * * since the issue on appeal is one in which the trustee has no direct interest other than being a stakeholder of the trust res, the trustee does not propose to file any brief.' Appellant also urges citing West Coast Hospital Association v. Florida National Bank of Jacksonville, Sup.Ct. Fla. 1958, 100 So.2d 807 and Warner v. Florida Bank & Trust Co. at West Palm Beach, 160 F.2d 766 (5th Cir. 1947), that the law of Florida provides that Charles Barnett and the other claimants may be entitled to receive from the trust assets reasonable costs of legal services necessarily rendered by their respective *550 attorneys incident to determining whether or not Charles Barnett was the blood issue of William L'Engle and that therefore the trust assets will be depleted by a substantial amount for legal services rendered by the attorneys for the trustee, without the trial court having any information as to the amount of reasonable attorneys' fees necessarily incurred by Charles Barnett and the other claimants.

[1] When a trustee seeks to charge a trust corpus with an expense incurred by him, including attorney fees, the burden of proof is upon the trustee to demonstrate that the expense was reasonably necessary and that such expense was incurred for the benefit of the trust, and not for his own benefit nor the benefit of others.

Our examination of the record reveals that the trustee failed to demonstrate the necessity of a substantial amount of the services rendered by his attorneys and failed to distinguish between services rendered for the trustee and services rendered for the other defendants. As already observed, the trustee finally asserted in his brief that he was only a stakeholder. It is clear that the trustee knew in April of 1968 that there were conflicting claims to the share of the trust estate claimed by appellant and he knew in September of 1968 that the real parties in interest were not going to settle their differences. At the time the trustee filed his complaint for declaratory judgment, the need for substantial additional legal services on the part of the trustee came to an end. All of the claimants being in court, it was not the duty nor prerogative of the trustee to favor one claimant over the other. Certainly the trustee is not entitled to have paid from the trust estate attorneys' fees for services rendered by the trustee's attorneys to other parties to the proceedings.

[3] The crucial question is whether, after filing a suit to determine which of the conflicting claims should prevail, the trustee should have actively continued to participate in the preparation of the pending litigation. While the trustee in his fiduciary capacity was required to do something more than stand on the sidelines and watch, it was not his duty to take a partisan stance and argue the side of one or more of the claimants. In order that the trustee might discharge his fiduciary responsibilities it was his duty to participate in the investigation of the claims, secure relevant documents

and procure other evidence. However, sub judice the record reveals that the trustee through the fourth day of the trial at which time his attorney announced 'I've done everything I intend to do' actively participated in the litigation, opposed appellant's motion for summary judgment and moved to strike certain defenses.

Although the record before us in inadquate to support a determination by this Court as to which services rendered by the trustee's attorneys were reasonably necessary in their representation of the trustee incident to his duties and responsibilities as trustee, that record does reflect that the trial judge awarded compensation for attorneys's services which were not reasonably necessary to such purpose. Further, services rendered by the trustee's attorneys incident to the preparation of one or more of the defendant's claims may not properly be paid from the trust estate.

Accordingly, we remand the case for further proceedings to determine proper fees to be awarded for the services of the trustee's attorneys consistent with the views expressed herein.

IT IS SO ORDERED.

BOYER, C.J., and RAWLS and MILLS, JJ., concur.

All Citations

340 So.2d 548

End of Document

295 So.3d 1255 District Court of Appeal of Florida, Second District.

> IN RE GUARDIANSHIP OF Leon BLOOM, an incapacitated person. Marc J. Soss, individually, Appellant/Cross-Appellee,

Marshall Bloom, individually, Appellee/Cross-Appellant, and

Robert M. Elliott, as Trustee of the Leon Bloom Revocable Living Trust u/a/d 11/18/1998, as Restated on 10/22/2009, Appellee.

> Case No. 2D18-4441 Opinion filed June 3, 2020

Synopsis

Background: In guardianship proceeding seeking to have beneficiary appointed as emergency temporary guardian of trustee's person and property, where trust was a party to the guardianship proceeding, personal representative of trustee's estate, who was substituted as petitioner in the guardianship proceeding, moved to disqualify successor trustee and appoint independent trustee, and to compel successor trustee to return fees paid from the trust. The Circuit Court, 12th Judicial Circuit, Sarasota County, Frederick P. Mercurio, J., granted both motions, and issued a sua sponte order requiring successor trustee to return \$20,000 held by successor trustee to the trust. Successor trustee appealed, and personal representative cross-appealed.

[Holding:] The District Court of Appeal, Atkinson, J., held that payments made by successor trustee to his attorney out of funds from trust were inappropriate, and thus, were required to be returned to the trust.

Affirmed in part, reversed in part, and remanded.

West Headnotes (5)

Appeal and Error - Discovery [1]

Orders on fees are generally reviewed for an abuse of discretion.

[2] Trusts 🐎 Evidence

Orders regarding fees paid by a trust to trustee must be supported by competent, substantial evidence.

[3] Trusts 🐎 Evidence

A trustee has the burden of proving the necessity of all expenses incurred by him or her, including attorney fees.

[4] Trusts \hookrightarrow Evidence

When a trustee seeks to charge a trust corpus with an expense incurred by him, including attorney fees, the burden of proof is upon the trustee to demonstrate that the expense was reasonably necessary and that such expense was incurred for the benefit of the trust, and not for his own benefit nor the benefit of others.

[5] Trusts - Counsel fees and costs

Payments made by alleged successor trustee to his attorney out of funds from trust were inappropriate and thus, were required to be returned to the trust after successor trustee was removed, although the funds had gone to successor trustee's attorney, rather than to him directly, where there was no showing that payments to attorney were for benefit of trust, rather than for successor trustee's own benefit.

*1256 Appeal from the Circuit Court for Sarasota County; Frederick P. Mercurio, Judge.

Attorneys and Law Firms

Marc J. Soss, pro se.

James L. Essenson, Barbara J. Welch, and Matthew J. Kelly of Law Firm of James L. Essenson, Sarasota, for Appellee/Cross Appellant Marshall Bloom.

No appearance for Appellee Robert M. Elliott.

Opinion

ATKINSON, Judge.

Marc J. Soss appeals an order directing him to return funds to the Leon Bloom Revocable Living Trust (the Trust) in a guardianship proceeding in which he was removed as Successor Trustee. Marshall Bloom cross-appeals the same order and argues that the court abused its discretion in failing to direct Soss to return all of the funds he took from the Trust and to pay interest on those funds. We find no reversible error as to the issues raised by Soss but find that one of the issues raised by Bloom has merit. We reverse the portion of the order that directs Soss to return only certain funds rather than all of them and thus remand for the entry of an order directing Soss to return all of the funds he paid to his attorney.

In 1988, Leon executed a trust naming his wife, Dorothy Bloom, as a secondary beneficiary and his attorney, Robert Johnson, as Successor Trustee. In 2012, after Leon became temporarily incapacitated, Johnson assumed the role as Trustee. In 2014, Johnson filed a guardianship proceeding seeking to have Marshall, Leon's nephew and a beneficiary of the trust, appointed as emergency temporary guardian of Leon's person and property. In the proceeding, Dorothy, who was represented by Soss, sought reimbursement from the Trust for funds she alleged she had used to care for Leon.

As a result of mediation, the parties entered into a global settlement that was ultimately ratified by the court. In the settlement order, the court added the Trust as a party to the guardianship proceeding, accepted the resignation of Johnson as Successor Trustee, and appointed Caldwell Trust Company as Successor Trustee. In 2015, after Leon passed away, Caldwell filed a petition to resign as Successor Trustee. The court subsequently approved of Caldwell's resignation and ordered that "a successor trustee shall be presented for appointment by" July 23, 2015. The court found that Johnson was "an interested party for purpose of notice and objection to [the] successor trustee."

On July 23, 2015, Dorothy filed a Notice of Appointment of Successor Trustees and named her lawyer Soss and Raymond James Trust, N.A., as Successor Trustees. The notice was never filed with the court. A few days later, Johnson objected to Soss serving as Successor Trustee due to a conflict of interest; Johnson did not object to the appointment of Raymond James. After Raymond James declined to serve, *1257 Soss became the sole putative Successor Trustee.

On August 31, 2015, Johnson passed away. A Petition for Administration was filed in the Estate of Leon Bloom, and Marshall was appointed as personal representative of Leon's estate. Then, Marshall, as personal representative of Leon's estate, was substituted for Johnson as petitioner in the guardianship proceeding. Marshall, through his attorney James L. Essenson, filed a motion to disqualify Soss as Successor Trustee and to appoint an independent trustee.

Marshall moved on an emergency basis to have the circuit court hear the motion to disqualify Soss as Successor Trustee. The circuit court scheduled an evidentiary hearing on the motion for January 15, 2016. Two days before the hearing, Soss withdrew as counsel for Dorothy in the guardianship proceeding. Then, Marshall, as personal representative of Leon's estate, filed a motion for an order compelling Soss to return any fees paid from the Trust.

The circuit court subsequently entered an order removing Soss as Successor Trustee. The court found that Soss's representation of Dorothy in her claim against the Trust while simultaneously serving as Successor Trustee of the Trust created an irreconcilable conflict of interest that was not cured by his subsequent withdrawal as counsel for Dorothy. The court further found that Dorothy's purported appointment of Soss was never confirmed by the court as mandated by its order approving of Caldwell's resignation. The court also removed Marshall as personal representative of Leon's estate and appointed Robert M. Elliott to serve as Trustee of the Trust and personal representative of Leon's estate.

Thereafter, in the guardianship proceeding, Essenson noticed his appearance on behalf of Marshall, individually, and filed an amended motion for an order compelling Soss to return any fees paid from the Trust. Soss noticed his appearance as cocounsel for Dorothy. Later, Marshall moved for and was granted leave to adduce additional evidence about events that occurred after the evidentiary hearing on Soss's removal in order to complete the record, which was heard on January 8

and 9, 2018. The evidence largely focused on the funds Soss withdrew from the Trust while he was putative Trustee.

At the January evidentiary hearing, the current Successor Trustee's accountant, Kevin Hassel, testified that Soss, while acting as Trustee from August 2015 to April 2016, paid himself \$45,360 from the Trust and paid another \$82,500 to his attorney, John Waskom, who defended Soss in the disqualification proceeding. Mr. Hassel also testified that Soss overpaid Dorothy \$62,494. The current Successor Trustee's lawyer, Logan Elliott, testified that he contacted Waskom to return the funds that Soss paid him and that Waskom transmitted a check to him for \$18,708.75. Logan Elliott also testified that he sent a letter to Soss on May 11, 2016, seeking the return of the \$127,860 that Soss took from the Trust, and that Soss received the letter but never returned the funds.

Soss testified that he still held \$20,000 from the Trust and claimed that no one had ever demanded that he return it. He claimed that he had not seen the letter from Logan Elliott requesting the funds until mid-2017. Soss testified that he held the \$20,000, despite getting a demand to return funds taken from the Trust, in case he was awarded attorney's fees from the Trust. The circuit court then sua sponte entered an order requiring Soss to return the \$20,000 to the Trust.

*1258 During a line of questioning regarding the order accepting Caldwell's resignation as Successor Trustee, the circuit court asked Soss about a handwritten portion of the order that stated that "a successor trustee shall be presented for appointment by the end of "July 23, 2015, and that "Robert M. Johnson is an interested party for purpose of notice and objection to [the] successor trustee." Soss responded that the order did not specifically say that it had to be presented to the court; instead, it had to be "presented for appointment to the beneficiaries of the trust and Robert Johnson, as an interested party." Soss never asked for clarification as to what the court meant in the handwritten portion of the order.

Subsequently, Marshall filed a supplemental motion for an order compelling Soss to return the funds to the Trust. The circuit court conducted an evidentiary hearing on the supplemental motion on September 12, 2018. After hearing testimony and arguments from counsel, the circuit court found that, "based upon the totality of the evidence presented in the record, ... it was clear that there was an objection to Mr. Soss serving as co-trustee or trustee [and] that he was on notice of that fact throughout the time." The court also found "it incredible to believe in good faith that [the order approving of Caldwell's resignation as successor trustee] was somehow misinterpreted." The court found that "it was clear that a successor trustee had to be presented and approved by the court or confirmed by the court, and that was never done."

Based on the testimony of Mr. Hassel, the court found that Soss took \$127,860 from the Trust, excluding any alleged overpayments he made to Dorothy. Of that amount, the court noted that \$18,708.75 was returned by Soss's attorney. Waskom, and that \$20,000 was returned by Soss due to an earlier court order, leaving a balance of \$81,151.25.

The court stated that it was not going to order the money paid to Waskom (totaling \$63,791.25) be returned. Although the court noted that these payments to Waskom were "ill-advised and inappropriate, in light of the clear evidence that Mr. Soss should not have been named as the successor trustee," the court found that "to order the return of those funds would be inappropriate and an undue punishment to Mr. Soss" because those funds went to Waskom and not to Soss.

As to the remaining amount of money paid to Soss (totaling \$25,360), the court found that those funds were "improperly paid from the trust" because although Soss was acting as "putative or de facto trustee," Soss "was not legally entitled to be paid that money in light of the Court's orders, and he was never legally the successor trustee." The circuit court stated the following:

I find that it would be an abuse of my discretion to ignore the fact that those payments were received by Mr. Soss at a time when he knew or should have known that he should not have made the payments because he was not an appropriate trustee; that as an experienced probate and trustee attorney, if he had any question about his ability to be presented and approved by the Court as successor trustee, simple enough in light of the fact he clearly knows how to file pleadings with the Court, he could have set a hearing on the request by Dorothy Bloom to appoint him as successor trustee and had a hearing. That was not done. As such, the circuit court ordered Soss to return \$17,959.50

to the Trust (\$25,360 minus the fees and costs of \$7,400.50 it awarded him in an earlier order). The *1259 circuit court declined to award interest on those funds.

[1] [3] [4] Orders on fees are generally reviewed for an abuse of discretion. Miller v. Fla. Ins. Guar. Ass'n, 200 So. 3d 200, 203 (Fla. 2d DCA 2016) (citing Grapski v. City of Alachua, 134 So. 3d 987, 989 (Fla. 1st DCA 2012)); see

also In re Guardianship of Sitter, 779 So. 2d 346, 348 (Fla. 2d DCA 2000). Orders regarding fees must also be supported by competent, substantial evidence. See In re Sitter, 779 So. 2d at 348. "A trustee has the burden of proving the necessity of all expenses incurred by him or her, including attorneys' fees." Ortmann v. Bell, 100 So. 3d 38, 46 (Fla. 2d DCA 2011).

When a trustee seeks to charge a trust corpus with an expense incurred by him, including attorney fees, the burden of proof is upon the trustee to demonstrate that the expense was reasonably necessary and that such expense was incurred for the benefit of the trust, and <u>not for his own</u> benefit nor the benefit of others.

Barnett v. Barnett, 340 So. 2d 548, 550 (Fla. 1st DCA 1976) (emphasis added).

[5] Here, at the September hearing, Soss testified about the services he performed while he was acting as Successor Trustee of the Trust in an attempt to establish the reasonableness of his fees. He provided the court with documentary evidence of the fees he took for himself as Trustee, which amounted to a total of \$25,360. Despite Soss's argument that he was entitled to compensation for acting as a "de facto" trustee, the court found that it would be an abuse of its discretion to award Soss compensation "when he knew or should have known that he should not have made the payments because he was not an appropriate trustee."

Despite finding that the payments to Waskom were "illadvised and inappropriate," the court declined to order Soss to return them—but not because Soss met his burden that such payments were reasonably necessary and for the benefit of the Trust. Instead, the court concluded that it "would be inappropriate and an undue punishment" to Soss because those funds had gone to his lawyer, Waskom, rather than to Soss directly. However, as Marshall correctly contends, those funds went to his attorney for the benefit of Soss-not for the benefit of the Trust. Cf. McCormick v. Cox, 118 So. 3d 980, 987 (Fla. 3d DCA 2013) (affirming disallowance of attorney's fees that trustee paid to law firm in beneficiaries' action to remove trustee for breaches of fiduciary duties). Given that Soss failed to demonstrate that his payments to Waskom were "for the benefit of the trust, and not for his own benefit," the circuit court abused its discretion in failing to order Soss to return those funds to the Trust. See Barnett, 340 So. 2d at 550. Accordingly, we reverse and remand with instructions that the circuit court enter an order requiring Soss to return all of the funds he paid to his attorney.

Affirmed in part, reversed in part, and remanded.

SLEET and SALARIO, JJ., Concur.

All Citations

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West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 736. Florida Trust Code (Refs & Annos)
Part VIII. Duties and Powers of Trustee (Refs & Annos)

West's F.S.A. § 736.0816

736.0816. Specific powers of trustee

Effective: July 1, 2016 Currentness

Except as limited or restricted by this code, a trustee may:

- (1) Collect trust property and accept or reject additions to the trust property from a settlor, including an asset in which the trustee is personally interested, and hold property in the name of a nominee or in other form without disclosure of the trust so that title to the property may pass by delivery but the trustee is liable for any act of the nominee in connection with the property so held.
- (2) Acquire or sell property, for cash or on credit, at public or private sale.
- (3) Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries. As used in this subsection, the term "mutual fund" includes an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.
- (4) Exchange, partition, or otherwise change the character of trust property.
- (5) Deposit trust money in an account in a regulated financial service institution.
- (6) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust and advance money for the protection of the trust.
- (7) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including, but not limited to, merging, dissolving, or otherwise changing the form of business organization or contributing additional capital.

- (8) With respect to stocks or other securities, exercise the rights of an absolute owner, including, but not limited to, the right to:
- (a) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement.
- (b) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery.
- (c) Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights.
- (d) Deposit the securities with a depositary or other regulated financial service institution.
- (9) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries.
- (10) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust.
- (11) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired.
- (12) Insure the property of the trust against damage or loss and insure the trustee, trustee's agents, and beneficiaries against liability arising from the administration of the trust.
- (13) Abandon or decline to administer property of no value or of insufficient value to justify the collection or continued administration of such property.
- (14) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust.
- (15) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust.
- (16) Allocate items of income or expense to trust income or principal, as provided by law.
- (17) Exercise elections with respect to federal, state, and local taxes.

- (18) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights under such plan, annuity, or insurance, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds.
- (19) Make loans out of trust property, including, but not limited to, loans to a beneficiary on terms and conditions that are fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans.
- (20) Employ persons, including, but not limited to, attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee, or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust, subject to s. 736.0802(10) with respect to attorney fees and costs, and act without independent investigation on the recommendations of such persons.
- (21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying the amount directly to the beneficiary or applying the amount for the beneficiary's benefit, or by:
- (a) Paying the amount to the beneficiary's guardian of the property or, if the beneficiary does not have a guardian of the property, the beneficiary's guardian of the person;
- (b) Paying the amount to the beneficiary's custodian under a Uniform Transfers to Minors Act¹ or custodial trustee under a Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial trust;
- (c) Paying the amount to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf, if the trustee does not know of a guardian of the property, guardian of the person, custodian, or custodial trustee; or
- (d) Managing the amount as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.
- (22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation.
- (23) Prosecute or defend, including appeals, an action, claim, or judicial proceeding in any jurisdiction to protect trust property or the trustee in the performance of the trustee's duties.
- (24) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers.

(25) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to the property, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

Credits

Added by Laws 2006, c. 2006-217, § 8, eff. July 1, 2007. Amended by Laws 2007, c. 2007-153, § 4, eff. July 1, 2007; Laws 2016, c. 2016-189, § 6, eff. July 1, 2016.

Footnotes

1 See F.S.A. § 710.101 et seq.

West's F. S. A. § 736.0816, FL ST § 736.0816

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

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West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 736. Florida Trust Code (Refs & Annos)
Part VII. Office of Trustee

West's F.S.A. § 736.0709

736.0709. Reimbursement of expenses

Effective: July 1, 2007 Currentness

- (1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for reasonable expenses that were properly incurred in the administration of the trust.
- (2) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Credits

Added by Laws 2006, c. 2006-217, § 7, eff. July 1, 2007.

West's F. S. A. § 736.0709, FL ST § 736.0709

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

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West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 736. Florida Trust Code (Refs & Annos)
Part V. Creditors' Claims; Spendthrift and Discretionary Trusts

West's F.S.A. § 736.05053

736.05053. Trustee's duty to pay expenses and obligations of settlor's estate

Effective: July 1, 2014 Currentness

- (1) A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payments must be made from assets, property, or the proceeds of the assets or property that are included in the settlor's gross estate for federal estate tax purposes and may not be made from assets proscribed in s. 733.707(3) or death benefits described in s. 733.808(4) unless the trust instrument expressly refers to s. 733.808(4) and directs that it does not apply.
- (2) Unless a settlor provides by will, or designates in a trust described in s. 733.707(3) funds or property passing under the trust to be used as designated, the expenses of the administration and obligations of the settlor's estate must be paid from the trust in the following order:
- (a) Property of the residue of the trust remaining after all distributions that are to be satisfied by reference to a specific property or type of property, fund, or sum.
- (b) Property that is not to be distributed from specified or identified property or a specified or identified item of property.
- (c) Property that is to be distributed from specified or identified property or a specified or identified item of property.
- (3) Trust distributions that are to be satisfied from specified or identified property must be classed as distributions to be satisfied from the general assets of the trust and not otherwise disposed of in the trust instrument on the failure or insufficiency of funds or property from which payment should be made, to the extent of the insufficiency. Trust distributions given for valuable consideration abate with other distributions of the same class only to the extent of the excess over the value of the consideration until all others of the same class are exhausted. Except as provided in this section, trust distributions abate equally and ratably and without preference or priority between real and personal property. When a specified or identified item of property that has been designated for distribution in the trust instrument or that is charged with a distribution is sold or taken by the trustee, other beneficiaries shall contribute according to their respective interests to the beneficiary whose property has been sold or taken. Before distribution, the trustee shall determine the amounts of the respective contributions and such amounts must be paid or withheld before distribution is made.

- (4) The trustee shall pay the expenses of trust administration, including compensation of trustees and attorneys of the trustees, before and in preference to the expenses of the administration and obligations of the settlor's estate.
- (5) Nonresiduary trust dispositions shall abate pro rata with nonresiduary devises pursuant to the priorities specified in this section and s. 733.805, determined as if the beneficiaries of the will and trust, other than the estate or trust itself, were taking under a common instrument.

Credits

Added by Laws 2006, c. 2006-217, § 5, eff. July 1, 2007. Amended by Laws 2010, c. 2010-122, § 6, eff. July 1, 2010; Laws 2014, c. 2014-127, § 9, eff. July 1, 2014.

West's F. S. A. § 736.05053, FL ST § 736.05053

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document

West's Florida Statutes Annotated

Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)

Chapter 733. Probate Code: Administration of Estates (Refs & Annos)

Part VII. Creditors' Claims (Refs & Annos)

West's F.S.A. § 733.707

733.707. Order of payment of expenses and obligations

Effective: July 1, 2012 Currentness

- (1) The personal representative shall pay the expenses of the administration and obligations of the decedent's estate in the following order:
- (a) Class 1.--Costs, expenses of administration, and compensation of personal representatives and their attorneys fees and attorneys fees awarded under s. 733.106(3).
- (b) Class 2.--Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian, the personal representative, or any other person, not to exceed the aggregate of \$6,000.
- (c) Class 3.--Debts and taxes with preference under federal law, claims pursuant to ss. 409.9101 and 414.28, and claims in favor of the state for unpaid court costs, fees, or fines.
- (d) Class 4.--Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of persons attending the decedent.
- (e) Class 5.--Family allowance.
- (f) Class 6.--Arrearage from court-ordered child support.
- (g) Class 7.--Debts acquired after death by the continuation of the decedent's business, in accordance with s. 733.612(22), but only to the extent of the assets of that business.
- (h) Class 8.--All other claims, including those founded on judgments or decrees rendered against the decedent during the decedent's lifetime, and any excess over the sums allowed in paragraphs (b) and (d).
- (2) After paying any preceding class, if the estate is insufficient to pay all of the next succeeding class, the creditors of the latter class shall be paid ratably in proportion to their respective claims.

- (3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in ss. 733.607(2) and 736.05053.
- (a) For purposes of this subsection, any trusts established as part of, and all payments from, either an employee annuity described in s. 403 of the Internal Revenue Code of 1986, as amended, an Individual Retirement Account, as described in s. 408 of the Internal Revenue Code of 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other plan established by a corporation which is qualified under s. 401 of the Internal Revenue Code of 1986, as amended, shall not be considered a trust over which the decedent has a right of revocation.
- (b) For purposes of this subsection, any trust described in s. 664 of the Internal Revenue Code of 1986,⁴ as amended, shall not be considered a trust over which the decedent has a right of revocation.
- (c) This subsection shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in s. 414(p) of the Internal Revenue Code of 1986, ⁵ as amended.
- (d) For purposes of this subsection, property held or received by a trust to the extent that the property would not have been subject to claims against the decedent's estate if it had been paid directly to a trust created under the decedent's will or other than to the decedent's estate, or assets received from any trust other than a trust described in this subsection, shall not be deemed assets of the trust available to the decedent's estate.
- (e) For purposes of this subsection, a "right of revocation" is a power retained by the decedent, held in any capacity, to:
- 1. Amend or revoke the trust and revest the principal of the trust in the decedent; or
- 2. Withdraw or appoint the principal of the trust to or for the decedent's benefit.

Credits

Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 86; Laws 1977, c. 77-87, § 35; Laws 1985, c. 85-79, § 7; Laws 1987, c. 87-226, § 69; Laws 1993, c. 93-208, § 20; Laws 1993, c. 93-257, § 11. Amended by Laws 1995, c. 95-401, § 10, eff. July 1, 1995; Laws 1997, c. 97-102, § 1018, eff. July 1, 1997; Laws 1997, c. 97-240, § 3, eff. May 30, 1997; Laws 2001, c. 2001-226, § 150, eff. Jan. 1, 2002; Laws 2010, c. 2010-122, § 2, eff. July 1, 2010; Laws 2012, c. 2012-100, § 17, eff. July 1, 2012.

Footnotes

- 1 26 U.S.C.A. § 403.
- 2 26 U.S.C.A. § 408.
- 3 26 U.S.C.A. § 401.
- 4 26 U.S.C.A. § 664.

5 26 U.S.C.A. § 414(p).

West's F. S. A. § 733.707, FL ST § 733.707

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document

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Proposed Legislation

West's Florida Statutes Annotated

Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)

Chapter 736. Florida Trust Code (Refs & Annos)

Part X. Liability of Trustee and Rights of Persons Dealing with Trustee

West's F.S.A. § 736.1007

736.1007. Trustee's attorney fees

Effective: October 1, 2021 Currentness

- (1)(a) Except as provided in paragraph (d), if the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust, subject to s. 736.0802(10), without court order. The trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney fees and costs.
- (b) An attorney representing a trustee in the initial administration of the trust who intends to charge a fee based upon the schedule set forth in subsection (2) shall make the following disclosures in writing to the trustee:
- 1. There is not a mandatory statutory attorney fee for trust administration.
- 2. The attorney fee is not required to be based on the size of the trust, and the presumed reasonable fee provided in subsection (2) may not be appropriate in all trust administrations.
- 3. The fee is subject to negotiation between the trustee and the attorney.
- 4. The selection of the attorney is made at the discretion of the trustee, who is not required to select the attorney who prepared the trust.
- 5. The trustee shall be entitled to a summary of ordinary and extraordinary services rendered for the fees agreed upon at the conclusion of the representation. The summary shall be provided by counsel and shall consist of the total hours devoted to the representation or a detailed summary of the services performed during the representation.
- (c) The attorney shall obtain the trustee's timely signature acknowledging the disclosures.

- (d) If the attorney does not make the disclosures required by this section, the attorney may not be paid for legal services without prior court approval of the fees or the written consent of the trustee and all qualified beneficiaries.
- (2) Unless otherwise agreed and subject to subsection (1), compensation based on the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable total compensation for ordinary services of all attorneys employed generally to advise a trustee concerning the trustee's duties in the initial trust administration.
- (3) Subject to subsection (1), an attorney who is retained to render only limited and specifically defined legal services shall be compensated as provided in the retaining agreement. If the amount or method of determining compensation is not provided in the agreement, the attorney is entitled to a reasonable fee, taking into account the factors set forth in subsection (6).
- (4) Ordinary services of the attorney in an initial trust administration include legal advice and representation concerning the trustee's duties relating to:
- (a) Review of the trust instrument and each amendment for legal sufficiency and interpretation.
- (b) Implementation of substitution of the successor trustee.
- (c) Persons who must or should be served with required notices and the method and timing of such service.
- (d) The obligation of a successor to require a former trustee to provide an accounting.
- (e) The trustee's duty to protect, insure, and manage trust assets and the trustee's liability relating to these duties.
- (f) The trustee's duty regarding investments imposed by the prudent investor rule.
- (g) The trustee's obligation to inform and account to beneficiaries and the method of satisfaction of such obligations, the liability of the trust and trustee to the settlor's creditors, and the advisability or necessity for probate proceedings to bar creditors.
- (h) Contributions due to the personal representative of the settlor's estate for payment of expenses of administration and obligations of the settlor's estate.
- (i) Identifying tax returns required to be filed by the trustee, the trustee's liability for payment of taxes, and the due date of returns.
- (j) Filing a nontaxable affidavit, if not filed by a personal representative.
- (k) Order of payment of expenses of administration of the trust and order and priority of abatement of trust distributions.

- (1) Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument.
- (m) Preparation of any legal documents required to effect distribution.
- (n) Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries.
- (o) If there is a conflict of interest between a trustee who is a beneficiary and other beneficiaries of the trust, advice to the trustee on limitations of certain authority of the trustee regarding discretionary distributions or exercise of certain powers and alternatives for appointment of an independent trustee and appropriate procedures.
- (p) Procedures for the trustee's discharge from liability for administration of the trust on termination or resignation.
- (5) Subject to subsection (1), in addition to the attorney fees for ordinary services, the attorney for the trustee shall be allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size and complexity of the trust. Extraordinary services may include, but are not limited to:
- (a) Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust.
- (b) Representation of the trustee in an audit or any proceeding for adjustment, determination, or collection of any taxes.
- (c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges, deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release from personal liability for payment of tax.
- (d) Review of an estate tax return and preparation or review of other tax returns required to be filed by the trustee.
- (e) Preparation of decedent's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of \$10 million and one-fourth of 1 percent on the value in excess of \$10 million, of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.
- (f) Purchase, sale, lease, or encumbrance of real property by the trustee or involvement in zoning, land use, environmental, or other similar matters.
- (g) Legal advice regarding carrying on of decedent's business or conducting other commercial activity by the trustee.

(h) Legal advice regarding claims for damage to the environment or related procedures.
(i) Legal advice regarding homestead status of trust real property or proceedings involving the status.
(j) Involvement in fiduciary, employee, or attorney compensation disputes.
(k) Considerations of special valuation of trust assets, including discounts for blockage, minority interests, lack of marketability and environmental liability.
(6) Upon petition of any interested person in a proceeding to review the compensation paid or to be paid to the attorney for the trustee, the court may increase or decrease the compensation for ordinary services of the attorney for the trustee or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court shall consider all of the following factors giving such weight to each as the court may determine to be appropriate:
(a) The promptness, efficiency, and skill with which the initial administration was handled by the attorney.
(b) The responsibilities assumed by, and potential liabilities of, the attorney.

(d) The benefits or detriments resulting to the trust or the trust's beneficiaries from the attorney's services.

(e) The complexity or simplicity of the administration and the novelty of issues presented.

(c) The nature and value of the assets that are affected by the decedent's death.

- (f) The attorney's participation in tax planning for the estate, the trust, and the trust's beneficiaries and tax return preparation or review and approval.
- (g) The nature of the trust assets, the expenses of administration, and the claims payable by the trust and the compensation paid to other professionals and fiduciaries.
- (h) Any delay in payment of the compensation after the services were furnished.
- (i) Any agreement relating to the attorney's compensation and whether written disclosures were made to the trustee in a timely manner under the circumstances pursuant to paragraph (1)(b).
- (j) Any other relevant factors.

- (7) If a separate written agreement regarding compensation exists between the attorney and the settlor, the attorney shall furnish a copy to the trustee prior to commencement of employment and, if employed, shall promptly file and serve a copy on all interested persons. A separate agreement or a provision in the trust suggesting or directing the trustee to retain a specific attorney does not obligate the trustee to employ the attorney or obligate the attorney to accept the representation but, if the attorney who is a party to the agreement or who drafted the trust is employed, the compensation paid shall not exceed the compensation provided in the agreement.
- (8) As used in this section, the term "initial trust administration" means administration of a revocable trust during the period that begins with the death of the settlor and ends on the final distribution of trust assets outright or to continuing trusts created under the trust agreement but, if an estate tax return is required, not until after issuance of an estate tax closing letter or other evidence of termination of the estate tax proceeding. This initial period is not intended to include continued regular administration of the trust.

Credits

Added by Laws 2006, c. 2006-217, § 10, eff. July 1, 2007. Amended by Laws 2010, c. 2010-122, § 7, eff. July 1, 2010; Laws 2016, c. 2016-189, § 7, eff. July 1, 2016; Laws 2021, c. 2021-145, § 2, eff. Oct. 1, 2021.

Footnotes

1 See 26 U.S.C.A. §§ 303 and 6166.

West's F. S. A. § 736.1007, FL ST § 736.1007

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

West's Florida Statutes Annotated

Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)

Chapter 733. Probate Code: Administration of Estates (Refs & Annos)

Part VI. Duties and Powers of Personal Representative

West's F.S.A. § 733.6171

733.6171. Compensation of attorney for the personal representative

Effective: October 1, 2021 Currentness

- (1) Except as provided in paragraph (2)(d), attorneys for personal representatives are entitled to reasonable compensation payable from the estate assets without court order.
- (2)(a) The attorney, the personal representative, and persons bearing the impact of the compensation may agree to compensation determined in a different manner than provided in this section. Compensation may also be determined in a different manner than provided in this section if the manner is disclosed to the parties bearing the impact of the compensation and if no objection is made as provided for in the Florida Probate Rules.
- (b) An attorney representing a personal representative in an estate administration who intends to charge a fee based upon the schedule set forth in subsection (3) shall make the following disclosures in writing to the personal representative:
- 1. There is not a mandatory statutory attorney fee for estate administration.
- 2. The attorney fee is not required to be based on the size of the estate, and the presumed reasonable fee provided in subsection (3) may not be appropriate in all estate administrations.
- 3. The fee is subject to negotiation between the personal representative and the attorney.
- 4. The selection of the attorney is made at the discretion of the personal representative, who is not required to select the attorney who prepared the will.
- 5. The personal representative shall be entitled to a summary of ordinary and extraordinary services rendered for the fees agreed upon at the conclusion of the representation. The summary shall be provided by counsel and shall consist of the total hours devoted to the representation or a detailed summary of the services performed during the representation.
- (c) The attorney shall obtain the personal representative's timely signature acknowledging the disclosures.

- (d) If the attorney does not make the disclosures required by this section, the attorney may not be paid for legal services without prior court approval of the fees or the written consent of all interested parties.
- (3) Subject to subsection (2), compensation for ordinary services of attorneys in a formal estate administration is presumed to be reasonable if based on the compensable value of the estate, which is the inventory value of the probate estate assets and the income earned by the estate during the administration as provided in the following schedule:
- (a) One thousand five hundred dollars for estates having a value of \$40,000 or less.
- (b) An additional \$750 for estates having a value of more than \$40,000 and not exceeding \$70,000.
- (c) An additional \$750 for estates having a value of more than \$70,000 and not exceeding \$100,000.
- (d) For estates having a value in excess of \$100,000, at the rate of 3 percent on the next \$900,000.
- (e) At the rate of 2.5 percent for all above \$1 million and not exceeding \$3 million.
- (f) At the rate of 2 percent for all above \$3 million and not exceeding \$5 million.
- (g) At the rate of 1.5 percent for all above \$5 million and not exceeding \$10 million.
- (h) At the rate of 1 percent for all above \$10 million.
- (4) Subject to subsection (2), in addition to fees for ordinary services, the attorney for the personal representative shall be allowed further reasonable compensation for any extraordinary service. What is an extraordinary service may vary depending on many factors, including the size and complexity of the estate. Extraordinary services may include, but are not limited to:
- (a) Involvement in a will contest, will construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceeding, apportionment of estate taxes, or any adversarial proceeding or litigation by or against the estate.
- (b) Representation of the personal representative in audit or any proceeding for adjustment, determination, or collection of any taxes.
- (c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 6166 and 303 privileges, deduction of last illness expenses, fiscal year planning, distribution planning, asset basis considerations, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release of personal liability for payment of tax.

- (d) Review of estate tax return and preparation or review of other tax returns required to be filed by the personal representative.
- (e) Preparation of the estate's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of \$10 million and one-fourth of 1 percent on the value in excess of \$10 million of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.
- (f) Purchase, sale, lease, or encumbrance of real property by the personal representative or involvement in zoning, land use, environmental, or other similar matters.
- (g) Legal advice regarding carrying on of the decedent's business or conducting other commercial activity by the personal representative.
- (h) Legal advice regarding claims for damage to the environment or related procedures.
- (i) Legal advice regarding homestead status of real property or proceedings involving that status and services related to protected homestead.
- (j) Involvement in fiduciary, employee, or attorney compensation disputes.
- (k) Proceedings involving ancillary administration of assets not subject to administration in this state.
- (5) Upon petition of any interested person, the court may increase or decrease the compensation for ordinary services of the attorney or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court shall consider all of the following factors, giving weight to each as it determines to be appropriate:
- (a) The promptness, efficiency, and skill with which the administration was handled by the attorney.
- (b) The responsibilities assumed by and the potential liabilities of the attorney.
- (c) The nature and value of the assets that are affected by the decedent's death.
- (d) The benefits or detriments resulting to the estate or interested persons from the attorney's services.
- (e) The complexity or simplicity of the administration and the novelty of issues presented.

- (f) The attorney's participation in tax planning for the estate and the estate's beneficiaries and tax return preparation, review, or approval.
- (g) The nature of the probate, nonprobate, and exempt assets, the expenses of administration, the liabilities of the decedent, and the compensation paid to other professionals and fiduciaries.
- (h) Any delay in payment of the compensation after the services were furnished.
- (i) Any agreement relating to the attorney's compensation and whether written disclosures were made to the personal representative in a timely manner under the circumstances pursuant to subsection (2).
- (j) Any other relevant factors.
- (6) If a separate written agreement regarding compensation exists between the attorney and the decedent, the attorney shall furnish a copy to the personal representative prior to commencement of employment, and, if employed, shall promptly file and serve a copy on all interested persons. A separate agreement or a provision in the will suggesting or directing that the personal representative retain a specific attorney does not obligate the personal representative to employ the attorney or obligate the attorney to accept the representation, but if the attorney who is a party to the agreement or who drafted the will is employed, the compensation paid shall not exceed the compensation provided in the agreement or in the will.

Credits

Laws 1993, c. 93-257, § 4. Amended by Laws 1995, c. 95-401, § 2, eff. July 1, 1995; Laws 2001, c. 2001-226, § 142, eff. Jan. 1, 2002; Laws 2021, c. 2021-145, § 1, eff. Oct. 1, 2021.

West's F. S. A. § 733.6171, FL ST § 733.6171

Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

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768 So.2d 1213 District Court of Appeal of Florida, Fourth District.

FIRST UNION NATIONAL BANK, Appellant,

v.

Dallas J. JONES, Dr. Charles F. Jones, and David L. Jones, Appellees.

No. 4D99-2740.

Synopsis

Motion for trust disbursement was brought. The Circuit Court, Indian River County, Charles E. Smith, J., directed total disbursement of the entire trust corpus. Trustee bank appealed. The District Court of Appeal, Shahood, J., held that: (1) action for alleged maladministration of the trust amounted to a suit against bank in its capacity as trustee, and thus was an "action" within meaning of statute requiring award of attorney fees in all "actions challenging the proper exercise of a trustee's powers," and (2) disbursement of entire trust corpus was precluded, pending resolution of the underlying action.

Reversed and remanded.

West Headnotes (7)

[1] Trusts 🖙 Expenses and Disbursements

Trusts ightharpoonup Counsel Fees and Costs

Trusts 🐎 Lien

A trustee is entitled to receive payment of his reasonable expenses, including attorney fees, in managing a trust from the assets of a trust he manages; such expenses are a lien on behalf of the trustee on the trust estate he manages.

3 Cases that cite this headnote

[2] Trusts 🐎 Lien

A trustee cannot be compelled to relinquish his control of the trust estate until his lien for payment of his reasonable expenses in managing the trust is satisfied.

2 Cases that cite this headnote

[3] Trusts 🐎 Costs

Action for alleged maladministration of the trust amounted to a suit against bank in its capacity as trustee, and thus was an "action" within meaning of statute requiring award of attorney fees in all "actions challenging the proper exercise of a trustee's powers," entitling bank to attorney fees for defending itself. West's F.S.A. § 737.627.

1 Cases that cite this headnote

[4] Trusts - Counsel Fees and Costs

Trusts 🐎 Costs

Costs and counsel fees should be allowed in those cases where a trustee, in good faith, institutes or defends an action or incurs legal expense in connection with his duties and responsibilities as trustee.

5 Cases that cite this headnote

[5] Trusts Payment or Distribution of Proceeds of Trust Property

Trusts 🐎 Costs

Trustee would be entitled to payment of its attorney fees from trust corpus if it prevailed in action against it for maladministration of trust, and thus, disbursement of entire trust corpus was precluded, pending resolution of the underlying action.

2 Cases that cite this headnote

[6] Trusts Payment or Distribution of Proceeds of Trust Property

Although a trust instrument directs termination of the trust and the distribution of the principal to the beneficiaries upon the settlor's death, the trustee cannot make complete distribution until provision has been made for all the expenses, claims and taxes the trust may be obligated to

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pay, and certainly not before these amounts have been fully ascertained.

3 Cases that cite this headnote

[7] Trusts Payment or Distribution of Proceeds of Trust Property

When a trust is the beneficiary of the grantor's probate estate and is charged with the duty to pay the expenses, claims, and taxes imposed on the probate estate, the trustee cannot make complete distribution of the trust until the probate proceeding has been substantially concluded.

3 Cases that cite this headnote

Attorneys and Law Firms

*1214 Susan M. Seigle and Amy S. Rubin of Ruden, McClosky, Smith, Schuster & Russell, P.A., West Palm Beach, for appellant.

Theodore W. Herzog of Theodore W. Herzog, P.A., Key West, for Appellee–David L. Jones.

Dallas J. Jones, Vero Beach, pro se.

Opinion

SHAHOOD, J.

Appellant, First Union National Bank as trustee, appeals the Order on Motion for Trust Disbursement entered by the trial court, which order directed a total disbursement of the entire corpus of the trust held by the trustee under the Revocable Living Trust executed by Charles L. Hodgkins as grantor. Because appellant may be entitled to an award of attorney's fees from the trust estate for defending itself in a pending action filed against it by the appellees, the residuary trust beneficiaries, alleging mismanagement of the trust after the death of the grantor, we reverse and remand.

[1] [2] In Florida, a trustee is entitled to receive payment of his reasonable expenses in managing a trust, including attorney's fees, from the assets of a trust he manages. *See Bay Biscayne Co. v. Baile*, 73 Fla. 1120, 75 So. 860 (1917); *see also Smith v. Jones*, 120 Fla. 237, 162 So. 496 (1935). Such expenses include attorney's fees, and are a lien on behalf of the trustee on the trust estate he manages. *Id.* at 498. A

trustee cannot be compelled to relinquish his control of the trust estate until the lien is satisfied. *Id.*

[3] Appellant argues that its lien is analogous to an attorney's retaining lien. It argues that it cannot enforce its lien by foreclosure proceedings, and has no security for its lien except the trust assets it previously had in its possession. A lien is passive in nature, rendering it all the more important that First Union be permitted to retain sufficient trust assets as security for the lien. The trial court's order, it argues, has impaired First Union's right to a lien in the trust estate. If the trial court's order is not vacated, and if the beneficiaries are not ordered to return the trust assets, First Union's lien will be destroyed. We agree.

Section 737.627, Florida Statutes (1999), requires the court to award costs including attorney's fees "[i]n all actions challenging the proper exercise of a trustee's powers." *1215 Section 737.2041(5)(a) provides that a trustee's attorney "shall" be allowed fees for extraordinary service, which may include an adversary proceeding or litigation "by or against the trust." Section 737.2041(9) provides that court proceedings to determine compensation are part of the trust administration process, and the costs including the trustee's attorney's fees are to be determined by the court and paid from the trusts assets unless the fee request is unreasonable.

[4] The trial court found that the action filed by the appellees against First Union for alleged maladministration of the trust was not litigation "by or against the trust" because the action is against First Union, the trustee, not against the trust, and cannot in any way benefit the trust. However, First Union is being sued in its capacity as trustee. "Costs and counsel fees should be allowed in those cases where a trustee, in good faith, institutes or defends an action or incurs legal expense in connection with his duties and responsibilities as trustee." West Coast Hosp. Ass'n v. Florida Nat'l Bank of Jacksonville, 100 So.2d 807, 812 (Fla.1958). An action seeking to recover for a trustee's alleged breach of fiduciary duty in monitoring an investment has been held to qualify as an "action" under section 737.627, providing for the award of costs and fees. See Republic Nat'l Bank v. Araujo, 697 So.2d 164 (Fla. 3d DCA 1997).

[5] As its second issue on appeal, appellant argues that the trial court erred in ordering disbursement of the entire corpus of the trust without any pending pleadings framing issues to be tried and without an evidentiary hearing. Specifically, First Union argues that the order on appeal necessarily makes

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an implicit finding that it is not entitled to an award of attorney's fees in defending itself against the action filed by the appellees, whether it prevails in that action or not, without any evidentiary support for that finding, because no evidence, only argument of counsel, was presented at the hearing. Further, the order appealed precludes payment from the trust for any expenses arising in the future.

We agree that the trial court's order, in essence, concluded that First Union would not be entitled to fees, even if it prevailed in the litigation filed against it by the appellees, as a matter of law, because the action was against First Union individually as trustee, and not against "the trust." But "the trustee" is merely the legal entity who is sued when an action is brought against "the trust."

[6] [7] Although a trust instrument directs termination of the trust and the distribution of the principal to the beneficiaries upon the settlor's death, the trustee cannot make complete distribution until provision has been made for all

the expenses, claims and taxes the trust may be obligated to pay, and certainly not before these amounts have been fully ascertained. Moreover, when the trust is the beneficiary of the grantor's probate estate and is charged with the duty to pay the expenses, claims, and taxes imposed on the probate estate, the trustee cannot make complete distribution of the trust until the probate proceeding has been substantially concluded, which was not the case here. Accordingly, based on the foregoing, we reverse the order entered by the trial court ordering total disbursement of the corpus of the trust and remand for further proceedings.

REVERSED AND REMANDED.

GUNTHER and POLEN, JJ., concur.

All Citations

768 So.2d 1213, 25 Fla. L. Weekly D2370

End of Document

Title XXXI. Trusts and Estates of Decedents and Persons Under Disability [Chs. 456-475] Chapter 456. Trusts and Trustees--the Uniform Trust Code (Refs & Annos) Missouri Uniform Trust Code (Refs & Annos) Article 7. Office of Trustee

V.A.M.S. 456.7-708

456.7-708. Compensation of trustee

Currentness

- 1. If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.
- 2. If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:
- (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or
- (2) the compensation specified by the terms of the trust would be unreasonably low or high.
- 3. For purposes of this section, reasonable compensation may include fees that take into account the administration of both income and principal whether or not the will or trust instrument contains provisions relating to compensation of the trustee.

Credits

(L.2004, H.B. No. 1511, § A.)

Notes of Decisions (2)

V. A. M. S. 456.7-708, MO ST 456.7-708

Statutes are current through West ID No. 45 of the 2021 First Regular and First Extraordinary Sessions of the 101st General Assembly. The Constitution is current through the November 3, 2020 General Election.

End of Document

Title XXXI. Trusts and Estates of Decedents and Persons Under Disability [Chs. 456-475] Chapter 456. Trusts and Trustees--the Uniform Trust Code (Refs & Annos) Missouri Uniform Trust Code (Refs & Annos) Article 7. Office of Trustee

V.A.M.S. 456.7-709

456.7-709. Reimbursement of expenses

Currentness

- 1. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:
- (1) expenses that were properly incurred in the administration of the trust; and
- (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
- 2. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Credits

(L.2004, H.B. No. 1511, § A.)

V. A. M. S. 456.7-709, MO ST 456.7-709

Statutes are current through West ID No. 45 of the 2021 First Regular and First Extraordinary Sessions of the 101st General Assembly. The Constitution is current through the November 3, 2020 General Election.

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Title XXXI. Trusts and Estates of Decedents and Persons Under Disability [Chs. 456-475] Chapter 456. Trusts and Trustees--the Uniform Trust Code (Refs & Annos) Missouri Uniform Trust Code (Refs & Annos) Article 7. Office of Trustee

V.A.M.S. 456.7-709

456.7-709. Reimbursement of expenses

Currentness

- 1. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:
- (1) expenses that were properly incurred in the administration of the trust; and
- (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
- 2. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Credits

(L.2004, H.B. No. 1511, § A.)

V. A. M. S. 456.7-709, MO ST 456.7-709

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Title XXXI. Trusts and Estates of Decedents and Persons Under Disability [Chs. 456-475]
Chapter 456. Trusts and Trustees--the Uniform Trust Code (Refs & Annos)
Missouri Uniform Trust Code (Refs & Annos)
Article 8. Duties and Powers of Trustee

V.A.M.S. 456.8-807

456.8-807. Delegation by trustee

Currentness

- 1. A trustee may delegate to an agent duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- 2. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- 3. A trustee who complies with subsection 1 of this section is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.
- 4. By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

Credits

(L.2004, H.B. No. 1511, § A.)

Notes of Decisions (1)

V. A. M. S. 456.8-807, MO ST 456.8-807

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Title XXXI. Trusts and Estates of Decedents and Persons Under Disability [Chs. 456-475] Chapter 456. Trusts and Trustees--the Uniform Trust Code (Refs & Annos) Missouri Uniform Trust Code (Refs & Annos)

Article 10. Liability of Trustees and Rights of Persons Dealing with Trustee

V.A.M.S. 456.10-1004

456.10-1004. Attorney's fees and costs

Currentness

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.

Credits

(L.2004, H.B. No. 1511, § A.)

Notes of Decisions (17)

V. A. M. S. 456.10-1004, MO ST 456.10-1004

Statutes are current through West ID No. 45 of the 2021 First Regular and First Extraordinary Sessions of the 101st General Assembly. The Constitution is current through the November 3, 2020 General Election.

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13 S.W.3d 650 Missouri Court of Appeals, Eastern District, Division Two.

Deborah M. ANSELMO, Plaintiff/Appellant,

V.

Josephine GUASTO, as Personal Representative for the Estate of Bernard T. Anselmo, Co–Trustee of Bernard T. Anselmo Revocable Living Trust Agreement, and Individually as a Beneficiary of the Bernard T. Anselmo Revocable Living Trust Agreement, Boatmen's Trust Company, Co–Trustee of the Bernard T. Anselmo Revocable Living Trust Agreement, and Andrew F. Guasto, Jerome Anselmo, Frances Ann Anselmo, Joseph Thomas Guasto, Andrew Vincent Guasto, Peter Paul Guasto, John Michael Gusto (Sic), Leonarda Marie Hovis, and Anthony Anselmo, all as Beneficiaries of the Bernard T. Anselmo Revocable Living Trust Agreement, Respondents/Defendants.

No. ED 75842.

Motion for Rehearing and/or Transfer to Supreme Court Denied March 2, 2000.

Synopsis

Sole heir at law filed action against personal representative of estate, co-trustees of trust, and beneficiaries of trust, seeking to have testator's will and revocable living trust set aside. The Circuit Court of the City of St. Louis, Thomas C. Grady, J., entered judgment in favor of heir but ordering fees and costs to be paid by trust. Heir appealed. The Court of Appeals, Crane, P.J., held that trial court did not abuse its discretion by ordering use of trust funds for payment of attorney fees and costs incurred by trustees in defending will which poured assets into trust and for payment of guardian ad litem fees incurred in representing minor beneficiary of trust.

Affirmed.

Attorneys and Law Firms

*652 Gary M. Siegel, Siegel Sevastianos, LLP, St. Louis, for appellant.

Dorothy L. White-Coleman, White & Watson, L.C., St. Louis, for respondent guardian ad litem for the minor child Anthony Anselmo.

Elizabeth M. Clark, St. Louis, for respondents Frances Ann Anselmo and Jerome Anselmo.

Josephine T. Guasto, Sullivan, Respondent Acting pro se.

Nations Bank, St. Louis, Respondent Acting pro se.

Opinion

CRANE, Presiding Judge.

Plaintiff brought a successful action against the personal representative of an estate and the co-trustees and ten beneficiaries of a trust to have the trust and the will, which poured over decedent's assets into the trust, declared invalid. However, she appeals from the trial court's order allowing the trustees' attorneys' fees and costs and the guardian ad litem fees for the minor defendant to be paid out of the trust assets. We affirm.

Plaintiff, Deborah Anselmo, the sole heir at law of decedent, Bernard Anselmo, brought an action to have decedent's will and revocable living trust set aside. Plaintiff alleged that the pourover will and the trust, both of which were executed contemporaneously on January 3, 1995, were invalid as a result of decedent's incapacity and/or defendant Josephine Guasto's undue influence over decedent which caused decedent to not provide for plaintiff. Plaintiff named as defendant Josephine Guasto in her capacities as personal representative of decedent's estate, co-trustee of the trust, and beneficiary of the trust. Plaintiff further named as defendants Boatmen's Trust Company, in its capacity as co-trustee of the trust, and nine other beneficiaries of the trust, including Anthony Anselmo, plaintiff's minor son, and Jerome Anselmo and Frances Ann Anselmo, who were determined to be mentally or physically infirm.

Pursuant to a consent order filed at the commencement of this litigation, Josephine T. Guasto and Boatmen's Trust Company were appointed Co–Trustees Pendente Lite of the trust. The order allowed the trustees to expend trust assets to prevent waste or depreciation and to maintain and/or manage the trust assets in a customary and ordinary manner.

Marc Kramer and Stewart Oelbaum appeared as attorneys for the co-trustees and for the beneficiaries in the trial court proceedings. The trial court appointed a guardian ad litem for Anthony Anselmo pursuant to Rule 52.02(e) and a guardian ad litem for Jerome Anselmo and Frances Ann Anselmo pursuant to Rule 52.02(k).

The circuit court found that plaintiff's claims were properly joined but deferred trial on the equitable counts in order to preserve the statutory right to a jury trial on the will contest. At trial the jury was instructed that it was to find that the will was the last will and testament of the decedent if it found that decedent was of sound mind unless plaintiff established that decedent signed the will as a result of the undue influence of Josephine Guasto. The jury rendered a verdict for plaintiff finding that "the document filed in this Court's probate division, dated 1–3–95, is not the last will and testament of Bernard *653 Anselmo." The trial court entered a judgment in accord with the verdict. The issue of the validity of the trust document was then tried to the court. The parties agreed that the evidence presented in the jury trial was to be considered by the court in ruling on the validity of the trust. The trial court found that the evidence did not support a finding that decedent was incompetent at the time the document was executed, but that it did support a finding that Josephine Guasto exercised undue influence over decedent and the trust instrument resulted from that undue influence. It ordered the assets of the trust to be delivered to the administrator of decedent's probate estate.

Plaintiff subsequently filed a motion to tax costs against defendant Josephine Guasto. The co-trustees, Josephine Guasto and Boatmen's, moved that their counsel fees and costs be paid from the trust assets pursuant to *Murphey v. Dalton*, 314 S.W.2d 726 (Mo.1958). The guardian ad litem for the minor beneficiary moved for attorney's fees and costs. The court ordered that the attorneys' fees incurred by the attorneys for the co-trustees, the fees of the guardians ad litem, and the costs of the action be paid out of the trust assets. In reaching this decision, the trial court specifically found that the attorneys' fees in question were reasonable, that the trustees had a duty to defend the trust, and that it was equitable for the fees to be paid out of the trust assets. The court found that the services performed by the attorneys were for the benefit of the trust although the beneficiaries also would have benefited had the trust prevailed.

1. Payment of Attorneys' Fees and Costs

For her first two points on appeal, plaintiff contends that the trial court erred in ordering that the trustees' attorneys' fees and the costs of the action be paid out of the trust assets because under the American rule each party should pay its own fees, and in a will contest the costs should be taxed against the party who did not prevail. She further asserts that the litigation did not benefit the trust, plaintiff was the prevailing party in setting aside both the will and the trust, the litigation did not involve the construction of the trust, and almost all of the attorneys' fees and costs were incurred in defending the will contest. We disagree. The issue raised is controlled by the law governing a court's authority to order a trustee's expenses incurred in defending a trust to be paid from the trust estate, not the law governing who, between the parties to an action, is liable for attorney's fees and costs.

As a general rule a trustee is entitled to be allowed against the trust estate all the trustee's proper expenses, including all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust. Coffman v. Gates, 110 Mo.App. 475, 488-89, 85 S.W. 657, 660 (1904). A trustee is bound to take all reasonable action to uphold the validity of the trust and to preserve the trust assets. Murphey v. Dalton, 314 S.W.2d 726, 732 (Mo.1958). Section 456.520.3(25) (RSMo Cum.Supp.1998) specifically gives the trustee, as fiduciary, the power to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his or her duties. Accordingly, a court is authorized to order payment of a trustee's expenses in defending the trust or the trust estate. *Matter of Estate of Holscher*, 724 S.W.2d 577, 582 (Mo.App.1986). A trustee must defend suits which will wholly invalidate the trust or reduce its scope. Nelson v. Mercantile Trust Company, 335 S.W.2d 167, 175 (Mo.1960); Columbia Union Nat. Bank & Trust v. Bundschu, 641 S.W.2d 864, 880 (Mo.App.1982); George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees Section 581, p. 334 (2 nd Ed. Rev.1980). A trustee who defends an action for the benefit of the trust, including to prevent the failure of the trust, may, with *654 propriety, incur such costs, the expense of an attorney included, as are reasonable for the purpose and is entitled to be reimbursed from the trust estate. Murphey, 314 S.W.2d at 732–33; Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 376 (1939); Matter of Heisserer, 797 S.W.2d 864, 874 (Mo.App.1990); In re Coats Trust, 581 S.W.2d 392, 398 (Mo.App.1979); Coffman, 85 S.W. at 661; 76 Am.Jur.2d Trusts Section 635 (1992). The trustee need not be successful in defending the trust before the court can order that the trustee's reasonable attorney's fees or the costs of the suit be paid out of the trust assets. Bogert, Section 581, p. 339. See In re Estate of Chrisman, 723 S.W.2d 484, 487 (Mo.App.1986) (applying this rule in an action to obtain construction of a will creating a trust).

the trustees were also obligated to defend the will and thereby preserve the trust and the trust assets. *Murphey*, 314 S.W.2d at 732. Attorney's fees and costs to defend the will may be paid out of the trust assets. *Id. See also Chrisman*, 723 S.W.2d at 487.

The trial court had the authority to order that the co-trustees' attorneys' fees and the costs in this case be paid out of the trust assets and did not abuse its discretion in doing so. Points one and two are denied.

2. Guardian Ad Litem Fees

For her third point, plaintiff contends that the trial court erred in ordering that the fees of the guardian ad litem for the minor beneficiary be paid out of the trust assets. Plaintiff argues that a guardian ad litem was unnecessary because the minor beneficiary's interests were identical to the rest of the beneficiaries and his interests were already adequately represented. We disagree.

Rule 52.02(e) requires that a civil action against a minor defendant not be prosecuted until a guardian ad litem is appointed for the minor defendant. Rule 52.02(j) provides that no person appointed guardian ad litem for a minor shall be personally liable for the costs of the action.

A court-appointed guardian ad litem may employ counsel or, if the guardian ad litem is an attorney, may act as counsel for the minor. *Ragan v. Looney*, 377 S.W.2d 273, 276 (Mo.1964). If the guardian ad litem acts as counsel and if the services were necessary, the guardian ad litem is entitled to a reasonable fee for services rendered as attorney and as guardian ad litem. *Id.* The duty of the court to appoint a guardian ad litem necessarily implies the obligation to pay the guardian ad litem and the power of the court to fix reasonable compensation. *Id. In Interest of C.J.E.*, 878 S.W.2d 845, 847 (Mo.App.1994). The guardian

ad litem's fee for representing a minor defendant is awarded by judgment. *C.J.E.*, 878 S.W.2d at 848; *Davis v. American Nat. Bank*, 672 S.W.2d 182, 184 (Mo.App.1984). It is within the trial court's discretion to determine against whom the judgment may be rendered. *Davis*, 672 S.W.2d at 184. If there is a fund, the court may in its discretion and in the exercise of its equitable powers direct payment from the fund. *Id.*

In this case the trial court did not abuse its discretion in charging the trust estate for the guardian ad litem fees for the minor beneficiary. The minor was involuntarily brought into court as a defendant solely by the virtue of the fact that he was a named beneficiary of the trust. The minor defendant was not awarded any monies as a result of the litigation. The guardian ad litem was necessary to properly adjudicate the action seeking to invalidate the trust and the will creating it. *655 The guardian ad litem's efforts were necessary to defend the estate. Under such circumstances a trial court may award a reasonable fee from the trust estate for the services of the guardian ad litem. See O'Reilly v. Jackson, 269 S.W.2d 631, 639 (Mo.1954).

The trial court did not abuse its discretion in ordering that the guardian ad litem's fees be paid out of the trust assets. Point three is denied.

The judgment of the trial court is affirmed.

ROBERT G. DOWD, Jr., J. and SHERRI B. SULLIVAN, J., concur.

All Citations

13 S.W.3d 650

Footnotes

The point is generally directed to guardian ad litem fees, but the argument only discusses the fees of the guardian ad litem for the minor beneficiary. The other guardian ad litem was appointed at plaintiff's suggestion, the order of appointment directed that the fees be paid from the trust estate, and plaintiff raised no objection to the payment of this guardian's fees at trial.

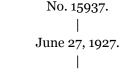
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222 Mo.App. 230 Kansas City Court of Appeals, Missouri.

FULKERSON

v.

NEW GAZETTE CO. ET AL.



Rehearing denied July 11, 1927.

Synopsis

Appeal from Circuit Court, Buchanan County; L. A. Vories, Judge.

Suit to foreclose chattel mortgage and for a receiver, brought by Walter P. Fulkerson, trustee, against the New Gazette Company and another. From a judgment allowing plaintiff remuneration, and an attorney's fee, defendants appeal. Reversed.

Attorneys and Law Firms

*115 G. L. Zwick and Culver, Phillip & Voorhees, all of St. Joseph, for appellants.

Mytton & Parkinson, of St. Joseph, for respondent.

Opinion

ARNOLD, J.

This is an appeal from a finding and judgment of the circuit court allowing the trustee remuneration in the sum of \$500 in a foreclosure proceeding of a chattel mortgage, and an attorney's fee of \$1,000 for services in connection therewith, and that such judgment in favor of plaintiff be a special lien against the property and assets of defendants.

Defendant, the New Gazette Company is a corporation engaged in the publication of a daily newspaper in the city of St. Joseph, Mo., and defendant the First Trust Company, as its name implies, is a trust company in said city.

The facts disclosed are that on August 24, 1905, the New Gazette Company executed a deed of trust covering its newspaper plant, franchises, and property to one Walter P. Fulkerson, trustee, to secure the payment of 63 bonds, of which 37 were of the par value of \$1,000 each and 26 of the par value of \$500 each, and numbered consecutively from 1 to 63, and payable on or before August 1, 1925, to the bearer, or to the registered holder thereof, if registered, with interest from August 1, 1905, at 6 per cent., payable semiannually on the 1st days of February and August each year, and evidenced by interest coupons.

In August, 1923, the New Gazette Company executed a second mortgage and deed of trust upon the same property to secure the payment of \$7,500 of second mortgage 20—year bonds, naming defendant the First Trust Company as trustee therein. The first mortgage bonds matured August 1, 1925, and remained unpaid, together with the interest coupon due on that date, until after the filing of the suit herein on February 16, 1926. It appears that default was made under the terms of the second mortgage and deed of trust, and in February, 1926, the First Trust Company, trustee, advertised the property to be sold on February 23, 1926, to satisfy the second mortgage.

On February 15, 1926, eight days before the day set for the sale just mentioned, plaintiff herein, as trustee under the first deed of trust, brought this suit to foreclose the first mortgage and for the appointment of a receiver to take charge of the mortgaged property, making the mortgagor and trustee in the second mortgage parties defendant therein. On the hearing of the application for the appointment of a receiver and upon the final hearing of the petition to foreclose, the trial court found that neither at the time the suit was instituted nor thereafter was the plaintiff entitled to have a receiver appointed; that at the time the suit was brought no default on the part of the New *116 Gazette Company had occurred and continued for the length of time provided in the mortgage which would entitle plaintiff to institute or prosecute this suit; and that plaintiff was not entitled to foreclose the mortgage. The court ruled that the application for a receiver and the petition for foreclosure be denied and plaintiff's petition dismissed.

The court further found, in connection with the institution and prosecution of this suit, that plaintiff, as trustee, rendered services of the value of \$500, and that he had employed attorneys to institute and prosecute the suit and that the reasonable value of such services was \$1,000, and thereupon the court adjudged that plaintiff recover from defendants the sum of \$1,500, together with the costs of this suit; that such judgment be a special lien upon the property of the New Gazette Company, described in the mortgage, and, if the judgment be not satisfied out of the property and assets of defendants, then the special lien upon the property described in the mortgage to be foreclosed by sale thereof to be made by the sheriff in the manner and upon the terms and notice provided for the sale of personal property under general execution. A motion by defendants to set aside said judgment was overruled, and defendants have appealed.

In their assignments of error, defendants urge the court erred in refusing defendants' declarations of law numbered 2, 3, 4, and 5, and in awarding plaintiff any compensation for services, and for his attorneys in connection with this suit. Said declarations of law are as follows:

- "(2) The court declares the law to be that the plaintiff is not entitled to recover the value of any attorney's fees for services rendered by any attorney in instituting or prosecuting this suit to foreclose the mortgage described in the petition in which the plaintiff is named as trustee.
- (3) The court declares the law to be that the plaintiff is not entitled to recover the value of any attorney's fees for services rendered by any attorney in preparing or presenting the application for receiver in this cause.
- (4) The court declares the law to be that the plaintiff is not entitled to recover the value of any of his services rendered in the application for a receiver or prosecuting said application.
- (5) The court declares the law to be that plaintiff is not entitled to recover the value of any services rendered by him in bringing this suit to foreclose the deed of trust mentioned in the petition in which the plaintiff is named as trustee, or for prosecuting the same."

Defendants insist that the only powers conferred and the only duties which plaintiff, as trustee, was authorized to perform in the administration of the trust, and the condition upon which the trustee was authorized to perform such duties and exercise such powers, were: (1) He was required to certify the bonds secured by the mortgage. (2) In the event of default in the payment of interest when demanded, or in the performance of any covenant to be performed by the mortgagor, and such default continued for three months after notice given in writing, the trustee could declare the principal of the bonds to be due. (3) If any such default continued for three months after notice had been given, the trustee could take possession of the property and operate it. (4) If any such default in the payment of the principal continued for three months after such notice had been given, the trustee, with or without taking possession, could either foreclose the mortgage by advertising and selling the property or institute suit to foreclose. (5) Whenever the trustee was entitled to foreclose, he was entitled as a matter of right to demand the appointment of a receiver.

An examination of the deed of trust discloses that this position is correct, as shown by articles II, IV, V, VI, and VII, of the instrument. And in respect to the compensation of the trustee, article X provides:

"The trustee shall have authority to pay such reasonable compensation as he shall deem proper to the counsel, attorney, agents, servants, and employees whom he may reasonably employ in the administration or management of this trust, and the trustee and his successor, or successors, shall have and be entitled to just compensation for all services which he, or they, may render in connection with the administration or management of the trust hereby created to be paid by the company or defrayed out of the trust estate, and, until so paid, to be a prior charge upon the premises hereby mortgaged. The trustee shall not be under any obligation to take any action towards the execution of this trust which, in his opinion, will be likely to involve him in personal expense or liability unless one or more of the said bondholders shall, as often as required by the trustee, give him reasonable indemnity against the same, anything herein to the contrary notwithstanding."

It is admitted that no notice of default had ever been given by the trustee to the mortgagor, and the trial court decreed that the New Gazette Company had not been guilty of any default which had continued for the specified three months to entitle the trustee to maintain an action and that he had no right to maintain the same.

It is defendant's position that the action of the trustee in instituting this suit and in the employment of attorneys to prosecute the same was not in the administration or management of the trust as contemplated by article X above quoted. It is plaintiff's position that this suit was instituted under article VII, which provides:

"The provisions in article VI are cumulative to the ordinary remedy by foreclosure in the courts now or hereafter in force, and the trustee herein may at his discretion and shall upon the written request of 5 per cent. in value of the outstanding and unpaid bonds, which may *117 have been issued hereunder, and upon being properly indemnified if required by the trustee, and whenever entitled to do so by the terms hereof, institute proceedings to foreclose this mortgage or deed of trust whenever said 5 per cent. of said bondholders may direct, and in the absence of any such direction then as the trustee may deem expedient, and in that event the trustee shall be entitled as a matter of right to demand the appointment of a receiver of all the property and assets of the company: Provided always that it is hereby expressly declared and agreed that no holder or holders of a bond or of any bonds secured hereby, or of any of said coupons which may be due and unpaid, shall have the right to institute any suit, action, or proceeding in equity or in law for the foreclosure of this mortgage or deed of trust, or for the execution of the trustee thereof, or for the appointment of a receiver or any other remedy without first giving 20 days' notice in writing to the trustee herein of the default having occurred and continued as aforesaid, and unless 5 per cent. in amount of the holders of the bonds then outstanding have made request in writing to the trustee as above provided, and have accorded him a reasonable opportunity to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in his own name."

And plaintiff insists that under these provisions this suit could be maintained at any time after three months from August 1, 1923, without demand for payment or notice of any kind by the trustee, and that he was entitled to the appointment of a receiver as a matter of right by the terms of the agreement; that he could bring the suit at his discretion, and, upon the written request of five per cent. in value of the outstanding bonds, it was his duty to bring the suit; that in this case a demand had been made upon him by more than 10 per cent. in value of the outstanding and unpaid bonds for the bringing of the suit.

It was the view of the trial court that there was no default under the terms of the first deed of trust and that the trustee thereunder was not entitled to the appointment of a receiver, and the court so ruled. The trial court having so ruled, it is defendant's contention that the court erred in allowing remuneration for the trustee and his attorneys in prosecuting the unwarranted suit. As we view the record, this is the main question for our determination.

Defendant urges that a trustee is entitled to compensation only for such services and expenditures as are within the line of the duties imposed upon him by the instrument creating the trust, and that he may not have compensation for services self–imposed and resulting from his own wrong. This is a statement of the general rule as laid down in 39 Cyc. 484, and this appears to be the rule in this state. Tracy v. Railroad, 13 Mo. App. 295; same case, 84 Mo. 210.

It is also urged that there can be no valid execution of a power of sale in a mortgage or deed of trust before the time prescribed by the instrument itself. This is also a statement of the general rule in this respect and we understand plaintiff does not undertake

to refute it. However, plaintiff contends that by the specific terms of the first deed of trust he is entitled to his remuneration and to attorney fees in the institution and prosecution of the suit which is the basis of this action.

Articles III, IV, and V of the first deed of trust provide for specified action in case of default in the payment of interest. Article VI provides that, if default be made in the payment of the principal, or under other specified conditions whereby the security of the mortgage becomes impaired, or if the company refuse and fail to keep the covenants and stipulations of the deed of trust or bonds for a period of three months after demand made by the trustee, it shall then, but not sooner, be lawful for the trustee, upon request in writing of a majority in interest of the holders of the bonds, to sell or dispose of the newspaper, property, franchises, etc., at public auction, and to apply the proceeds in the manner specified.

Article VII is to the effect that:

"The provisions of article VI are cumulative to the ordinary remedy by foreclosure in the courts now or hereafter in force, and the trustee *may* at his discretion and *shall* upon the written request of 5 per cent. in value of the outstanding and unpaid bonds which may have been issued hereunder and upon being properly identified, if required by the trustee and whenever entitled to do so by the terms hereof, institute proceedings to foreclose this mortgage * * * whenever said 5 per cent. of said bondholders may direct, and in the absence of any such direction then as the trustee may deem expedient, and in that event the trustee shall be entitled as a matter of right to demand the appointment of a receiver," etc.

The said section further provides that no holder or holders of any of the due and unpaid bonds or coupons shall have the right to institute any suit in law or equity to foreclose or for any other remedy without first giving notice in writing to the trustee of default having occurred and continued for the specified time, unless 5 per cent. of the holders of the bonds then outstanding shall have made request in writing to the trustee, and have accorded him a reasonable opportunity to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in his own name.

The testimony shows that written demand had been made upon the trustee by more than the required 5 per cent. in value of the outstanding and unpaid bonds for the institution of this suit, and plaintiff insists that this suit was maintainable at any time after three months from August 1, 1925, the due date, without any demand for payment or notice by the trustee of any kind, and the *118 trustee was entitled to the appointment of a receiver as a matter of right under the terms of the agreement. But the trial court held that the mortgage was not in default and that plaintiff was not entitled to have a receiver appointed and not entitled to have the mortgage foreclosed. Therefore the question as to whether, under the provisions of the mortgage, there was in fact a default at the time suit was instituted, is not before this court, as plaintiff did not appeal, and the action of the court so adjudging became res adjudicata. The only question before us is: Assuming that plaintiff had no right to institute this suit for receiver and foreclosure, is he entitled to be recompensed for the services of himself and his attorney in bringing and prosecuting the suit?

In the case of Tracy v. Railroad, 13 Mo. App. 295, 297, affirmed in 84 Mo. 210, it was held that a trustee is not entitled to compensation "for mere accommodations or voluntary benefactions, however beneficial to the estate, or to the parties interested, but only for such services or expenditures as are within the line of duties clearly imposed upon him by the instrument creating the trust"; that such services or expenditures must either be "expressly directed by the founder of the trust or be necessary to the performance of some duty enjoined"; that, "as to powers not conferred upon the trustee, either expressly or by implication, in the appointing instrument, he is, to all intents, a stranger to the estate"; that "the true test * * * whether the services and expenses for which he (the trustee) demands compensation and reimbursement were either directed by the terms of the deed of trust, or were necessary to a performance of the duties imposed upon him by that instrument."

A trustee cannot receive pay for his services and expenses if not within the line of the duties imposed upon him by the instrument creating the trust and he is not entitled to the expenses of litigation brought on by him not within the express or implied provisions of the deed of trust. 2 Perry on Trusts (6th Ed.) § 910. If the trustee had no right to institute this suit, the fact that he did so in good faith would not entitle him to recover recompense for the services of himself and his attorney. See 26 R. C. L. p. 1372, where it is stated:

"And it is equally well settled that the actual and bona fide exercise of those faculties affords no protection whatever to the trustee who had in fact gone beyond the limit of his powers, and assumed a discretion or an option not fairly conferred upon him by the terms of the instrument in their legal sense and import."

If the mortgage in the case at bar was not in default, then there was no occasion for the bringing of this suit. The fact that proceedings had been brought to foreclose a second mortgage does not ordinarily jeopardize the interests of the bondholders under the first mortgage and there is no evidence tending to disclose how they could have been injuriously affected in this instance by the foreclosure of the second mortgage. The court held that the plaintiff had no right to maintain this suit for the appointment of a receiver and the foreclosure of the mortgage because there had been no default by the mortgagor. Plaintiff was therefore, under the authorities cited supra, not entitled to recover the expense of the litigation unless there is some provision of the mortgage giving him this right. There is no such provision of the mortgage unless it be in article X. An examination of this article of the mortgage shows that it provides for such compensation only where the trustee had taken some action in the administration or management of the trust and under the provisions of the mortgage. This is emphasized by a clause of article X which was intended as a protection to the trustee if he were in doubt as to his right to proceed in a given instance. This clause reads as follows:

"The trustee shall not be under any obligation to take any action towards the execution of this trust, which in his opinion will be likely to involve him in personal expense or liability unless one or more of the said bondholders shall as often as required by the trustee, give him reasonable indemnity against the same, anything herein to the contrary notwithstanding. The trustee may resign and discharge himself of the trust hereby created by notice in writing to the company given at least three months before such resignation shall take effect, or such shorter time as the company shall accept as adequate."

For the reasons above stated, we hold the ruling of the trial court was error, and the judgment should be reversed.

It is so ordered

BLAND, J., concurs.

TRIMBLE, P. J., absent.

All Citations

222 Mo.App. 230, 297 S.W. 115

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432 S.W.3d 293 Missouri Court of Appeals, Western District.

Noelle HANKS, Successor Trustee of the William L. Hanks Trust Agreement of June 14, 2006, Respondent,

> v. Phil MORRIS, Appellant.

> > No. WD 76608. | June 3, 2014.

Synopsis

Background: Successor trustee brought action against former co-trustee alleging fraud and conversion in management of trust. The Circuit Court, Nodaway County, Roger Martin Prokes, J., entered judgment on jury verdict in favor of successor trustee, and on punitive damages award of \$400,000. Co-trustee appealed.

Holdings: The Court of Appeals, Gabbert, J., held that:

proposed instruction on co-trustee's affirmative defense for compensation was properly rejected;

co-trustee's proposed instruction on trustee liability was misleading;

court's instruction on trustee liability was not required to include both prevention and redress elements as a defense; and punitive damages award was not excessive.

Affirmed.

Attorneys and Law Firms

*295 Scott Ross, Maryville, MO., Harlan D. Burkehead, Kansas City, MO, for Respondent.

Michael Richard Ong, Leadwood KS, for Appellant.

Before Division One: JOSEPH M. ELLIS PJ., KAREN KING MITCHELL, ANTHONY REX GABBERT, JJ.

Opinion

ANTHONY REX GABBERT, Judge.

Phil Morris appeals from a judgment entered upon a jury verdict finding in favor of Noelle Hanks (Plaintiff), successor trustee of the William L. Hanks Trust Agreement of June 14, 2006. The jury's verdict was against Morris for compensatory damages in the amount of \$450,000 and punitive damages in the amount of \$400,000 on Plaintiff's "Second Amended Petition for Accounting, Surcharges to the Former Trustees and for Damages for Fraud and Conversion and for Punitive Damages and Other Relief"

which claimed that Morris and his co-defendants improperly managed the William L. Hanks Trust. Morris asserts four points on appeal. First, Morris contends that the circuit court erred in refusing to instruct the jury that, if it determined Morris was a trustee with special skills or knowledge, or named as trustee on that basis, it could consider whether Morris was entitled to additional compensation. Second, Morris contends that the circuit court erred in refusing to instruct the jury on the proper legal standard for the imposition of liability upon a trustee for the actions of a co-trustee. Third, Morris asserts that the circuit court erred in giving Instruction No. 6 to the jury because he claims that the instruction failed to set forth the essential statutory elements for co-trustee liability. Fourth, Morris asserts that the circuit court erred in denying his post-trial motion for remittitur of punitive damages alleging that the damages imposed by the jury are grossly excessive and contrary to the law. We affirm.

The evidence in the light most favorable to the jury's verdict shows that Morris began farming for William Hanks's father in 1969. Morris developed a friendship and business relationship with William Hanks in 1977 when Hanks moved back to Missouri after living in Oregon. Morris testified that, in 2006, Hanks called Morris to Hanks's home and asked Morris if he would act as trustee of his trust, along with Larry D. Owens, after Hanks's death. Morris testified that Hanks told him that he wanted Morris as trustee because he had knowledge of Hanks's farms. On June 14, 2006, Hanks executed the William L. Hanks Revocable Trust Agreement wherein he designated himself as trustee and Morris and Owens as successor co-trustees. In May of 2008, Hanks died and Morris and Owens became acting co-trustees of the Hanks Trust. At the time Morris and Owens took over as trustees, the trust had beginning assets valued at nearly 1.5 million dollars. These assets consisted mainly of farm real estate and a brokerage account.

On June 4, 2008, Morris and Owens hired Debra Owens, Owens's wife, as the *296 accountant for the Hanks Trust. Debra operated a sole-proprietorship titled Dollars and Cents Accounting and Tax Service. The engagement letter indicated that service reimbursement would be at the rate of \$50 per hour. For the approximate three year period from June 3, 2008, to May 15, 2011, Debra's business was paid \$67,544 in service fees from the Hanks Trust. During that same three-year time period, Morris collected \$100,908 in trustee's fees and Larry Owens collected \$163,720 in trustee's fees.

Morris testified at trial that, prior to Hanks's death, Morris worked with Hanks on improving his farm properties through terracing work for soil conservation to maintain the value of the farmland and meet government guidelines for a government cost share program. Morris testified that he was not paid for his work on these farm improvements at the time he did the work. Some of the work Morris contended that he was not paid for went as far back as 2004. There is no dispute, however, that all of this alleged work was performed prior to Hanks's death. Morris testified that he paid himself for these farm improvements out of the trust after Hanks's death and these payments totaled over \$92,000. Morris acknowledged, however, that only approximately \$9,000 of the \$92,000 that he was paid for these farm improvements was for work done to land in the Hanks Trust. Morris testified that the other over \$80,000 was actually for improvements he did to land in Hanks's father's trust. Although Hanks was one beneficiary of his father's trust, there were other beneficiaries in that trust different from the beneficiaries named in Hanks's trust. The documentation Morris had to support his billing for the farm improvements consisted of brief summaries that he claims to have made from original time card records. He testified that he kept the original time cards in a box, but destroyed those original records after he made his bills out to Dollars and Cents Accounting.

Larry Owens, Morris's co-trustee, was part owner of a developmental league baseball team located in Hannibal, Missouri, known as the Hannibal Cavemen. There were three entities involved in this venture: Clemens Field Development, Hannibal Sports and Entertainment Group, and Hannibal Baseball Investment Group. Owens owned one-third of Clemens Field Development, 50% of Hannibal Sports and Entertainment Group, and 38% of Hannibal Baseball Investment Group. In March of 2009, the Hanks Trust transferred \$150,000 to Clemens Field Development. In September of 2009, Morris and Owens signed a document pledging a loan in the amount of \$200,000 to Hannibal Sports and Entertainment Group.

Larry Owens and his wife, Debra, were also co-owners of a startup winery/bed and breakfast named Casa de Loco Winery. Larry owned a 95% interest and Debra owned a 5% interest in the business. Approximately two months after Hanks died, both Morris and Owens signed a check transferring \$30,000 from the Hanks Trust to Casa de Loco. On January 2, 2009, Owens transferred another \$40,000 to Casa de Loco, and on March 1, 2009, Owens transferred \$20,000 to Casa de Loco. The transfers

from the Hanks Trust to Casa de Loco eventually reached nearly *297 \$140,000. The evidence at trial showed that the Trust would likely be unable to recover any assets from the baseball investment or Casa de Loco Winery.

In March of 2009, all creditors of the Hanks Trust and estate had been paid and all beneficiaries of the Hanks Trust had received their bequests with the exception of Hanks's daughters, Noelle Hanks and Tiffany Wiederhorn, whom Morris and Owens did not pay. These daughters were each bequeathed \$1,000. Larry Owens's son, Casey Owens, was bequeathed \$100,000 and was paid his share from the Trust on January 2, 2009.

The University of Oregon Foundation was the remainder beneficiary of the Hanks Trust. On June 4, 2008, Morris's and Owens's then attorney, Jere Loyd, sent the Foundation a letter advising the Foundation of Hanks's death and notifying the Foundation that Morris and Owens were the successor co-trustees of the Hanks Trust. Over the next several months, the Foundation's attorney corresponded with Loyd in an attempt to receive an accounting from the co-trustees. On April 22, 2009, Loyd sent Morris and Owens a letter advising them of the Foundation's requests for an accounting and informing them that they were obligated to report to the beneficiary at least annually. Loyd suggested to Morris and Owens that an accounting be prepared from the beginning of their administration through the end of 2008. Morris and Owens failed to provide an accounting at that time. Morris testified that, at some point, Morris and Owens discussed contacting the Foundation to determine the Foundation's position with regard to whether the trust should be left open or whether the Foundation wanted to directly take the land in the trust, but instead decided to "just let it ride for a while." Over eight months after Loyd sent his first letter to Morris and Owens, Loyd sent another letter advising them again of the Foundation's request for an accounting and their obligation to provide one. Eventually, on January 28, 2010, the Foundation was provided "Charge and Discharge Statements" for 2008 and 2009 and was later provided statements for 2010. On July 14, 2010, counsel for the Foundation sent a letter to Loyd expressing concern that the statements evidenced "bafflingly large" and "extreme" accounting and trustee's fees and requested a prompt and comprehensive explanation. The letter also expressed concern that the trustees were supposed to be expeditiously liquidating the assets of the Hanks Trust, but little progress had been made towards that end.

Approximately one year later, in July of 2011, the Foundation and Hanks's two daughters filed suit against Morris and Owens seeking, among other relief, an injunction against further spending or asset disposition by Morris and Owens and their removal as trustees. A Second Amended Petition added claims for punitive damages and added Debra Owens as a party. Morris and Owens ultimately resigned as trustees.³ On April 12, 2013, the jury found Morris liable to the Hanks Trust for \$450,000 in compensatory damages and \$400,000 in punitive damages. Morris's post-trial Motion for New Trial and for *298 Remittitur of Punitive Damages was denied. Morris appeals.

In Morris's first point on appeal, he contends that the circuit court erred in refusing to instruct the jury that, if it determined Morris was a trustee with special skills or knowledge, or named as trustee on that basis, it could consider whether Morris was entitled to additional compensation. Morris argues that he was entitled to an instruction on his affirmative defense theory that he was a trustee with special skills and knowledge who applied those skills in carrying out his fiduciary duty, and he was prejudiced by the jury not being instructed that it could take those skills and knowledge into consideration in determining the appropriate compensation due Morris. He argues that his proffered "Instruction Y" was a proper statement of Missouri law and supported by the evidence. We find no error.

When a party claims that the trial court erred in refusing to submit a non-MAI instruction, we review the court's denial of that instruction for abuse of discretion. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 396 (Mo.App.2011). The court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 134 (Mo. banc 2013). If we find that the court erred in refusing to give an instruction, we will only reverse if the refusal was prejudicial to the offering party and materially affected the merits of the action. *Freight House Lofts Condo Ass'n v. VSI Meter Services, Inc.*, 402 S.W.3d 586, 595 (Mo.App.2013). Rule 70.02(a) provides that all instructions "shall be given or refused by the court according to the law and the evidence in the case." "[A] party is entitled to an instruction upon any theory supported by the evidence." *Cluck v. Union Pacific R. Co.*, 367 S.W.3d 25, 33 (Mo. banc 2012). However, "even

when a party is entitled to have an instruction submitted, the trial court does not have a duty to submit a correct instruction in the place of the parties' erroneous instruction." *Id*.

Morris proffered "Instruction Y" which Morris presented as being applicable to Section 456.8–806, RSMo Cum.Supp.2013. He claims that the instruction addressed his affirmative defense that he provided valuable and necessary services to the Trust, including work related to maintaining the condition of the farm property as a productive asset for which the beneficiaries benefitted. He also contends that Instruction Y reflects a proper statement of Missouri law pursuant to the official comments to Section 456.7–708, RSMo Cum.Supp.2013. Morris's proposed Instruction Y stated:

On the claim of the plaintiff for compensatory damages against Phil Morris related to his Trustee fees if you believe:

First, either

Phil Morris was a trustee who has special skills or expertise

Phil Morris was named trustee in reliance upon the his [sic] representation that he had special skills or expertise,

Second, you are entitled to consider if Phil Morris may be entitled to extra compensation for performing services that would ordinarily be delegated.

We do not find Morris's proposed Instruction Y to be a proper statement of Missouri law pursuant to Section 456.8–806 or Section 456.7–708. Section 456.8–806 does not address trustee compensation. Section 456.8–806 merely states that, "[a] trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee *299 has special skills or expertise, shall use those special skills or expertise."

Although Morris proffered Instruction Y as following Section 456.8–806 and argues on appeal its applicability to that statute, he also argues that a Uniform Trust Code comment to Section 456.7–708 suggests relevant factors that may be taken into consideration when determining *reasonable compensation* pursuant to Section 456.7–708. *See* 4C FRANCIS M. HANNA, MISSOURI PRACTICE, TRUST CODE AND LAW MANUAL § 456.7–708 UTC Comment (2013–1014). He argues that the factors suggested in the comment are applicable to him and for consideration of the compensation he received as trustee under the Hanks Trust. Yet, Morris and his proposed Instruction Y ignore the express language Section 456.7–708. Section 456.7–708 states, in relevant part:

- 1. If the terms of the trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.
- 2. If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:
- (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or
- (2) the compensation specified by the terms of the trust would be unreasonably low or high.

Here, the terms of the Hanks Trust specify the trustee's compensation. The Hanks Trust provides that the trustee "shall be compensated for its services as provided in the schedule of fees published by The Country Club Trust Company, of Kansas City, Missouri, in effect at the date the services are rendered." Therefore "the terms of the trust [] override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances." HANNA, MISSOURI PRACTICE, TRUST CODE AND LAW MANUAL § 456.7–708 UTC Comment. Pursuant to Section 456.7–708, Morris would have only been entitled to compensation above that provided by the trust document if his trustee duties were substantially different from those contemplated when the trust was created or if the compensation specified by the terms of the trust was unreasonably low under the circumstances. Nothing within Morris's proffered Instruction Y mentions this significant provision of Section 456.7–708. Clearly, as Morris claims that he was named trustee based on his

knowledge, skills, and the expertise he was to provide to the trust, he cannot argue that his trustee duties were substantially different from those contemplated when the trust was created. Additionally, the evidence does not support that the compensation provided for in the trust was unreasonably low for the services Morris actually provided, thereby justifying an instruction based on Section 456.7–708.4

Morris argues that, because of his special skills and expertise, he was entitled to fees for special or extraordinary services under the Country Club Trust Company fee schedule because the schedule allows for such in its provision for "Fees for Special or Extraordinary Services." This provision states:

The foregoing charges are for standard and customary services performed by Country Club Trust Company. Additional *300 charges may be assessed if special or extraordinary services are required, including reimbursement of actual costs to thirdparties. These include, but are not limited to, processing discretionary distributions, payment of bills, preparation of tax returns, monthly adjustments to the principal balance of assets, preparation for and involvement in litigation, and participation in the management or sale of a business venture.

Thomas Wallingford, a Country Club Trust Company trust officer, confirmed in his testimony that the Country Club Trust Company might assess additional charges against a trust if special or extraordinary services are required in managing the trust. He testified that, active management of a farm would be an extraordinary service. He testified that, dealing with partition actions, dealing with quiet title actions, doing actual farm maintenance, and acting as an agent on behalf of the trust in negotiating a sale price are also extraordinary services. He testified that, if the County Club Trust Company utilizes extraordinary services, the beneficiaries are consulted and advised.

We first note that Morris accepted the position of trustee under the terms of the trust and could have petitioned the court pursuant to Section 456.7–708.2 to consider additional fees if he believed the fees set forth by the trust were unreasonably low. This would have allowed the beneficiaries of the trust the opportunity to dispute Morris's contention and protect their interests. Morris did not consult the court nor did he consult or advise the trust beneficiaries of the need for additional fees for extraordinary services. Instead, Morris chose to determine his own fee schedule and relies on the language in the Country Club Trust Company fee schedule regarding extraordinary services to argue that he justifiably charged the trust for those extraordinary services and that he was entitled to an instruction regarding that defense. Yet, there is no evidence that the schedule of fees published by the Country Club Trust Company was unreasonably low for the services Morris performed.

The Country Club Trust Company was named in the Hanks Trust as the successor trustee if Morris and Owens failed to serve or chose not to serve. Wallingford, a trust officer for the Country Club Trust Company, testified at trial that, the fee schedule at the time Morris and Owens first became trustees was 1.1% on the first million dollars in assets, and .6% for the next \$500,000 in assets. Wallingford testified that these fees would have included accounting services provided by the Country Club Trust Company. Wallingford testified that, if the Country Club Trust Company had managed the Hanks Trust, the trust would have been charged \$38,000 in trustee fees for the approximate three-year time period that Morris and Hanks governed the trust. The approximate total of trustee and accounting fees paid by the Hanks Trust to Morris and Owens, excluding the \$67,544 paid to Owens's wife for accounting services, was \$264,628.

The Country Club Trust Company fee schedule sets forth a fee for standard and customary services performed by the trustee, and then allows for additional charges for extraordinary services. There was no evidence at trial that Morris first accepted the fee within the schedule for his standard and customary services, and then assessed additional charges for extraordinary services. Rather, Morris assessed the trust \$125 per hour for all services he performed. While Morris's affirmative defense, as set forth in his petition, claims that he performed work related to maintaining the condition of the farm property as a productive asset for which the beneficiaries benefitted, Morris billed the trust *301 \$92,000 separately for these farm improvements. While Morris argues that an extensive portion of his time as trustee was also devoted to the marketing and sale of the farm property, the evidence shows that a realtor was paid \$37,339 for the sale of one tract of land and an auctioneer was paid \$20,280 for the sale of another. One could reasonably infer that these professionals earned their fees based on their own marketing and sale of the farm properties.

Morris's own evidence reflects that many hours of trustee work for which Morris billed the trust did not require special skills and knowledge in maintaining farm property, installing soil conservation terraces, and maintaining terrace work. For example, Morris's Exhibit 101 contains a section titled "Farm Sale & Maintenance." It describes trustee work performed and the number of hours worked. On April 1, 2010, Morris billed the trust one hour (\$125) for: "Spoke to Phil Blasier about days for trash." On April 3, 2010, Morris billed the trust eight and a half hours (\$1062.50) for: "Rain so I worked in implement shed to start cleaning out junk iron and trash all day." On April 12, 2010, Morris billed the trust three hours (\$375) for: "Rain again—contacted people to please dump scrap and trash dumpster and then hauled load to Mound City myself." On April 24, 2010, three hours (\$375) for: "Rain—pulled old pickup out of the building and re-inflated [tires] and cleared out cab of paper and documents of registration and licensing." On April 25, 2010, seven hours (\$875) for: "started on west wall now; doors and signs and junk that was of no value moved to the north wall."

Also on Morris's Exhibit 101 is a section titled "General Trust Fund Duties" and a section titled "Legal." Morris billed the trust a total of \$11,062.50 for "General Trust Fund Duties" and \$12,437.50 for "Legal" duties. There was no evidence that these "general" or "legal" duties utilized Morris's special farm knowledge or expertise such that they would be considered "extraordinary." Morris's argument on appeal that "there was no evidence presented that Morris did not perform the work shown on exhibits 101 and 102, nor the farm improvement work as shown on exhibits 108 and 109" and that the evidence showed that Morris "has special skill and knowledge in his profession with regard to maintaining farm property, installing soil conservation terraces and maintaining that terracing work" suggests entitlement to a presumption that he used his special skill and knowledge in all of the work he performed for the trust. Given the evidence, such a presumption is unwarranted.

We find that the circuit court did not abuse its discretion in refusing to submit Instruction Y to the jury. Instruction Y did not follow substantive law with regard to Morris's affirmative defense that he performed special skills as trustee thereby entitling him to additional fees for the performance of extraordinary services. Further, even if the evidence might have supported an instruction setting forth Morris's affirmative defense, which we find questionable, the court had no duty to submit a correct instruction in the place of Morris's erroneous instruction. Point one is denied.

In Morris's second point on appeal, he argues that the circuit court erred in refusing to instruct the jury on the proper legal standard for the imposition of liability upon a trustee for the actions of a co-trustee. Morris contends that he was entitled to an instruction that was a proper and complete statement of Missouri law and supported by the evidence. He contends that he took remedial action in response *302 to the breach of duty by his co-trustee and was prejudiced by the jury not being instructed that such remedial actions could be a basis for relieving Morris of liability for the actions of co-trustee Owens. Therefore, he claims that the court erred in failing to submit his proposed Instruction X to the jury. We find no error.

Morris's proposed Instruction X reads:

On the claim of the plaintiff for compensatory damages against Phil Morris related to the activities of Larry Owens:

First, your verdict must be for the plaintiff and against Phil Morris if you believe Phil Morris joined in the actions of Larry Owens.

Second, your verdict must be for Phil Morris and against the plaintiff if you believe:

- (1) Phil Morris exercised reasonable care to prevent Larry Owens from committing that serious breach of trust; and
- (2) Phil Morris exercised reasonable care to compel Larry Owens to redress that serious breach of trust.

If you do not believe Phil Morris exercised reasonable care under paragraphs (1) and (2) above your verdict must be for the plaintiff and against Phil Morris

Morris's proposed Instruction X is misleading with regard to the substantive law of co-trustee liability as set forth in Section 456.7–703, RSMo Cum.Supp.2013, and we disagree with Morris's contention that Instruction X parallels this statute. Section 456.7–703.6 states: "Except as otherwise provided in subsection 7 of this section, a trustee who does not join in an action of another trustee is not liable for the action." (Emphasis added). Subsection 7 provides that: "Each trustee shall exercise reasonable care to: (1) prevent a cotrustee from committing a serious breach of trust; and (2) compel a cotrustee to redress a serious breach of trust." Instruction X does not parallel Section 456.7–703 because it presents the statutory language in the reverse and fails to note at the outset that there are exceptions to a co-trustee's avoidance of liability for the actions of a malfeasant co-trustee where the co-trustee does not join in that action. It is misleading in that it states in the first paragraph that Morris must have joined in the actions of Owens in order to incur liability, and then in the second paragraph presents that the jury verdict must be for Morris if he exercised reasonable care to prevent a serious breach of trust by Owens and exercised reasonable care to compel Owens to redress that breach. Therein, Morris confusingly inserts a converse instruction in the body of the verdict director. Significantly, Instruction X omits a necessary element for tortious conduct—that the Hanks Trust suffered damage as a result of Morris's conduct. We find that the court did not abuse its discretion in refusing to submit Instruction X to the jury. Point two is denied.

In Morris's third point on appeal, he claims that, in addition to erring by not submitting his proposed Instruction X to the jury, it was concurrent error for the court to instead submit Instruction No. 6 to the jury because the instruction failed to set forth the essential statutory elements for co-trustee liability. We find no error.

"Whether a jury was instructed properly is a question of law this [c]ourt reviews de novo." *Hervey v. Missouri Dept. of Corrections*, 379 S.W.3d 156, 159 (Mo. banc 2012). Although Morris claims that Instruction No. 6 was erroneous, he *303 failed to object to this instruction at trial and, therefore, did not preserve this argument for review. *Gorman v. Wal–Mart Stores, Inc.*, 19 S.W.3d 725, 729 (Mo.App.2000). While Morris argues in his brief that "[n]either Plaintiff or Defendant were given the opportunity to object on the record to the instruction ordered by the Court," the record reflects that the court discussed Instruction No. 6 on the record, indicated that it would be submitted, and then moved on to discuss Instruction No. 7. There is nothing in the record to indicate that Morris was prevented from objecting. Rule 70.03 requires that a party make a specific objection to jury instructions prior to submission to the jury. *Id.* Rule 70.03 states: "Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

Morris further argues that he preserved this claim because he objected to the instruction offered by the Plaintiff which the court ultimately modified to create Instruction No. 6. He argues that the part of that instruction that he objected to remained the same in Instruction No. 6. We find that, even if Instruction No. 6 was properly objected to, Morris's claims as to its error still have no merit.

Instruction No. 6 reads:

On the claim of plaintiff for compensatory damages against defendant your verdict must be for plaintiff and against defendant if you believe:

First, either:

defendant failed to administer the trust solely in the interests of the beneficiaries, or

defendant failed to administer the trust as a prudent person would, or

defendant failed to keep the beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, or

defendant failed to exercise reasonable care to prevent co-Trustee, Larry Owens, from committing a serious breach of trust, and

Second, as a direct result of any of the actions specified in paragraph First, above,

the William L. Hanks Trust sustained damage.

First, Morris complains that Instruction No. 6 does not track Section 456.7–703 as it pertains to co-trustee liability. There is no requirement that a non-MAI instruction's language must track statutory language, just that it must follow the substantive law and be readily understood. *See Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 200 (Mo.App.2013). Second, Morris argues in essence that, Instruction No. 6 does not follow the substantive law of Section 456.7–703.7 because it fails to include both the "prevention" and "redress" elements as a defense to Morris's liability for Owens's serious breaches of trust. Morris argues that there was substantial evidence that Morris undertook efforts to redress Owens's breaches once discovered⁶ and, therefore, Instruction No. 6 should have included the defense of exercising reasonable care to compel a co-trustee to redress a serious breach of *304 trust.⁷ Yet, Section 456.7–703.7 states that each trustee shall exercise reasonable care to: (1) prevent a co-trustee from committing a serious breach of trust; *and* (2) compel a co-trustee to redress a serious breach of trust. Therefore, even if the evidence showed that Morris exercised reasonable care to compel Owens to redress his breaches of trust, this would still not provide Morris a defense to failing to exercise reasonable care to *prevent* Owens from committing a serious breach of trust. Instruction No. 6's exclusion of the "redress" language actually removed one possible option for which the jury could have found Morris liable. This exclusion benefitted, rather than harmed, Morris. Therefore, although we find no error in the exclusion of the "redress" language, even if Morris could prove error, he cannot prove prejudice. Point three is denied.

In Morris's fourth point on appeal, he argues that the circuit court erred in denying his post-trial motion for remittitur of punitive damages alleging that the damages imposed by the jury are grossly excessive and contrary to the law. "We review the trial court's denial of a motion for remittitur for an abuse of discretion." *Peel*, 408 S.W.3d at 211. "The assessment of punitive damages is peculiarly committed to the discretion of the jury and the circuit court, and appellate courts will interfere only in extreme cases." *Payne v. Markeson*, 414 S.W.3d 530, 543 (Mo.App.2013). Such cases must evidence an abuse of discretion so grossly excessive that it shocks the conscience of the court. *Peel*, 408 S.W.3d at 211. Three factors considered by courts to assess whether a punitive damage award is grossly excessive are: "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Estate of Overbey v. Chad Franklin National Auto Sales North, LLC*, 361 S.W.3d 364, 372 (Mo. banc 2012) (internal quotations and citations omitted). "We review the evidence and its reasonable inferences in the light most favorable to the award" and "disregard all adverse inferences." *Holmes v. Kansas City Missouri Bd. of Police Com'rs ex rel. Its Members*, 364 S.W.3d 615, 628 (Mo.App.2012).

Morris argues that there was no evidence that he acted with an intentional purpose, goal, or motive to cause economic harm to the Trust. He contends that, "[w]hile there may be dispute as to the hourly rate charged by Morris or whether the hours charged were not maintained as accurately as would have been optimal, those relatively minor items do not warrant the imposition of punitive damages." He argues that there was no evidence that he personally participated in or profited from the inappropriate actions of his co-trustee, Owens, and Morris's failure to discover Owens's activities "perhaps rose to the level of plain negligence," which is not enough for an award of exemplary damages.

We find no abuse of discretion. Morris focuses almost exclusively on co-trustee Owens's breaches and argues that Morris was merely negligent, at most, for failing to discover those breaches. In his brief he argues that the jury must have assigned *305 liability to him based upon damage to the trust caused by Owens's activities because "the compensatory damages award assessed by the jury exceeds by over \$250,000 the total sums Morris received as trustee fees and reimbursements for accrued farm maintenance and improvements." Yet, our review of the record reveals that the jury could have arrived at its compensatory damage figure solely by considering Morris's own authorized debits from the Hanks trust. Exhibit 2B lists all debits from the trust account and the signatories for those debits. Exhibit 2B shows that Morris personally authorized trustee payments to himself, farm improvement payments to himself, trustee payments to Owens, and accounting payments to Debra Owens that totaled approximately \$290,150.47. Including the \$200,000 loan to Hannibal Sports and Entertainment that Morris pledged in writing and admitted to authorizing in his trial testimony, the total disbursements authorized by Morris amount to \$490,150.47.

Wallingford, the trust officer for the Country Club Trust Company, testified that if the Country Club Trust Company had managed the Hanks Trust, the trust would have been charged \$38,000 in trustee fees for the approximate three-year time period that Morris and Hanks governed the trust and that sum would have included accounting fees. Thus, the jury could have found that Morris alone authorized disbursements of approximately \$452,150.47 in excess of what the fee schedule set forth for trustee compensation. The jury assessed compensatory damages in the amount of \$450,000. Therefore, the jury's verdict does not require a presumption that the jury held Morris accountable for Owens's actions as well as his own.

The evidence was more than sufficient to establish all of the Plaintiff's claims against Morris—that Morris failed to administer the trust solely in the interests of the beneficiaries, failed to administer the trust as a prudent person would, failed to keep the beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, and failed to exercise reasonable care to prevent co-trustee Owens from committing a serious breach of trust. The compensatory and punitive damages awards combined total \$850,000. As the Hanks Trust was depleted of over a million dollars on Morris's watch, nearly half of that directly attributable to Morris without even considering the actions of his co-trustee, we cannot find the punitive damage award of \$400,000 to be an abuse of discretion. Morris flagrantly ignored requests and warnings to account to the trust beneficiaries who were dependent upon his accounting and trustworthiness to protect their interests. The Hanks Trust was financially vulnerable and the evidence showed that Morris took advantage of that vulnerability for his own benefit. ¹⁰ Point four is denied.

*306 We conclude, therefore, that the circuit court did not abuse its discretion in refusing to submit Morris's Instruction Y to the jury. Instruction Y does not follow substantive law with regard to Morris's affirmative defense that he performed special skills as trustee thereby entitling him to additional fees for the performance of extraordinary services and, even if the evidence might have supported an instruction setting forth Morris's affirmative defense, the court had no duty to submit a correct instruction in the place of Morris's erroneous instruction. Further, we conclude that the court did not abuse its discretion in refusing to submit Morris's proposed Instruction X to the jury. Instruction X is misleading with regard to the substantive law of co-trustee liability as set forth in Section 456.7–703 and omits the necessary element of damages. Additionally, we conclude that the court did not abuse its discretion by submitting Instruction No. 6 to the jury. The "redress" language of Section 456.7–703.7 was not necessary to the instruction and Morris was not prejudiced by its exclusion. Finally, the court did not abuse its discretion in denying Morris's post-trial motion for remittitur of punitive damages because the damages imposed are not grossly excessive in light of the evidence. We affirm the circuit court's judgment. 11

All concur.

All Citations

432 S.W.3d 293

Footnotes

- It appears from the record that William Hanks's father had established a trust of his own prior to his death which included land that Morris apparently farmed and/or helped maintain.
- 2 Morris confirmed in his trial testimony that he authorized this transaction.
- On May 22, 2012, Morris filed suit against Owens for his alleged breaches of trust as co-trustee of the Hanks Trust. He received a default judgment against Owens in the amount of \$705,646.54. Morris assigned his rights in the judgment to the Hanks Trust, but the trust declined to accept the assignment. Morris's brief indicates that Owens declared personal bankruptcy the day before the trial date and has a bankruptcy case pending. The record indicates that, at some point, the Foundation chose to accept what it had already received under the Hanks Trust and removed itself from the litigation.
- We view the evidence in the light most favorable to submission of the instruction. *Vandergriff v. Missouri Pacific R.R.*, 769 S.W.2d 99, 104 (Mo. banc 1989).

- 5 "Tort law focuses on three basic elements: duty, breach and damages." *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P.,* 75 S.W.3d 247, 257 (Mo. banc 2002).
- Morris's evidentiary support for this contention is that he filed suit against Owens for Owens's breaches to the Hanks Trust. The record reflects that Morris did not file suit against Owens until suit had already been filed against both Morris and Owens by the beneficiaries of the Hanks Trust.
- With regard to the language regarding co-trustee liability, Instruction No. 6 stated that on Plaintiff's claim for compensatory damages the verdict must be for the Plaintiff if the jury believed that "defendant failed to exercise reasonable care to prevent co-[t]rustee, Larry Owens, from committing a serious breach of trust" and, as a result, the Hanks Trust sustained damage.
- These disbursements signed for by Morris do not include the disbursements solely authorized by Owens or Debra Owens that Morris claims he had only belated knowledge of.
- If solely considering Morris's disbursements in this figure, the jury would have also had to find that Morris was not entitled to the \$92,000 in farm improvements he purportedly performed prior to the death of William Hanks and prior to becoming trustee.
- Morris's brief displays that the damages imposed are not excessive in relation to damages allowed in other jurisdictions. Morris notes that the Kansas Trust Code imposes double damages against a breaching trustee who engaged in self dealing transactions. K.S.A. 58a–1002(3)(a). This statute allows for punitive damages in addition to double damages. K.S.A. 58a–1002(3)(c). Here, the combined compensatory and punitive damages total less than double the compensatory damages.
- We grant appellate Respondent Noelle Hanks's Motion for Award of Attorneys' Fees and Costs on appeal in the amount of \$13,555.50. Section 456.10–1004, RSMo Cum.Supp.2013.

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199 S.W.3d 831 Missouri Court of Appeals, Eastern District, Division Three.

Elaine KLINKERFUSS, Plaintiff/Respondent/Cross-Appellant,

v.

William L. CRONIN, Defendant/Appellant/Cross-Respondent,

and

Delores J. Cronin, Defendant.

Nos. ED 85926, ED 85985, ED 86141.

July 11, 2006.

Motion for Rehearing and/or Transfer to Supreme Court Denied Aug. 17, 2006.

Application for Transfer Denied Sept. 26, 2006.

Synopsis

Background: Beneficiary of trust filed petition asking for removal of trustee. The Circuit Court of St. Louis County, Kenneth M. Romines, J., granted trustee's motion for judgment made at trial at the close of beneficiary's case, and beneficiary appealed. The Court of Appeals, 120 S.W.3d 758, affirmed. Trustee filed a motion for trustee fees and attorney fees. The Circuit Court awarded the requested trustee fees and some of the requested attorney fees, and charged some of the fees against beneficiary's share of the trust estate. Both parties appealed.

Holdings: The Court of Appeals, Kathianne Knaup Crane, P. J., held that:

trial court had jurisdiction over trustee's motion for trustee fees and attorney fees;

evidence was sufficient to support award of trustee fees in the amount of \$14,284.64;

reasonable amount of attorney fees incurred as a result of beneficiary's removal action should be allocated against beneficiary's share;

trial court decision to allocate against beneficiary's share only half of the attorney fees billed by attorney representing trust was based on inconsistent and ambiguous findings; and

trustee was entitled to be reimbursed by the trust for attorney fees billed by attorney he hired to defend him in beneficiary's removal action.

Affirmed in part, and reversed and remanded in part.

Attorneys and Law Firms

*835 Irl B. Baris, Baris Law Firm, St. Louis, MO, for cross-appellant.

Michael A. Gross, Joseph F. Yeckel, Law Offices of Michael A. Gross, St. Louis, MO, for cross-respondent.

Opinion

KATHIANNE KNAUP CRANE, Presiding Judge.

In this consolidated appeal, both trustee and beneficiary appeal from a judgment awarding trustee's fees and allocating attorney's fees to trustee after a judgment had been entered in trustee's favor in beneficiary's action to remove trustee, to recover damages, and to obtain an accounting. The trial court entered a judgment in which it awarded trustee \$14,284.64 in trustee's fees and allocated \$21,052.00 of the attorney's fees incurred by trustee against beneficiary's share of the trust estate, but denied all other claims for relief. For her appeal, beneficiary claims that the trial court erred 1) in denying her motion to dismiss for lack of jurisdiction trustee's motions for award of trustee's fees and allocation of attorney's fees; 2) in awarding \$14,284.64 as trustee's fees; 3) in allocating \$21,052.00 of the attorney's fees against beneficiary's share of the trust estate; and 4) in taxing costs against beneficiary. In his appeal, trustee asserts that the trial court erred 1) in finding one law firm's fees were only \$42,104.00 and in allocating only \$21,052.00 of those fees against beneficiary's share of the trust estate, and 2) in denying trustee reimbursement for the attorney's fees of another attorney who represented him before and during trial in the removal and accounting action. Trustee also seeks attorney's fees on appeal. We affirm in part, reverse in part, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 1995, Erna Strawn executed a revocable living trust naming her adult daughters, plaintiff Elaine Klinkerfuss and defendant Delores Cronin, as the primary beneficiaries. Ms. Strawn named herself and her grandson, defendant William L. Cronin, as co-trustees. The trust provided that upon Ms. Strawn's death, disability, or incapacity, Mr. Cronin (hereinafter, trustee) would continue as sole trustee. The trust also provided that upon Ms. Strawn's death, if both primary beneficiaries were living, the trust assets were to be divided into two equal shares, each share of the principal to be distributed to the beneficiaries in the following manner: one third upon Ms. Strawn's death, one half on the fifth anniversary of her death, and the remainder on the tenth anniversary of her death. The trust also contained provisions that kept a share in trust if one of the primary beneficiaries died prior to final distribution of all of the principal, and that distributed both shares to descendants if both primary beneficiaries died before final distribution.

After Ms. Strawn's death on July 22, 1999, Ms. Klinkerfuss (hereinafter, beneficiary) notified trustee that she questioned whether the trust should continue to exist and that she intended to "break" the trust and have Mr. Cronin removed and her share of the trust terminated so she could have the property outright. Beneficiary's attorney also told trustee that they wanted to do away with the trust and sent trustee a letter asking him to consider terminating the trust.

Although he was an attorney and CPA, trustee concluded that he did not have the expertise to defend the trust against beneficiary's allegations or to prepare the trust tax returns and required accountings. Trustee decided that he needed to hire a law firm that specialized in this area and in other trust matters. On October 19, 1999, *836 trustee retained the law firm of Greensfelder, Hemker, and Gale, P.C. (Greensfelder) to represent him as trustee of the trust and personal representative of the estate. Greensfelder prepared accountings and tax returns for the trust, and it assisted in the administration of the trust. Greensfelder also represented trustee in communicating with beneficiary's attorney, who was proposing to have the trust terminated.

Beneficiary's Removal Action

On November 8, 2000, beneficiary filed a petition in the Circuit Court of St. Louis County for removal of trustee, money damages, and an accounting, naming trustee and Ms. Cronin as defendants. In the petition, beneficiary alleged that trustee had breached his fiduciary duty in performing his duties as trustee. She specifically alleged that trustee failed to file necessary and required tax returns, provide information to her, distribute quarterly income, provide an accounting, and act impartially. She further alleged that trustee committed waste. On December 11, 2000, William G. Jochens, a Greensfelder attorney, entered his appearance for trustee. On January 18, 2001, Greensfelder filed trustee's answer to beneficiary's petition. Greensfelder represented trustee at a settlement conference in July 2001, at which beneficiary's attorney proposed the possibility of terminating the trust if all parties agreed. Greensfelder concluded that trustee could not consent to a termination of the trust.

On October 5, 2001, trustee contacted Jan Adams, an attorney who was not associated with Greensfelder, because he believed there was a conflict of interest between the administration of the trust and the personal attacks on him and he should have separate representation to respond to the attacks made on him as trustee. On October 25, 2001, Ms. Adams filed an entry of appearance in the removal action on trustee's behalf, "individually." Prior to trial, Ms. Adams divided litigation responsibilities with Greensfelder. However, Ms. Adams was the sole attorney to take beneficiary's deposition on trustee's behalf. Ms. Adams was also the sole attorney representing trustee when he was deposed by beneficiary. Likewise, Ms. Adams was the sole attorney representing trustee at trial in April 2002. Greensfelder did not appear as counsel for trustee at these proceedings.

One of the issues at trial was beneficiary's claim that trustee had committed waste by incurring \$59,200.00 in attorney's fees. To support this claim, beneficiary called Mr. Jochens to testify to Greensfelder's attorney's fees. Beneficiary also introduced evidence, in the form of a compilation of all of Greensfelder's invoices billed to the trust from October 19, 1999, through March 29, 2002, that Greensfelder's total fees for services rendered to the trust estate were \$59,200.00. Mr. Jochens testified that \$5,000.00 to \$6,000.00 of the charges were for services relating to the probate estate. When he was cross-examined by trustee, Mr. Jochens testified that all of Greensfelder's fees appearing on the invoices were reasonable and necessary under the circumstances.

After beneficiary rested, trustee moved for judgment at the close of plaintiff's case, which the trial court granted. In its judgment, the trial court found that beneficiary's actions caused trustee to engage Greensfelder to represent the trust; that since the day of Ms. Strawn's death, beneficiary had attempted to have her interest in the trust settled upon her immediately, contrary to the trust provisions; that beneficiary had shown animosity toward trustee in her attempt to have the trust provisions relating to her terminated; that, consistent with Ms. Strawn's wishes, trustee *837 divided the personal property, sold the real property, and conservatively and prudently invested the trust assets; that trustee made timely accounting to beneficiary, properly prepared and filed all tax returns, acted impartially, prudently maintained the trust corpus, and had not committed waste; that the attorney's fees in this case were reasonable and necessary, and that the bulk of the attorney's fees involved were occasioned by beneficiary's actions in filing suit; that beneficiary filed the lawsuit for selfish reasons and not to protect the trust; and that beneficiary's actions were such that trustee was required to hire outside counsel, even though he was an attorney and CPA. The court concluded by entering judgment for trustee and against beneficiary, and taxed costs to beneficiary.

Beneficiary filed a motion to set aside, amend, and modify the judgment. At the hearing on this motion, Ms. Adams and Mr. Jochens appeared on behalf of trustee and both attorneys argued in support of the court's judgment. The trial court denied beneficiary's motion to set aside, amend, and modify the judgment, finding that beneficiary "was not a truthful witness and thus the Court was unable to give credit to her testimony."

Beneficiary's Appeal of Removal Action

Beneficiary appealed from the judgment against her in the removal action on the grounds that the evidence supported factual findings in her favor and that the court erroneously applied the law. We affirmed the trial court's judgment by order with a supplemental memorandum. *Klinkerfuss v. Cronin*, 120 S.W.3d 758 (Mo.App.2003). In our supplemental memorandum, we

held that it was within the trial court's discretion to find that beneficiary's actions caused trustee to retain Greensfelder to assist him with the controversies arising from his interaction with beneficiary, and that Greensfelder's legal bill of approximately \$60,000.00 was reasonable and did not constitute waste.

Trustee's Motions for Trustee's Fees and Attorney's Fees

On June 7, 2004, trustee sent both beneficiaries a copy of the most recent accounting, the judgments of the trial court, and the opinion of this court, along with a cover memorandum reporting on the deadline for the second distribution of assets and the results of the litigation. Trustee further advised that because litigation was complete, he had decided to dismiss Greensfelder.

Trustee subsequently filed a motion for trustee's fees and a motion for allocation of attorney's fees. In his motion for trustee's fees, trustee sought an award of trustee's fees in the amount of \$14,284.64, which he calculated using the lowest institutional rate on record of one quarter of one percent per quarter for assets handled in each quarter. In his motion for allocation of attorney's fees and supporting memorandum and affidavits, he sought an award of all attorney's fees related to the litigation to be allocated exclusively against beneficiary's share of the trust estate. He specifically requested \$42,104.00, representing Greensfelder's fees attributable to the litigation, and \$33,616.00, representing Ms. Adams' fees as lead counsel in the litigation, for a total of \$75,720.00 in attorney's fees. In his supporting affidavit, Attorney Kenneth C. Buren, a former Greensfelder attorney, averred that he was familiar with the facts in beneficiary's removal action, that he was familiar with the billing practices and methods of Greensfelder, that he had reviewed Greensfelder's invoices associated with the removal action, that \$42,104.31 of Greensfelder's fees were a direct result of the litigation, and that the remainder of the fees were the result of beneficiary's requests for accounting and *838 ordinary trust administration costs. Ms. Adams attached her itemized bill for legal services in the total amount of \$33,616.00 to her affidavit. She attested that her bill for legal services and costs rendered to trustee was true and correct, that her hourly rate of \$150.00 was reasonable, customary, and necessary, and that the bill was limited to charges that trustee believed should be allocated to beneficiary.

At the hearing on trustee's motions, Ms. Adams appeared on behalf of trustee. The trial court announced that it had taken judicial notice of the file in beneficiary's removal action.

Trustee called Mr. Buren, who testified that he had specialized in trusts and estates and estate planning for the past seven years, that he had been practicing with a private firm for the past three years, and that prior to practicing with that firm, he had been an associate at Greensfelder where he had worked extensively on beneficiary's removal action from August 1, 2000, through August 31, 2001. Trustee had recently retained Mr. Buren to advise him on legal matters pertaining to the trust. Mr. Buren testified to the accuracy of his sworn affidavit, and explained that he had reviewed the compilation of all of Greensfelder's invoices billed to the trust and was able to extrapolate from those invoices the amount of fees that was attributable to the controversy with beneficiary.

Mr. Buren also testified that he had reviewed Ms. Adams' statement of itemized billing, that Ms. Adams' hourly rate of \$150 was reasonable and customary, that Ms. Adams' total charges for her legal services on the statement were \$33,616.00, and that the services itemized on the statement were necessary to defend the trust and trustee.

Mr. Buren testified that he had reviewed the motion for trustee's fees and trustee's reimbursement request, and he concluded that the time spent and the fees requested were customary and necessary and that, to his knowledge, trustee had performed the work. He further testified that trustee's calculation based on the rate of one quarter of one percent of the assets in the trust was accurate and resulted in a fee of \$14,248.64. He testified that the fee was reasonable based on his review of trustee's claim, the time trustee spent dealing with the trust, of which Mr. Buren had personal knowledge, and what similar trustees would charge. Mr. Buren also testified that most trustees charge a fee based on a percentage of the assets under management.

After trustee rested, beneficiary called Ms. Adams as her witness. Ms. Adams testified that she had billed trustee, as trustee of the trust, approximately \$33,000.00, and trustee had paid the fees. She admitted that during her argument at the hearing on beneficiary's motion to set aside, amend and modify the judgment in the removal action, she had said that she represented trustee

"personally," she did not represent the trust, and she did not represent trustee in his capacity as trustee. However, she added that it was in trustee's capacity as trustee that he was being attacked "so you can't separate those two."

On November 29, 2004, the court entered its judgment, order and decree. The court found that it had jurisdiction over trustee's motions and denied beneficiary's motion to dismiss on this ground. The court also found that trustee was entitled to trustee's fees in the amount of \$14,284.64; that Greensfelder's fees in the amount of \$42,104.00 were "reasonable and necessary," and that half of that fee, \$21,052.00, was occasioned by beneficiary's actions and should be charged against her portion of the trust estate; and that Ms. Adams' attorney's fees were for the personal *839 representation of trustee and not in his capacity as trustee, and those fees should not be charged against the trust or allocated against beneficiary's share of the trust estate. The court taxed all costs to beneficiary.

On February 22, 2005, Ms. Adams formally withdrew from the case. Trustee filed a motion to amend the judgment, and beneficiary filed a motion to set aside, amend, and modify the judgment. The trial court denied these motions. Both parties have appealed from the trial court's judgment.

DISCUSSION

BENEFICIARY'S APPEAL

I. Jurisdiction

In her first point, beneficiary contends that the trial court erred in denying her motion to dismiss trustee's motions for trustee's fees and allocation of attorney's fees because the court no longer had jurisdiction over the matter. Beneficiary claims that trustee's motions were not timely filed because the court had previously denied trustee's request for fees in beneficiary's removal action, and trustee did not appeal that denial.

Beneficiary's argument rests on the faulty premise that trustee requested an award of attorney's fees at the trial on beneficiary's removal action and that the trial court denied that request. The record is clear that trustee never filed a fee request in that action and the trial court did not deny a fee request. In its judgment in beneficiary's removal action, the trial court did not deny or award trustee's fees or attorney's fees. Further, at the subsequent hearing on trustee's motion for trustee's fees, the trial court stated on the record that trustee had not requested fees and the trial court had not refused fees in the removal action.

Beneficiary's jurisdictional attack has no factual support in the record. Point one is denied.

II. Trustee's Fees/Attorney's Fees

In her second point, beneficiary contends that the trial court erred in awarding \$14,284.64 to trustee for trustee's fees and in allocating \$21,052.00 in attorney's fees against beneficiary's share of the trust estate because "1) the evidence at the hearing did not establish the amount of any such fees, and 2) Mr. Buren should not have been permitted to express expert opinions on the subject."

This point contains multiple claims of error because it challenges three separate trial court actions, the award of \$14,284.64 to trustee for trustee's fees, the allocation of \$21,052.00 in attorney's fees against beneficiary's share of the trust estate, and the admission of Mr. Buren's testimony. Beneficiary's claims should have been set out in three separate points. *Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978); *In re Marriage of Cohen*, 884 S.W.2d 35, 37 n. 1 (Mo.App.1994). Moreover, the legal reasons for these claims of error are unclear. Points that are vague and ill-defined do not comply with Rule 84.04(d). *Eddington v. Cova*, 118 S.W.3d 678, 681 (Mo.App.2003). Nevertheless, we have elected to review the arguments under this point that relate to *840 these three claims of error to determine if any have merit.²

A. Award of Trustee's Fees

In the argument portion of the brief, beneficiary argues that insufficient evidence supports the award of trustee's fees because, aside from some documents, the sole witness to testify to those fees, Mr. Buren, offered vague testimony. In support of this argument, beneficiary cites only Mr. Buren's testimony in response to beneficiary's questions on cross-examination, in which beneficiary was questioning Mr. Buren about the decline in assets under management, a collateral matter. On direct examination, Mr. Buren clearly testified to the rate used to calculate the fee requested and the accuracy of the calculation. The underlying exhibits were in evidence. Substantial evidence supported the award of trustee's fees in the amount of \$14,284.64.

B. Allocation of Attorney's Fees

The argument portion of beneficiary's brief does not discuss why the trial court's \$21,052.00 allocation of the attorney's fee award against her share of the trust estate was erroneous. It does not even refer to the allocation of this amount, except to state that the court ordered it. Because this argument is so undeveloped, we consider it abandoned. *Lemay v. Hardin*, 108 S.W.3d 705, 709 (Mo.App.2003).

C. Admissibility of Mr. Buren's Testimony

In the argument portion of the brief, beneficiary argues Mr. Buren should not have been permitted to express an expert opinion on a matter that was the ultimate issue to be decided by the court. She also argues that Mr. Buren's status as an attorney and his brief employment at Greensfelder did not qualify him as an expert. Beneficiary does not support any of these arguments with any legal authority or analysis beyond these bare conclusions; accordingly, we deem them abandoned. *Beatty v. State Tax Com'n*, 912 S.W.2d 492, 498–99 (Mo. banc 1995); *Coleman v. Gilyard*, 969 S.W.2d 271, 274 (Mo.App.1998); *Estate of Dean v. Morris*, 963 S.W.2d 461, 466 (Mo.App.1998).

Further, the claim that a court cannot allow an attorney to testify as an expert on fees in a court-tried case has no merit. A court is an expert on the subject of attorney's fees and is not bound by expert testimony on legal fees; however, a court has discretion to hear expert testimony on attorney's fees because such testimony can be advisory and helpful. *Arnett v. Johnson*, 689 S.W.2d 836, 838 (Mo.App.1985); *Sluggett v. Phillips*, 178 S.W.2d 458, 462 (Mo.App.1944). Here, consistent with these principles, the trial court heard Mr. Buren's testimony, but specifically advised the parties at the hearing on trustee's motions that it was not bound by the testimony because it was, itself, an expert in the area of attorney's fees. Point two is denied.

III. Costs

In her final point, beneficiary contends that the trial court erred in taxing costs against her as a matter of law because trustee was not the prevailing party. This point also has no merit.

*841 Rule 77.01 allows the prevailing party in a civil action to recover costs against the other party, unless otherwise provided in the civil rules or by law. Rule 77.01; Section 514.060 RSMo (2000). In addition, a trial court has discretion to award all costs to a plaintiff in a multi-count petition if the plaintiff has prevailed on some, but not all, of his or her claims. *Jerry Bennett Masonry v. Crossland Const.*, 171 S.W.3d 81, 98 (Mo.App.2005). Trustee was the prevailing party on all of beneficiary's claims. Trustee prevailed on substantially all of his claims in the trial court and, as a result of this appeal, has prevailed on all of his claims. The trial court did not abuse its discretion in taxing all costs against beneficiary. Point three is denied.

TRUSTEE'S APPEAL

I. Allocation of Greensfelder's Attorney's Fees Against Beneficiary's Share of Trust Estate

In his first three points, trustee contends that the trial court erred in finding Greensfelder's fees to be \$42,104.00 and in allocating only \$21,052.00 of Greensfelder's attorney's fees to beneficiary's share of the trust estate because these findings were "irreconcilable" with the findings and judgment in beneficiary's removal action. Trustee argues that the judgment in the removal action had established Greensfelder's fees to be \$59,000.00, that these fees were reasonable and necessary, and that the "bulk" of those fees were occasioned by the actions of beneficiary, and that the trial court's finding that Greensfelder's reasonable fees were \$42,104.00 conflicted with the findings in the removal action.

In the removal action, the trial court found that none of beneficiary's claims against trustee had any merit and that beneficiary had filed the lawsuit for selfish reasons and not to protect the trust. In this situation, the trial court properly allocated the expense of litigation against beneficiary's share of the trust estate. If a beneficiary litigates questions capriciously or without reason "or if the conduct of a party is vexatious and litigious, or if he raises improper points, or in any way creates unnecessary delay or expense, the court will not only refuse him costs and counsel fees but will order him to pay costs." *Coates v. Coates*, 316 S.W.2d 875, 878 (Mo.App.1958); *Webbe v. First Nat. Bank and Trust Co.*, 139 Ill.App.3d 806, 93 Ill.Dec. 886, 487 N.E.2d 711, 714 (1985). "[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." *Webbe*, 93 Ill.Dec. 886, 487 N.E.2d at 714. *See also Boston Safe Deposit and Trust Company v. Stone*, 348 Mass. 345, 203 N.E.2d 547, 554 (1965); George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees, section 525, p. 46 (Rev.2d ed.1993).

Trustee challenges the amount of fees that were allocated. Trustee claims the trial court erred in determining that Greensfelder's fees in the amount of \$42,104.00 were reasonable and necessary, and in allocating only \$21,052.00 against beneficiary's share of the trust estate.

In the removal action, beneficiary introduced evidence that, as of April 1, 2002, Greensfelder had billed trustee \$59,200.00 for representing the trust, and she argued that trustee committed waste by incurring a bill in this amount. Trustee adduced evidence of the reasonableness and necessity of this amount and that the *842 amount beneficiary was claiming as "waste" was caused by her actions. In its judgment, the trial court found that the attorney's fees "[i]n this cause were reasonable and necessary," and that "the bulk" of the attorney's fees was caused by beneficiary filing suit. In our memorandum affirming this judgment, we found that trustee did not commit waste by incurring a legal bill of approximately \$60,000.00 for Greensfelder's services and upheld the trial court's finding that the fees were reasonable.

In his motion for allocation of attorney's fees and supporting memorandum and affidavits, trustee sought all attorney's fees related to the litigation to be allocated against beneficiary's share of the trust estate. In support of the motion, Mr. Buren filed an affidavit in which he attested that he had reviewed all of Greensfelder's invoices to trustee, and concluded:

A review of the invoices and pre-bills indicates that fees that are a direct result of the above referenced controversy total \$42,104.31. The remainder of the fees billed by the Greensfelder bills are a result of the requests for accounting by the petitioner and normal trust administration costs.

At the hearing on trustee's motions, Mr. Buren testified that the \$42,104.31 figure was based on an analysis of Greensfelder's invoices in evidence at the trial in the removal action and additional invoices for services rendered after that exhibit was prepared. Counsel for beneficiary cross-examined Mr. Buren on the reasons he did or did not attribute various legal services to the lawsuit.

In its judgment on trustee's motions, the trial court found: "The record reflects, and the Court finds, that the fees of Greensfelder in the amount of \$42,104.00 were reasonable and necessary[.]" Trustee argues that this finding is irreconcilable with the court's other findings. If the trial court meant this to be a finding on all of Greensfelder's fees, it appears to be inconsistent with its previous finding, which had become the law of the case, that all of Greensfelder's fees in evidence, which totaled \$59,200.00, were reasonable and necessary. On the other hand, if the trial court was limiting its consideration to the amount requested to be allocated, \$42,104.00, it appears to be inconsistent for the court to find this amount reasonable and necessary, but not allocate all of it against beneficiary's share of the trust estate.

"We will not speculate on what grounds the trial court ruled by sifting through findings that are inconsistent and ambiguous." *In re Marriage of Maninger*, 106 S.W.3d 4, 12 (Mo.App.2003). If a judgment that is based on inconsistent and ambiguous findings does not allow for adequate appellate review, the judgment must be reversed and remanded. *Id.; Burton v. Donahue*, 959 S.W.2d 946, 948 (Mo.App.1998). Trustee has shown sufficient ambiguity for us to reverse and remand that part of the judgment allocating \$21,052.00 against beneficiary's share of the trust estate.

On remand, the trial court should first take the \$59,000.00 in Greensfelder's fees that it has already determined to be reasonable and necessary, and then determine how much of that amount is attributable to the litigation. We emphasize that the trial court has broad discretion to determine this amount,³ as long as the findings make clear that the court recognizes that a total *843 of \$59,000.00 has already been found necessary and reasonable, and it proceeds from that basis with its analysis.

II. Ms. Adams' Attorney's Fees

For his final point, trustee asserts that the trial court erred when it did not reimburse him for Ms. Adams' attorney's fees. Trustee contends that the trust is responsible for attorney's fees incurred in the defense of the trust or of the trustee, Ms. Adams was representing him in beneficiary's removal action, he did not act in bad faith, and Ms. Adams successfully defended the lawsuit. Trustee claims the disallowance of Ms. Adams' attorney's fees out of the trust estate unjustly compels him to bear the fees personally.

The trial court found that Ms. Adams' fees were for the "personal representation of William Cronin and not in his capacity as Trustee," and therefore, were not chargeable to the trust and could not be allocated against beneficiary's share of the trust estate. It appears this finding was based on Ms. Adams' statements to the court in response to beneficiary's motion to set aside, amend and modify the judgment in the removal action. In that motion, beneficiary had made a new claim that trustee had committed waste by continuing to engage Greensfelder when Ms. Adams was representing trustee. At the hearing on beneficiary's motion, Ms. Adams responded to this claim by stating she was representing trustee "personally," and did not represent the trust or trustee in his capacity as trustee.

Ms. Adams' mischaracterization does not preclude trustee from being reimbursed for her fees. First, Ms. Adams' statements were made in response to an argument that was irrelevant to the motion to set aside the judgment because it was not an issue at trial, and thus, the statements were superfluous to any issue then properly before the court. Next, it is clear that in her attempt to distinguish her litigation services from Greensfelder's trust administration services, Ms. Adams misspoke. It is a matter of record that trustee had not been sued as an individual and had been sued only in his capacity as trustee, and although Greensfelder remained attorney of record, Ms. Adams alone represented trustee during depositions and at trial. "[I]mprovident or erroneous statements or admissions resulting from unguarded expressions or mistake should not be binding on the client." *Kansas City v. Martin*, 391 S.W.2d 608, 615 (Mo.App.1965). Last, to the extent that Ms. Adams' statements constituted her mistaken legal interpretation of her role, "neither the client nor the court is bound by the attorney's statements or admission as to matters of law or legal conclusions." *Id.* As explained in the remainder of this discussion, because Ms. Adams' fees were incurred in defending trustee's administration of the trust in beneficiary's removal action, trustee was entitled to reimbursement.

Under the "American Rule," absent statutory authorization or contractual agreement, with few exceptions, each party bears the expense of his or her own attorney's fees. *Schindler v. Pepple*, 158 S.W.3d 784, 786 (Mo.App.2005). One of the exceptions to the "American Rule" is that attorney's fees may be awarded to a successful litigant where special or very unusual circumstances exist so it may be said that equity demands a balance of benefits. *Id.* at 787. These special or unusual circumstances include the "*Bernheimer* exception," which allows attorney's fees to be awarded from a trust estate for litigation resolving questions important to the administration of the trust, or for the benefit of the trust. *Id.*; *844 Washington Univ. v. Royal Crown Bottling, 801 S.W.2d 458, 468 (Mo.App.1990) (citing Bernheimer v. First Nat. Bank of Kansas City, 359 Mo. 1119, 225 S.W.2d 745 (1949)). "It is beyond dispute that a trustee may recover from the trust estate all of its proper expenses, including reasonable attorney's fees and fees incurred in preserving and protecting trust property." Schindler, 158 S.W.3d at 786 (citing Anselmo v. Guasto, 13 S.W.3d 650, 653 (Mo.App.1999)).

As a general rule, a trustee is entitled to recover from the trust estate all of his or her proper expenses, including reasonable attorney's fees and fees incurred for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust. *St. Louis Union Trust Company v. Conant*, 499 S.W.2d 761, 769 (Mo.1973); *Anselmo*, 13 S.W.3d at 653–54. A trustee must take all reasonable action to uphold the validity of the trust and to preserve the trust assets. *Anselmo*, 13 S.W.3d at 653. Further, a trustee is required to defend suits that will invalidate a trust or reduce its scope. *Id.* If a trustee defends the trust or the trust estate, a court is authorized to order payment of the trustee's expenses. *Id.* "A trustee who defends an action for the benefit of the trust, including to prevent the failure of the trust, may, with propriety, incur such costs, the expense of an attorney included, as are reasonable for the purpose and is entitled to be reimbursed from the trust estate." *Id.* at 653–54.

It is well-established that the good faith defense of a lawsuit to remove a trustee falls within the ambit of actions that uphold the trust and preserve the trust property. "Where the beneficiaries bring a proceeding for the removal of the trustee, the trustee can properly charge the estate with the expense of defending the proceeding." III Austin Wakeman Scott and William Franklin Fratcher, The Law of Trusts, section 188.4, p. 65 (4th ed.1988). That text quotes *Jessup v. Smith*, 223 N.Y. 203, 119 N.E. 403, 404 (1918), in which Judge Cardozo said of the trustee:

He owed a duty to the estate to stand his ground against unjust attack. He resisted an attempt to wrest the administration of the trust from one selected by the testator and to place it in strange hands.... Plainly, such services, if paid for by the trustee personally, would justify reimbursement on his accounting before the surrogate.

See also Willson v. Whitehead, 181 Va. 960, 27 S.E.2d 213, 216 (1943). In Weidlich v. Comley, 267 F.2d 133, 134 (2d Cir.1959), Judge Learned Hand applied Jessup:

... [T]he plaintiff's first complaint is the allowance to the defendant out of the trust assets of his expenses in defending himself in the action. The argument is that these expenses were incurred in the defendant's individual interest, and may not be charged against the trust. That completely misses the true situation: a trustee was appointed to administer the assets; the settlor selected him to do so, and whatever interferes with his discharge of his duty *pro tanto* defeats the settlor's purpose. When the trustee's administration of the assets is unjustifiably assailed it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement to his acceptance of the burden of his duties. This has been uniformly the ruling, so far as we have found.

In *American Cancer Soc. v. Hammerstein*, 631 S.W.2d 858, 865 (Mo.App.1981), we reversed and remanded a trial court *845 judgment that found that a trustee had improperly terminated a trust and that the trustee should be removed. We held that the trustee was properly acting within his powers in terminating the trust, that there was no basis for removing him as trustee, and that he was entitled to an award from the trust assets for his reasonable attorney's fees and expenses. *Id. In Jarvis v. Boatmen's National Bank of St. Louis*, 478 S.W.2d 266, 277 (Mo.1972), we upheld a judgment in a trustee's favor on claims alleging trustee misconduct and breach of trust, and seeking removal. We held a trustee who successfully defends such claims is entitled to reasonable fees from the trust. *Id.*

"A trustee is entitled to reasonable attorneys' fees, to be paid out of the trust estate, incurred in good faith in defending his administration of the trust." *In re Trust Created under Will of Freeman*, 247 Minn. 50, 75 N.W.2d 906, 910 (1956). "[A] successful defense by a trustee against an effort to remove him as trustee is a defense on behalf of the trust estate itself." *Saulsbury v. Denton National Bank*, 25 Md.App. 669, 335 A.2d 199, 201 (1975). "If the attempt to remove the trustee fails, it is proper to order payment of costs out of the trust estate." Bogert, *supra*, section 525, p. 46. A trustee who has a good faith basis for opposing his or her removal and who prevails is entitled to recover attorney's fees and costs from the trust estate. *Cooper v. Brodie*, 253 Va. 38, 480 S.E.2d 101, 104 (1997).

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.

II Jairus Ware Perry, A Treatise on the Law of Trusts and Trustees, section 894, pp. 1515–16 (7th ed.1929).

The situation in which a trustee is not entitled to recover attorney's fees arises when the legal services performed for the trustee are personal to the trustee and have nothing to do with the preservation of the trust. *Conant*, 499 S.W.2d at 769. In *Conant*, the attorney's services related solely to the trustee's potential liability in the event the trustee entered into and participated in a proposed plan to partially destroy the trust. *Id*.

In contrast, in this case, beneficiary sued trustee solely in his capacity as trustee, seeking his removal for breach of fiduciary duty. Trustee owed a duty to the trust to resist the unjust attempt to take the administration of the trust from the person selected by Ms. Strawn. *Jessup*, 119 N.E. at 404; *Willson*, 27 S.E.2d at 216. He also owed a duty to the contingent beneficiaries to preserve the trust. *In re McGuire Marital Trust*, 260 Wis.2d 815, 660 N.W.2d 308, 313 (2003). Under all of the above authorities, Ms. Adams' services defending trustee in the removal action were not personal to the trustee, but rather were to defend against beneficiary's attempt to remove trustee, and thereby preserve the trust. Accordingly, trustee was entitled to reimbursement for Ms. Adams' attorney's fees.

This brings us to trustee's remaining claim that Ms. Adams' fee should be allocated against beneficiary's share of the *846 trust estate. If an attempt to remove a trustee appears malicious and some of the beneficiaries have not taken part in it, the court may compel the beneficiaries who brought the suit to pay the attorney's fees personally. Bogert, *supra*, section 525, p. 47. *See also* 90A C.J.S. *Trusts*, section 653 (2002). As we explained in our discussion of the allocation of Greensfelder's fees, the court may allocate the reasonable amount of Ms. Adams' fees that was caused by beneficiary's vexatious litigation against beneficiary's share of the trust. *See Coates*, 316 S.W.2d at 878; *Webbe*, 93 Ill.Dec. 886, 487 N.E.2d at 714; *Boston Safe*, 203 N.E.2d at 554; Bogert, *supra*, section 525, p. 46. Point four is granted.

MOTION FOR ATTORNEY'S FEES ON APPEAL

Prior to submission, trustee filed a verified motion for an award of attorney's fees on appeal. Trustee is entitled to reasonable fees for services rendered on appeal. See Columbia Union Nat. Bank & Trust v. Bundschu, 641 S.W.2d 864, 879–80 (Mo.App.1982). Because the trial court is better equipped to hear evidence and argument on this issue and determine the reasonableness of the fee requested, on remand, the trial court should conduct a hearing to determine the reasonableness of the attorney's fees and expenses requested on appeal. Vogel v. Mercantile Trust Company National Ass'n, 511 S.W.2d 784, 789–90 (Mo.1974). Trustee has also requested that these fees be allocated against beneficiary's share of the trust estate. This appeal represents a continuation of beneficiary's groundless and unsuccessful litigation against trustee, with the sole purpose of benefiting beneficiary. The trial court is instructed to allocate the amount of reasonable attorney's fees and expenses on appeal against beneficiary's share of the trust estate.

Conclusion

The judgment of the trial court allocating \$21,052.00 against beneficiary's share of the trust estate is reversed and remanded with directions to determine the reasonable amount of Greensfelder's total attorney's fees that was caused by beneficiary's vexatious litigation, and allocate that amount against beneficiary's share of the trust estate. The judgment of the trial court denying trustee reimbursement for Ms. Adams' fees is reversed and remanded with directions to determine the reasonable amount of Ms. Adams' fees that were caused by beneficiary's vexatious litigation and allocate that amount against beneficiary's share of the trust estate. On remand, the trial court shall also conduct a hearing to determine the reasonable amount of attorney's fees on appeal and allocate that amount against beneficiary's share of the trust estate. In all other respects, the judgment is affirmed.⁴

LAWRENCE E. MOONEY and BOOKER T. SHAW, JJ., concur.

All Citations

199 S.W.3d 831

Footnotes

- Trustee did make an attempt to put on evidence of trustee's fees during beneficiary's removal action. However, beneficiary objected to the introduction of this evidence on the ground that the evidence was irrelevant because "there's no application before the Court," and the court sustained the objection.
- Beneficiary devotes a section of her argument under this point to the trial court's failure to draw an adverse inference and devotes another section to the sufficiency of the evidence supporting Greensfelder's \$42,000.00 fee. Since these errors were not included in the point relied on, they are not reviewable. *Real Estate Investors v. Am. Design Group*, 46 S.W.3d 51, 59 (Mo.App.2001).
- We do not believe that the trial court's prior finding, that the "bulk" of the fees was caused by beneficiary's litigation, requires any particular fee award because the exact amount of fees caused by beneficiary was not an issue in the removal action.
- 4 Beneficiary's motions to strike and dismiss appeals are denied. Trustee's motion to take judicial notice of the court's file in beneficiary's removal action is granted.

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427 S.W.3d 315 Missouri Court of Appeals, Eastern District, Division Three.

Mary L. LEHMANN, et al., Respondents, v. BANK OF AMERICA, N.A., d/b/a U.S. Trust, Appellant.

> No. ED 99782. | April 15, 2014.

Synopsis

Background: Trust beneficiaries sought no-fault removal of trust's corporate trustee. The Circuit Court, St. Louis City, Philip Heagney, J., granted summary judgment to beneficiaries and found that trustee was not entitled to distribution fee on removal. Trustee appealed.

Holdings: The Court of Appeals, Kurt S. Odenwald, J., held that:

trust instrument did not provide for payment of distribution fee to corporate trustee upon trustee's no-fault removal, but

genuine issue of material fact existed as to whether trustee was entitled to additional compensation pursuant to statute providing for such compensation if that specified by terms of trust would be unreasonably low.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

*316 Jeffrey S. Russell, Kathleen R. Sherby, Kimberly A. Mohr, Bryan Cave LLP, St. Louis, MO, for Appellant.

Steven M. Hamburg, Steven M. Hamburg P.C., Clayton, MO, for Respondent.

KURT S. ODENWALD, Judge.

Introduction

Bank of America, N.A. ("Bank") appeals from the judgment of the probate division of the Circuit Court of St. Louis City ("probate court") granting summary judgment in favor of Respondents Mary L. Lehmann, Kenneth L. Lehmann, and Frederick W. Lehmann, IV ("Respondents"). Respondents sought the removal of Bank as corporate trustee of a trust executed by Frederick W. Lehmann, III ("the Settlor") in favor of Respondents. Bank alleged that its removal as corporate trustee triggered the payment of a distribution fee set forth in the applicable fee schedule. The probate court granted summary judgment in favor of Respondents, finding that Bank was not entitled to the distribution fee provided in the fee schedule or any other additional compensation upon its removal as corporate trustee. On appeal, Bank asserts that the probate court erred in granting summary

judgment in favor of Respondents because: (1) it was the clear and controlling intent of the Settlor that Bank receive the distribution fee set forth in the fee schedule; and (2) whether Bank was entitled to additional, reasonable compensation pursuant to Section 456.7–708¹ was a factual issue inappropriate for resolution on summary judgment. Bank also appeals the probate court's denial of its request for attorneys' fees. We affirm in part and reverse and remand in part.

Factual and Procedural History

On July 17, 1967, the Settlor established an inter vivos trust ("the Trust") and named Boatmen's National Bank of St. Louis ("Boatmen's Bank") as trustee. *317 Bank is the corporate successor in interest to Boatmen's Bank and is currently serving as corporate trustee of the Trust. In addition to the corporate trustee, the Settlor designated himself and Mary L. Lehmann as individual trustees. The Settlor died on February 21, 2001. On March 28, 2008, Mary L. Lehmann resigned as trustee and appointed Frederick W. Lehmann, IV as her successor. Frederick W. Lehmann, IV currently serves as individual trustee of the Trust.

Mary L. Lehmann is the sole income beneficiary of the Trust for the duration of her life. The Trust provides that upon Mary L. Lehmann's death, the Trust principal is to be divided into equal shares for the sons of the Settlor, Frederick W. Lehmann, IV and Kennett L. Lehmann, and their shares transferred free of trust to them.

Article V of the Trust provides that the corporate trustee be compensated for its services as trustee in accordance with its published schedule of fees in effect on the date the Trust was created. The parties agree that the applicable schedule of fees is Boatmen's Bank's Schedule of Fees for Services Rendered under Personal Trusts and Agencies published on October 1, 1955 (the "Schedule of Fees"). Schedule II of the Schedule of Fees sets forth two different fees to be charged for the administration of personal trusts: an annual fee, which is charged to income, and a distribution fee, which is charged to principal. Since the creation of the Trust in 1967, Bank and its corporate predecessors have charged fees in accordance with the Schedule of Fees.

In 2004, the General Assembly enacted Sections 456.1101 to 456.111106, effective January 1, 2005. Section 456.7–706 provides for the removal of a trustee in differing circumstances. Relevant to this appeal is Section 456.7–706.2(4), which provides for the removal of a trustee upon request by the qualified beneficiaries without any showing of wrongdoing by the trustee. This mechanism for removing a trustee did not exist prior to the legislative enactment in 2004.

On April 30, 2012, Respondents filed a Petition for Trustee Removal and Declaratory Relief ("Respondents' Petition") seeking a "no fault" removal of Bank as corporate trustee of the Trust under Section 456.7–706.2(4) and the appointment of The Bank of Missouri as successor corporate trustee. Respondents also sought an order declaring that Bank was not entitled to a distribution fee or any other compensation as a result of its removal as corporate trustee. Acknowledging the rights conferred to the beneficiaries under Section 456.7–706, Bank did not contest Respondent's request for its no-fault removal as trustee. However, in its Answer to Respondents' Petition, Bank asked the court to advise and instruct on whether Bank was entitled to the distribution fee set forth in the Schedule of Fees upon its removal as corporate trustee and distribution of the Trust assets to The Bank of Missouri. In the event the probate court determined Bank was not entitled to the distribution fee, Bank alternatively sought an equitable determination as to whether its compensation would be unreasonably low so as to entitle it to additional compensation for its services under Section 456.7–708(2).

On July 17, 2012, Bank served discovery requests on Respondents seeking, *inter alia*, information on the proposed successor corporate trustee's fees for administration of the Trust. In response to Bank's discovery requests, Respondents moved for a protective order arguing that the discovery served no purpose because no factual issues were in dispute and the sole determination to be made by the probate *318 court was a legal one—namely, whether Bank was entitled to the distribution fee set forth in Schedule of Fees. Thereafter, the parties agreed to suspend discovery relating to Bank's ancillary claim that, in the absence of the distribution fee, its compensation would be unreasonably low. Discovery on this issue ceased pending the probate court's

determination of Bank's entitlement to the distribution fee as a result of the transfer of the trust assets to the successor corporate trustee.

The parties prepared a joint stipulation of facts so that the following issues could be resolved on summary judgment: (1) whether Bank is entitled to the distribution fee set forth in the Schedule of Fees when the transfer of trust assets is to a successor corporate trustee; and (2) whether a court may adjust a trustee's compensation under Section 456.7–708 when the trustee's fee is specified in the trust.

The parties filed cross-motions for partial summary judgment on November 20, 2012. On February 19, 2013, the probate court entered its judgment and order granting Respondents' motion for summary judgment and denying Bank's motion for summary judgment. The probate court found that neither the Trust instrument nor the Schedule of Fees contemplated the nofault resignation of the corporate trustee and the corresponding transfer of assets to a successor corporate trustee. Accordingly, the probate court looked to the plain meaning of the word "distribution" and found that the term generally designates the delivery of trust assets to the proper beneficiaries at the termination of a trust. Applying this meaning of the word "distribution," the probate court concluded that the distribution fee set forth in the Schedule of Fees would be paid only when the Trust assets are distributed to the beneficiaries at the termination of the Trust. The probate court ruled that because the transfer of the Trust assets from Bank to a successor corporate trustee was not a distribution of assets to the beneficiaries, Bank was not entitled to the distribution fee set forth in the Schedule of Fees. The probate court also concluded that the joint stipulation of facts provided no basis to award Bank any additional fees outside the Schedule of Fees.

Following the probate court's order granting Respondent's motion for partial summary judgment, both parties petitioned for an award of attorneys' fees. On April 29, 2013, the probate court entered its final judgment and order removing Bank as corporate trustee, appointing The Bank of Missouri as successor corporate trustee, and denying both parties' motions for attorneys' fees. This appeal follows.

Points on Appeal

Bank raises three points on appeal. First, Bank asserts that the probate court erred in granting Respondent's motion for partial summary judgment because both the terms of the Trust and the law applicable at the time of the Trust's creation show that the Settlor intended for Bank to receive the distribution fee set forth in the Schedule of Fees upon the completion of its duties as corporate trustee. Bank next contends that the probate court erred in granting Respondent's motion for partial summary judgment on Bank's alternative equitable fee claim. Specifically, Bank posits that the issue of the reasonableness of Bank's compensation absent payment of the distribution fee was not ripe for adjudication on summary judgment. Finally, Bank argues that the probate court erred in denying Bank's motion for attorneys' fees and costs.

Standards of Review

Summary judgment allows a trial court to enter judgment for the moving party *319 where the party demonstrates a right to judgment as a matter of law based on facts about which there is no genuine dispute. *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). On appeal, our review is essentially *de novo;* we need not defer to the trial court's order. *Id.* We view the record in the light most favorable to the party against whom judgment was entered. *Id.* We will affirm the judgment where the trial court reached the correct result, even if for the wrong reason. *Carman v. Wieland*, 406 S.W.3d 70, 73 (Mo.App. E.D.2013).

We review the denial of a request for attorneys' fees for an abuse of discretion. *Green v. Plaza in Clayton Condominium Ass'n*, 410 S.W.3d 272, 281 (Mo.App. E.D.2013). "To demonstrate an abuse of discretion the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice."

Id. (quoting *Howard v. City of Kansas City*, 332 S.W.3d 772, 792 (Mo. banc 2011) (internal quotations omitted)). On appeal of a denial of attorneys' fees, we view the evidence with great deference toward the trial court. *Id.*

Discussion

I. Bank is not entitled to the distribution fee set forth in the Schedule of Fees.

The probate court granted Respondents' motion for partial summary judgment on the basis that the distribution fee set forth in the Schedule of Fees may be charged only upon the termination of the Trust and distribution of the Trust assets to the beneficiaries. The probate court reasoned that, under Missouri case law, the word "distribution" is used to designate the delivery of assets free from trust to beneficiaries at the termination of a trust, citing *Mercantile Trust Co. Nat'l Assn. v. Jaeger*, 457 S.W.2d 727, 731 (Mo. banc 1970). Because the Trust instrument contained no language providing for compensation to the trustee upon the transfer of trust assets to a successor corporate trustee, the probate court concluded that the distribution fee could be charged only at the time the Trust was terminated and the assets were distributed free from trust to the beneficiaries.

Bank argues that the probate court's holding erroneously ignored the clear intent of the Settlor to fully compensate Bank by deferring the bulk of its compensation until the conclusion of Bank's services as corporate trustee. Bank notes that at the time the Settlor created the Trust in 1967, the applicable law did not allow for its removal as trustee without cause. Only upon the enactment of Section 456.7–706 in 2004 was it legally possible for a "no-fault" removal of Bank as trustee. Because no legal mechanism existed to remove Bank as trustee without cause when the Trust was created, Bank reasons that the Settlor could have had no intent other than for Bank to remain the corporate trustee until the termination of the Trust. Consistent with that intent, Bank further argues that the Settlor logically intended for Bank to earn the distribution fee upon the conclusion of its services. Bank reasons that the distribution fee is, in reality, deferred compensation for services Bank has rendered to the Trust since its appointment as trustee in 1967. Bank argues that this type of compensation structure was recognized by the Missouri Supreme Court in *Mercantile Trust Company National Association*. Bank further suggests that the provisions of Schedule II of the Trust, which either reduce or eliminate the payment of the distribution fee upon the occurrence of certain events, support its characterization *320 of the distribution fee as deferred income and is proof of the Settlor's intent that the distribution fee be paid to Bank upon completion of its services as trustee. Bank maintains that the Settlor necessarily understood the meaning of the term "distribution" as used in the Trust to be broader than the distribution of Trust assets at the termination of the Trust, and necessarily included any distribution of the Trust assets.

In In re Gene Wild Insurance Trust, the Southern District aptly summarized the rules to be used when construing a trust:

Ultimately, the paramount rule in construing a trust is that the intent of the grantor is supreme. This intent must be gleaned, if possible, from the trust instrument as a whole. In examining the entirety of the trust agreement at issue, no single word or clause is given undue preference. Rather, we must give meaning to the trust in its entirety and adopt a construction of its terms that reconciles, rather than creates, inconsistencies. Furthermore, where the language is clear and of well-defined force and meaning, it must stand as written, ... and a testator is presumed to know and intend the legal effect of the language he [or she] uses. Unless the context of a will or trust indicates a different meaning of a word, the word will be interpreted according to its plain, ordinary meaning. Finally, if the language of the trust is clear, there is no need to engage the rules of construction, as we cannot rewrite the terms of the trust using such rules.

In re Gene Wild Ins. Trust, 340 S.W.3d 139, 143 (Mo.App. S.D.2011) (internal quotations and citations omitted).

These clear statements of law guide our resolution of the issue before us. The Trust provides for compensation of Bank for its services as corporate trustee in accordance with the Schedule of Fees. It is not disputed that the Trust expresses the Settlor's clear intent that Bank be paid in accordance with the Schedule of Fees. Accordingly, to determine the Settlor's intent with respect to whether Bank is entitled to the distribution fee, we must look to the Schedule of Fees prepared by Bank and incorporated into the Trust by the Settlor.

As noted by the probate court, the Schedule of Fees constitutes a contract for fees to be paid for services performed by Bank and its predecessors on behalf of the Trust. The cardinal principle for contract interpretation is to ascertain the intention of the parties from the contract itself and to give effect to that intent. *Butler v. Mitchell–Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995). When interpreting a contract, we must use the plain, ordinary, and usual meaning of the contract's words and consider the document as a whole. *State ex rel. Missouri Highway & Transp. Comm'n v. Maryville Land P'ship*, 62 S.W.3d 485, 491 (Mo.App. E.D.2001). Each term and clause is construed to avoid an effect that renders other terms and provisions meaningless. *Id.* at 492. "A construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement is preferred to one that leaves some of the provisions without function or sense." *Id.*

We have carefully reviewed the Schedule of Fees in its entirety. Applying the plain meaning of the words used in the Schedule of Fees, we reject Bank's argument and hold that the language used in the Schedule of Fees clearly expresses the parties' intent for the corporate trustee to be paid when the Trust assets are distributed free from trust at the time the Trust is terminated. In reaching this conclusion, we consider the Schedule of Fees as a *321 whole, rather than viewing any schedule in isolation. However, because Schedule II applies to personal trusts of the type created by the Settlor, we begin our analysis there.

Schedule II simply provides for the payment of a distribution fee in the amount of 3% on the first \$100,000 of Principal and 1 1/2 % on the balance of the Principal. The term "distribution fee" is not further defined in Schedule II except to state that the distribution fee shall be charged to Principal. Schedule II ties the payment of the distribution fee to termination of a trust under provisions that (1) reduce the payment of the distribution fee should the Trust terminate within five years of its creation, and (2) eliminate the requirement to pay a distribution fee to the trustee if the Trust is terminated, in whole or in part, by the grantor during his lifetime. Each of these provisions plainly intertwines the payment of the distribution fee provided to the corporate trustee of a personal trust to the termination of the trust and corresponding distribution of the principal. We find no language within Schedule II that articulates a concept separating the payment of the distribution fee from the termination of the Trust and distribution of the principal. We find the association of these concepts within Schedule II compelling evidence that the Settlor intended the payment of the distribution fee upon termination of the Trust and distribution of the Trust assets free of trust.

Bank contends these same provisions indicate the intent of the Settlor and Bank to establish the distribution fee as "deferred compensation," which Bank earned during its years of service as corporate trustee and is now entitled to receive upon termination of "its services." We are not persuaded. The Schedule of Fees describes neither the nature nor purpose of the distribution fee; it states only the amount. To adopt Bank's reasoning, we must add words to the Schedule of Fees, words not expressed by either the Settlor or Bank. This we will not do. The Schedule of Fees does not define the distribution fee as deferred compensation. Moreover, such interpretation is inconsistent with the provision eliminating the distribution fee upon termination of the Trust by the Grantor within his lifetime. This provision eliminates the distribution fee if the Grantor terminates the Trust regardless of what services were provided by the corporate trustee during the Grantor's life—here a period exceeding 33 years. We will not speculate as to what the Settlor and Bank may have intended as to the distribution fee under the circumstances presented. Instead we are guided by the plain meaning of the words used as we review the Schedule of Fees as a whole.

In our attempt to ascertain the Settlor's intent, we next look to Schedule III of the Schedule of Fees. Schedule III applies to perpetual trusts and thus does not govern Bank's compensation for administration of the Trust before us. Nonetheless, we consider Schedule III as part of our review of the Schedule of Fees as a whole for guidance regarding the term "distribution fee." Similar to Schedule II, Schedule III also provides for the payment of an annual fee and a distribution fee. Schedule III states that the distribution fee is "[a]pplicable to any part of the principal *distributed or paid out free from trust* in accordance with the terms of the trust." Although Schedule III does not govern Bank's compensation under Schedule II, our guiding principles of contract interpretation require us to harmonize all provisions of the Schedule of Fees so as not to leave any phrase or clause without meaning. *See CB Commercial Real Estate Grp., Inc. v. Equity P'ships Corp., 917 S.W.2d 641, 646–47 (Mo.App. W.D.1996)*. Applying the same *322 meaning for distribution fee in Schedules II and III achieves this harmony and allows for a "reasonable and natural construction of [the parties'] agreement." *Id.* at 647.

We have carefully considered Bank's argument that, in light of the state of the law at the time the Trust was created, the Settlor would have understood that Bank would serve as corporate trustee until the termination of the Trust, and therefore must have intended for Bank to receive the distribution fee set forth in the Schedule of Fees when its services as corporate trustee were completed. Although we acknowledge that the Settlor likely never contemplated Bank's no-fault removal as corporate trustee, we are nonetheless constrained to ascertain the intention of the parties with respect to Bank's compensation from the express language of their agreement. The objective meaning of the language used in the Schedule of Fees is our guidepost, not the subjective thoughts of what the parties may have intended had they contemplated the change of law. Where a contract is clear and unambiguous, a reviewing court cannot go outside the agreement and make a new contract for the parties. *Grantham v. Rockhurst Univ.*, 563 S.W.2d 147, 150 (Mo.App. W.D.1978).

We find that the Schedule of Fees is clear and unambiguous as to the meaning of "distribution fee." Further, the language of the Trust clearly demonstrates the Settlor's intent to adopt the Schedule of Fees as the payment obligations of the Trust to Bank. The subsequent enactment of Section 456.7–706 did not alter the intent expressed by the parties when the Trust was created. Because Bank is not distributing the Trust assets free of trust at its termination, Bank is not entitled to the distribution fee set forth in the Schedule of Fees agreed to by the Settlor and Bank. Whether we believe the Trust has obtained an unforeseen benefit as a result of the statutory change in 2004 is not relevant to our holding. As noted previously by this Court, "[w]e must adhere to the clear language contained in the trust instruments and not alter our position because of the result that occurs." *Boatmen's Trust Co. v. Sugden*, 827 S.W.2d 249, 254 (Mo.App. E.D.1992). Point denied.

II. Genuine issues of fact exist as to whether Bank is entitled to additional compensation pursuant to Section 456.7–708(2).

In its second point on appeal, Bank asserts that the probate court erred in granting Respondents' motion for partial summary judgment on the ground that Bank is not entitled to any additional fees in the absence of a distribution fee. Bank contends that whether it was entitled to additional compensation pursuant to Section 456.7–708 requires consideration of facts not included in the record on summary judgment. Because discovery on facts relevant to the reasonableness of Bank's compensation had been expressly reserved pending the probate court's determination regarding the distribution fee, Bank contends summary judgment on this issue was inappropriate. We agree.

Section 456.7–708 provides, in relevant part:

- 2. If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:
 - (1) the duties of the trustee are substantially different from those contemplated when the trust was created; or
 - *323 (2) the compensation specified by the terms of the trust would be unreasonably low or high.
- 3. For purposes of this section, reasonable compensation may include fees that take into account the administration of both income and principal whether or not the will or trust instrument contains provisions relating to compensation of the trustee. (emphasis added). Missouri courts generally deny trustees additional compensation where the trust instrument specifies the trustee's compensation, *see*, *e.g.*, *Estate of Ingram v. Ashcroft*, 709 S.W.2d 956, 958 (Mo.App. W.D.1986). However, Section 456.7–708 modifies the common law rule to allow a trustee additional compensation "if ... the compensation specified by the terms of the trust would be unreasonably low." Section 456.7–708.2(2).

The record before us shows that the parties agreed to bifurcate the issues advocated by the Bank in support of its claim for a fee upon its no fault removal as trustee. The parties suspended discovery on Bank's claim that its fee would be unreasonably low in the absence of a distribution fee, allowing the probate court to first determine whether Bank was going to receive the distribution fee. This bifurcation of issues logically promoted judicial economy by narrowing the scope of the summary judgment motions. The bifurcation also served the interest of minimizing the financial burden to all parties involved in the litigation.

Consistent with the bifurcation of issues, the joint stipulation of facts submitted by the parties on summary judgment *did not* include any facts relating to the issue of the reasonableness of Bank's compensation. Summary judgment may only be granted when there is no genuine dispute as to the facts and the facts as admitted show a legal right to judgment for the movant. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 380. Because no facts were presented to the probate court on the reasonableness of Bank's compensation, the probate court acted prematurely in considering the issue of Bank's entitlement to additional fees once it determined Bank would receive no distribution fee.

In light of our holding that Bank is not entitled to the distribution fee set forth in the Schedule of Fees, a genuine issue of fact exists as to whether the annual fee alone provides Bank reasonable compensation for its services as corporate trustee of the Trust for forty-five years. The record reveals that discovery on the issue of the reasonableness of the fees paid to Bank in light of Section 456.7–708 remains. Bank is entitled to develop evidence relating to this issue through discovery prior to the probate court's consideration of summary judgment. *Adams v. USAA Cas. Ins. Co.*, 317 S.W.3d 66, 75 (Mo.App. E.D.2010). We reverse the probate court's judgment with respect to the issue of adjusting Bank's compensation pursuant to Section 456.7–708 and remand for discovery on the issue of the reasonableness of Bank's fee. Point granted.

III. The probate court did not abuse its discretion in denying Bank's request for attorneys' fees.

In its third and final point on appeal, Bank argues that the probate court erred in denying its request for costs and expenses, including reasonable attorneys' fees, pursuant to Section 456.10–1004.

Section 456.10–1004 provides that, "[i]n 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."

*324 Section 456.10–1004 is a discretionary statute. The statute provides that a court "may award costs and expenses, including reasonable attorney's fees." Section 456.10–1004. Thus, this statute is permissive and not mandatory. Because Section 456.10–1004 grants the trial court authority to award attorneys' fees, but does not mandate an award, the probate court has discretion to either award or deny the request for attorneys' fees. We are not persuaded that the probate court's denial of Bank's request for attorney fees was against the logic of the circumstances and "so arbitrary and unreasonable as to shock one's sense of justice." *Green,* 410 S.W.3d at 281. Based on the record before us, we hold that the probate court did not abuse its discretion in denying Bank's request for attorneys' fees. Point denied.

Conclusion

We affirm in part and reverse and remand in part for further proceedings consistent with this opinion.

MARY K. HOFF, P.J. and ANGELA T. QUIGLESS J., concur.

All Citations

427 S.W.3d 315

Footnotes

All statutory references are to RSMo Cum.Supp.2012.

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Declined to Follow by Turnbull v. Turnbull, V.I.Super., May 4, 2018

362 Mo. 499 Supreme Court of Missouri, Division No. 1.

> LIPIC et al. v. WHEELER et al.

> > No. 42383. | Sept. 10, 1951.

Synopsis

Action by Joseph Lipic, Jr., and another, as successor trustees under declaration of trust of Joseph Lipic, Sr., as beneficiaries of trust, and as individuals, and others against Gertrude Wheeler and another for determination of rights, final distribution of trust estate under court's supervision, and allowance of attorneys' fees. The Circuit Court, City of St. Louis, James F. Nangle, J., entered judgment for defendants and the successor trustees appealed. The Supreme Court, Lozier, C., held that the successor trustees were not liable for failing to secure assets from estate which evidence showed to have been removed from trust assets by settlor and original trustee.

Reversed and remanded with directions.

Attorneys and Law Firms

*500 **44 Charles A. Neumann, William Kohn, St. Louis, for appellants.

*502 Roberts P. Elam, St. Louis, for respondents Gertrude Wheeler and Marie Phelan.

Opinion

*504 LOZIER, Commissioner.

This case involves final distribution of a trust fund. As submitted below, four of six beneficiaries as such, and two of them as successor co-trustees, were plaintiffs. Defendants were the other two beneficiaries. All parties asked determination of their rights, final distribution of the trust estate under court supervision, and allowance of attorneys' fees. The two co-trustees asked allowance for their services. Defendants asked removal of the co-trustees **45 for alleged breaches of trust, and collection, by their court-appointed successor, of an alleged deficiency in trust assets at the time of the death of the settlor and original trustee. Some of the findings of fact were made by a special master. The two plaintiffs-successor trustees appealed from an adverse judgment. The appeal is properly here because of the amount involved.

The issues require construction of a declaration of trust, the validity of which none of the parties challenge. The principal issue is appellants' liability, as successor trustees, for failure to collect alleged trust assets from the estate of the deceased predecessor trustee of which estate the appellants-successor trustees were also co-executors and legatees.

There was no conflict in the evidence as to the material facts. Joseph Lipic Sr. died testate on February 5, 1946, survived by: his widow, Agatha; five sons, Joseph Jr., Emil, Walter and Leonard, plaintiffs below, and Sylvester; and two daughters, Gertrude Wheeler and Marie Phelan, defendants below. His will was duly probated. After making several small charitable bequests, he

bequeathed his interest in the Jos. Lipic Pen Co. to Joseph Jr., Emil and Leonard, left the residuum to his widow and nominated Joseph Jr. and Emil as co-executors. These two qualified and are still serving as such co-executors.

*505 On July 2, 1943, Joseph Lipic Sr. executed and put into effect a declaration of trust wherein and whereby he vested in himself 'as trustee, all my right, title and interest in' and 'the full legal title to' the notes and securing trust deeds and the real estate property 'set forth in the list attached hereto marked 'Assets of Trust of Joseph Lipic Sr.' together with all reinvestments of the proceeds of the sales of said deeds of trust of real estate in said list.' During his lifetime he was to 'administer said trust property, and any other property which may from time to time be added thereto by me, or which may be a reinvestment of the present property listed in the assets of the trust estate for my benefit during my lifetime, reserving the right of income as fully as if said trust property were my sole property.' Joseph Jr. and Emil were to become successor trustees when Joseph Sr. died.

The list, entitled 'Assets of Trust of Joseph Lipic Sr.,' described eight real estate loans and securing trust deeds, and showed the balances of principal then due. These balances totaled \$29,950. The final item was: 'Real Estate (value \$3,000), 2751 Shenandoah St.,' followed by a brief description of the property. The nine items totaled \$32,500. This list is hereinafter referred to as Exhibit A.

The trust assets received by the successor trustees were listed in Exhibit C. This described seven real estate loans and securing trust deeds, the principal balances of which totaled \$26,800, \$3150 less than the principal balances of the eight loans listed in Exhibit A. Five of the Exhibit A loans, totaling \$18,250, were not listed in Exhibit C. Exhibit C listed three of the Exhibit A loans, or renewals thereof, totaling \$11,300, \$400 less than the principal balances of these three loans as listed in Exhibit A. Exhibit C listed five loans, totaling \$15,500, not listed in Exhibit A.

Exhibit C listed no real estate. After setting up the trust, Joseph Sr. sold the Shenandoah St. property for \$3500, and one of the Exhibit C loans was taken as part payment of the purchase price. The principal balance of this loan was \$2,000 when Joseph Sr. died.

The seven Exhibit C items totaled \$27,800, \$6150 less than the nine Exhibit A items. The successor trustees were held liable below for this \$6150, for the \$500 excess of the sale price of the Shenandoah St. property over its Exhibit A valuation, and for \$1733.63, 6% interest upon the total of the two items, \$6650.

We must first determine whether these loans and this \$500 claim the co-trustees failed to press against father's estate, of which they themselves were co-executors and legatees, were actually parts of the trust corpus when they became successor trustees. If these were not trust assets when Joseph Sr. died, there was no breach of the duty of a trustee 'to take reasonable steps to take and keep control of the trust property.' Restatement, Trusts, Sec. 175.

**46 *506 The final paragraph of the trust declaration was: 'I also reserve full power and right to amend or alter this trust from time to time as I shall deem proper and expedient, or name or substitute a new or additional trustee.' In this court, the parties agree that Joseph St. thus reserved full power to amend or alter the trust or even revoke it entirely. They also agree that Joseph Sr. was not required to exercise any of these powers by written instrument. They also agree that where no method of exercise is specified, alteration or partial revocation powers may be exercised in any manner sufficiently manifesting an intention to alter or to partially revoke. We need not discuss the cases the parties cite. In each, the principles just stated were reannounced and applied to the facts of that particular case. We must apply these principles to the facts here. Did Joseph Sr.'s handing of the trust assets show an intention to amend or partially revoke the trust? This matter was not ruled below.

It is our conclusion that this settlor's conduct showed an intention to alter or modify the trust by reducing the total of the trust assets; and that his conduct was entirely consistent with that intention and wholly inconsistent with an intent to revoke the trust in toto. This conclusion is based upon uncontradicted evidence. Joseph Sr. kept the trust declaration, the attached list (Exhibit A) and all the papers relating to the assets of this trust in an unlabeled paper package in a bank deposit box. He also kept his personal papers in this box, separate and apart, however, from the package. The box was held in the pen company's name. Access to the box could be had only by Joseph Sr. singly or by Joseph Jr. and Emil jointly.

About ten days before he died, Joseph Sr. sent for Emil and asked him to go to the box, saying: 'In there you will find a package. Will you go in that package and take out a deed on Connecticut St. and deliver it to Mr. Rengel?' (Rengel was with the real estate firm which handled Joseph Sr.'s loan transactions.) Emil's recollection was that his father said that the loan on this property was to be paid off. Joseph Sr. also instructed Emil to take from the package two envelopes and deliver one each to Mrs. Wheeler and Mrs. Phelan. Joseph Jr. and Emil went to the bank, took the Connecticut St. property loan papers and the two envelopes out of the package and Emil made the deliveries requested by his father.

The two envelopes were plain, had no writing on the outside and were sealed. Joseph Jr. and Emil did not know what the envelopes contained but Emil said, 'they felt like money.' When he made the separate deliveries of the envelopes, Emil told Mrs. Wheeler and Mrs. Phelan, 'Here's some money pop told me to deliver to you.'

About ten days after Joseph Sr. died, Joseph Jr. and Emil went to the office of Charles A. Neumann, their father's attorney. Neumann told them that he had drawn a will for Joseph Sr. and suggested they look for it in the box. He also suggested that they look for a *507 trust declaration he had drawn and some deeds of trust. They returned to his office with the will and the package. As Neumann recalled, the trust declaration was in an envelope 'with my name on top of it, that we lawyers use. It was sealed. * * * The will was in an envelope of that kind and was sealed and it had on it, 'Last Will and Testament of Joseph Lipic.' Neumann thought, but was not sure, because his 'custom was always to put a heading on the envelope, that is, an identification on it. I was under the impression that I had the stenographer put on there, 'Declaration of Trust by Joseph Lipic.' * * * And then there were deeds of trust each in a separate manila envelope, as the real estate men use, a place for the description and amount, and the whole thing was wrapped in a brown sheet of paper and had a rubber band about it. The will was separate. The trust declaration and deeds of trust were in this package.' The trust deeds to which he referred were those listed in Exhibit C.

Joseph Sr. obviously treated the package as the repository of the trust declaration, the initial list and the trust assets. He kept no bank account as trustee and apparently kept all trust assets in the package. **47 From it, he withdrew some initial loans, and into it he placed others. From it, he withdrew the warranty deed to the Shenandoah St. real estate, and into it, he placed the Shenandoah St. property purchase money note and trust deed. (But not, apparently, any of the cash received in that transaction. If he put any such cash in the package, he later withdrew it. The two plain envelopes delivered to defendants may have contained money. In any event there was no money in the package when he died.) In that package, he had once placed two unmarked envelopes which contained, if not currency, some documents which he evidently considered trust assets. In that package, he placed the loan papers on the Connecticut St. property, not one of the initial loans but one which he seems to have treated as an additional or substitute asset. And, ten days before he died, he had the Connecticut St. property loan papers taken from that package and delivered to his agent for collection. (The principal of this loan was paid off after Joseph Sr. died and was listed in Exhibit C.) At the same time, he had the two unmarked envelopes taken from that package and delivered to the defendants.

Joseph Sr. never transferred the record legal title to the Shenandoah St. real estate to himself as trustee, and when he sold that property he conveyed as individual owner. And, so far as appears, he used the proceeds of that sale, and thereafter placed the equivalent of only \$2,000 thereof (the balance on the purchase money note) in that package.

Joseph Sr.'s conduct does not even suggest an intention to revoke the trust in toto. He did not disclose the existence of the trust and kept the trust declaration and the trust assets entirely within his *508 control. Yet, he was careful to segregate from his individual papers all of the documents relating to what he regarded as changing trust assets, and to keep all such documents, together with the trust declaration itself, in a separate package. That package was in the box when he died. His conduct under all the circumstances is most persuasive that, from time to time, he deliberately and intentionally exercised his reserved power to alter the trust; and that such exercises were wholly consistent with the continued existence of the trust itself but entirely inconsistent with any intention of maintaining the trust corpus at its initial value.

We rule that the \$6150 and \$500 items were not trust assets when Joseph Sr. died, and that, accordingly, the successor trustees are not liable for failing to attempt to secure these items for the trust estate. It follows that they would not be liable for the \$1733.63, interest upon the \$6150 and \$500 items.

The trial court properly refused to charge against defendants the \$2500 claimed to have been in the two envelopes removed from the package and delivered to them. As defendants did not testify, there was no evidence of what the envelopes contained. And, under the co-trustees' own theory, which we have sustained, the contents of the envelopes were not trust assets when Joseph Sr. died.

Other breaches of trust charged by defendants were failure to keep part of the trust assets invested and failure to make final distribution of the trust estate. The trust declaration provided: 'After my death, said trust shall continue for a period of one (1) year after the date of the appointment of my executor or executors, and shall then be liquidated as soon as may be practical and expedient, as hereinafter set forth. Upon my death, my sons, Joseph Lipic Jr. and Emil Lipic, shall become the successor trustees, with full power and authority to administer said trust, and to sell, exchange, and reinvest any property belonging to said trust estate, in their sole name and capacity as successor trustees, with such incidental powers as the collection of rent, income and interest, as may be necessary for the purpose of managing said trust estate and its assets. After the expiration of the year mentioned herein, computed from the date of the appointment of the executor or executors of my estate, the successor trustees shall liquidate, or divide the assets of this trust in equal shares between my children: Joseph Lipic Jr., Emil Lipic, Walter Lipic, Leonard Lipic, **48 Mary Phelan, and Gertrude Wheeler, and this trust shall then terminate. ***

Before considering the alleged failures to invest and to make final distribution, we note other assignments made by defendants. Advised by counsel to start a trust account, the co-trustees opened an account in the name of 'Emil Lipic or Joseph Lipic Jr.' on April 18, 1946. They testified that it never entered their minds that 'we should have hooked on to the end of our names, 'trustees." This *509 failure to earmark the trust assets was a breach of trust. Restatement, Trusts, Secs. 179, 180. After their attorney had discovered how the account was being carried, he advised them to have it properly entered. On February 24, 1948, they closed the old account and transferred the balance to a new account in their names as 'successor trustees u/w of Joseph Lipic Sr., Dec.'d.' It is noted that the trust estate sustained no loss from this particular breach of trust.

It is not clear when Joseph Jr. and Emil notified Leonard and Walter of the existence of the trust and that they were acting as co-trustees. But it was conceded that Mrs. Wheeler's and Mrs. Phelan's first knowledge was when they were served with process in this suit, filed on December 30, 1947. That was twenty-two months after Joseph Jr. and Emil opened the package, read the trust declaration and undertook to act as successor trustees. We agree that such concealment was a breach of trust. See Restatement, Trusts, Secs. 173, 183.

Next, Joseph Jr.'s and Emil's interests as trustees were adverse to their interests as co-executors and legatees of their father's estate. Wiegand v. Woerner, 155 Mo.App. 277, 134 S.W. 596. This concealment of the trust's existence and their delay in seeking the advice of a court of equity as to their respective duties as cotrustees and as co-executors, appear to have been a violation of the duty of a trustee to refrain from having conflicting interests. See Restatement, Trusts, Sec. 170; Bogert, Trusts & Trustees, Vol. 3, Pt. 1, Sec. 543.

The trial judge held the co-trustees liable for \$1994.59, 6% interest to trial time upon cash received and kept in a noninterest bearing bank account, from dates of receipt until March 3, 1949. On that date, the co-trustees bought approximately \$23,000 of U. S. Treasury 1 1/4% notes. The receipts were payments of principal of loans bearing either 4%, 5%, 5 1/2% or 6%. These payments varied from \$100 to \$8000. They began very shortly after the co-trustees discovered the trust declaration in February, 1946, and continued until November, 1948. The larger payments were \$4000, February 15, 1946; \$1300, June 18, 1946; \$2200, July 17, 1947; \$8000, November 20, 1947; \$1750, May 21, 1948; and \$1750, November 21, 1948. The evidence was that between February 16, 1946, and March 3, 1949, short-term investment of trust funds in \$100 denominations was not available and that the returns of such investment in larger denominations was only from 1% to 1 1/2%.

The co-trustees contend that, under the trust declaration, they were obligated, not to invest the assets, but to liquidate them for purposes of final distribution; and that, in any event, they should not be held liable for interest in excess of 1 1/2%. However, for reasons hereinafter set out, we concur in the trial judge's conclusion that the co-trustees should be charged 6% interest upon these funds.

*510 As to their failure to make final distribution 'as soon as may be practical and expedient' after February 15, 1947 (one year after the appointment of the executors of the Joseph Sr. estate), the co-trustees contend that distribution could not have been made (and still cannot be made) until the amounts of the federal estate and state inheritance taxes payable by the Joseph Sr. estate have been ascertained, and the liability of the trust estate for its pro rata share thereof, has been determined. There is merit in this assignment.

As co-executors of the Joseph Sr. estate, Joseph Jr. and Emil filed both federal estate and state inheritance tax returns in which the trust assets were listed as assets of the Joseph Sr. estate. The amounts of these taxes have not been finally determined. As co-trustees, Joseph Jr. and Emil made neither a federal estate nor a state inheritance tax return. The liability of the **49 trust estate for its pro rata part of the taxes payable by the Joseph Sr. estate was not ruled below. The parties here agree that, absent state statutory requirements or the provisions of the will or trust declaration, the trust estate is not liable for such pro rata of federal estate taxes, and that no such statutory requirements exist in Missouri.

Joseph Sr.'s will was silent as to taxes. One of the provisions of the trust declaration authorized the successor trustees 'to pay any and all taxes which may be assessed against the property included in this trust, whether state, municipal, federal, income or inheritance taxes, and to sell part of the trust estate property for such purpose.'

Defendants assert that this tax provision 'relates to taxes 'assessed' against the property included in the trust, and federal estate taxes are not 'assessed' against the trust property.' Furthermore, they contend, as the provision does not mention 'estate' taxes, the intention was to exclude federal estate taxes.

We cannot so strictly construe the tax provision. On the contrary, it is quite clear that Joseph Sr. Intended that the trust estate be obligated for *any and all* taxes which his own estate was legally obligated to pay upon the trust assets. See Priedeman v. Jamison, 356 Mo. 627, 202 S.W.2d 900. Assuming that federal estate taxes are not technically 'assessed' against trust assets, we do not believe that Joseph Sr. used 'assessed' in a narrow sense or that he meant a technical 'tax assessment.' Similarly, we think that he used 'inheritance taxes' in the broad sense of 'state or federal 'death duties' and not with any thought of including state 'inheritance' taxes and excluding federal 'estate' taxes. See Ferguson v. Massachusetts Audubon Soc., 316 Mass. 436, 55 N.E.2d 891.

The very presence of the tax provision shows Joseph Sr.'s intention to shift from his own estate some of the taxes for which that estate would be liable on account of the trust assets. And we think he meant just what he said—'any and all taxes.' See Priedeman v. Jamison, supra. And note again the authorization for the sale of part of the *511 trust assets for the purpose of paying the tax obligations he had imposed upon the trust estate. Read in its entirety, the tax provision reflects a clear intent to require the trust estate, and ultimately the trust beneficiaries, to bear its and their shares of all 'death duties,' including the federal estate tax. It is immaterial whether the tax provision was mandatory. The co-trustees have shown their intent to act under this authorization and to reimburse the Joseph Sr. estate the trust estate's pro rata share of these taxes when same are ascertained. They cannot do so until the amounts are finally determined. They may have to sell some of the trust assets to secure funds with which to pay the taxes. They must act in this matter prior to final distribution. We hold that the co-trustees are entitled to reimburse the Joseph Sr. estate the trust's pro rata share of these taxes and take credit therefor in the final distribution of the trust estate. See In re Poe's Estate, 356 Mo. 276, 201 S.W.2d 441.

We need not rule whether the pendency of certain litigation between some of the instant parties would justify the co-trustees' failure to make distribution. However, the pendency of one of the suits is of significance, though not in justification either of the co-trustees' failure to seek equity's guidance or their failure to make distribution. Briefly, Mrs. Wheeler, as administratrix d. b. n. of her mother's estate, sued Joseph Jr. and Emil, as co-executors of Joseph Sr.'s estate, for alleged conversion of assets of her mother's estate by Joseph Sr. as administrator of her mother's estate. Among the properties involved were three loans listed upon Exhibit A, totaling \$12,500. See State ex rel. Lipic v. Flynn, 358 Mo. 429, 215 S.W.2d 446. In the Matter of the Estate of Emma Lipic, Deceased, an appeal in a suit between Mrs. Wheeler and Joseph Jr. and Emil, involving the same issue of discovery of assets, is now pending in this court.

We agree with the trial judge that, in all probability, had the successor trustees promptly disclosed the existence of the trust and asked judicial guidance in its **50 administration, the other suits would not have been instituted. In any event, the fact remains that Joseph Jr. and Emil continued to withhold from the other beneficiaries information they were obligated to disclose. We have found that the co-trustees were not obligated to try to collect the \$6650 from their father's estate and were not liable for interest thereon. The record shows that they accounted for all of the trust assets that came into their possession and for all income thereon actually received thereafter. Defendants do not contend otherwise. On the other hand, the co-trustees' deliberate suppression of knowledge of the trust's existence, their secret acceptance of the trusteeship and their surreptitious administration of the trust for nearly two years—during all of which time, they conceded, they did *512 'perceive here a divided duty'—cannot be justified. For twenty-two months they declined to seek the advice and guidance of a court of equity in the administration of the trust. Their conduct may have been the cause of the other litigation which, in turn, may still further postpone distribution of the trust's final net assets. Knowing that final distribution could not be made until the tax questions and the matters involved in the other suits were settled, they failed, for over a period of three years, to reinvest funds. Like the servant who traded not with his one talent but 'went and digged in the earth and hid his lord's money,' these co-trustees neglected to secure any interest whatsoever upon substantial portions of the trust assets. Their conduct requires that they be held liable for 6% interest on these funds, \$1994.59.

We also believe that by their conduct, especially by their delay in seeking the aid of a court of equity, the co-trustees have forfeited any rights to compensation for their services or to reimbursement for their attorneys' fees. See Restatement, Trusts, Sec. 243; Bogert, Trusts & Trustees, Vol. 4, Pt. 2, Sec. 979; Anno. 110 A.L.R. 566; Wiegand v. Woerner, supra.

However, as the co-trustees did not embezzle or appropriate any of the trust assets they received when their father died, and, as we have ruled the principal issue in their favor, they should not be required to pay all of the costs below. Such costs, accrued and hereafter accruing, should be assessed equally among the six beneficiaries,—the four plaintiffs and the two defendants. See Wiegand v. Woerner, supra. (These costs include the allowances of \$1000 for services and \$35 for expenses of the special master. The record shows that the trial judge did not abuse his discretion in making these allowances.) One-sixth of the appeal costs are taxed against each of the six parties.

The judgment is reversed and the cause is remanded with directions to enter judgment as of the date of the original judgment, October 16, 1950, in conformity with our rulings herein, and to retain jurisdiction of the cause for the purposes of supervising further administration of the trust by the co-trustees and final distribution among the six beneficiaries.

VAN OSDOL and COIL, CC., concur.

PER CURIAM.

The foregoing opinion by LOZIER, C., is adopted as the opinion of the court.

All concur.

All Citations

362 Mo. 499, 242 S.W.2d 43

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349 S.W.2d 865 Supreme Court of Missouri, Division No. 2.

Frank P. SEBREE, Administrator with Will Annexed of the Estate of Sarah Rosen, Deceased, Morris Rosen, Rose Silverman, and Meyer Rosenwasser, Appellants-Respondents,

v.

Jacob ROSEN, Jacob Rosen, As Trustee of the Trust Estate Created under and by Virtue of the Purported Inter Vivos Trust Agreement of Pete Rosen and Sarah Rosen, Dated May 22, 1952, and Trust Agreement Supplements Thereto Dated July 24, 1953, and February 27, 1954; Jacob Rosen, as Executor of the Estate of Pete Rosen, Deceased, Betty Rosen, Sue Hyken, Carl Hyken, Mary Bodney, Bernard Bodney, Sam Rosen, and Avrom Rosen, Herbert Rosen, Joyce Rosen, Beverly Hyken, David Rosen, and Mary Sue Rosen, Pro Ami, Respondents-Appellants, Raymond Rosen and Charlotte Rosen, Pro Ami, Sylvia Bain, Dorothy Hyken, Melvin Silverman, Sarah Lena Mendelsohn, and Dorothy Rosen, Respondents.



Motion for Clarification and Modification of Opinion Denied Oct. 11, 1961.

Synopsis

Suit to set aside inter vivos trust agreement and certain deeds after death of settlors and grantors, to remove trustee, and for other relief. The Circuit Court of Jackson County, J. Donald Murphy, J., rendered judgments upholding validity of trust and generally favorable to defendants, but decreeing removal of surviving trustee and an accounting, and both plaintiffs and defendants appealed. The Supreme Court, held, inter alia, that the chancellor's finding that inter vivos trust agreement was voluntarily executed without undue influence or fraud was supported by substantial evidence, but that the best interests of trust estate required that surviving trustee be removed and required to account for losses occasioned to trust estate.

Judgments affirmed in part and reversed in part and cause remanded with directions.

Attorneys and Law Firms

*870 Terence M. O'Brien, Daniel S. Millman, Kansas City, for Frank P. Sebree and others.

Walter A. Raymond, Kansas City, for Jacob Rosen and others.

Opinion

BOHLING, Commissioner.

This review involves controversies between the children, heirs at law, of Pete and Sarah Rosen (formerly Rosenwasser), with other descendants of said Pete and Sarah having contingent interests joined as parties defendant. The trial was under an amended

petition of fourteen counts. A separate trial was ordered on Count XIV, the court retaining jurisdiction thereover. The record is lengthy. It is not possible to refer to all of the many and varied factual situations and statements of the deceased settlors within reasonable limits. The purpose of the suit was to set aside an inter vivos trust agreement, including supplements, and certain other deeds and agreements of the parents or the survivor, and to recover and decree title to specific real preperty, for damages, and other relief. Some defendants, children of plaintiffs, joined in the allegations and prayers of plaintiffs' petition. The decree was, generally speaking and so far as material here, in favor of the defendants, subject to exceptions presently noted. Plaintiffs have appealed and present issues involved only in Counts I, III, VII, and VIII of their petition. Defendant heirs, their spouses, children, and attorneys have appealed and attack that portion of the decree on Count III removing the settlors' surviving trustee, Jacob Rosen, and appointing the City National Bank and Trust Company of Kansas City, Missouri, as successor trustee, and they also attack on the ground of inadequacy that part of the decree awarding \$20,000 out of the trust estate to each of the two attorneys for the defendants. Count I involves the validity of a trust estate consisting of real property appraised at \$545,741. The appeals come to this court. Walsh v. Southwestern Bell Tel. Co., 331 Mo. 118, 52 S.W.2d 839[1].

Defendants have filed a motion to dismiss plaintiffs' appeal for violations of Civil Rule 83.05, V.A.M.R. We find the brief of plaintiffs-appellants subject to criticism, as is also defendants-appellants' brief. However, we conclude that the interests of justice require a decision on the merits. Civil Rule 83.09. Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 373[3], 63 A.L.R.2d 504. The motion to dismiss is overruled.

Pete and Sarah Rosenwasser lived in Warsaw, Poland, with their children Meyer, Rose, Morris, Mary, and Charles. Pete came to Kansas City, Missouri, in 1910. Sarah and all the children except Meyer, the eldest, who had to be left behind on account of a scalp rash or disease, joined him here in 1913. The family name was changed to 'Rosen.' Jake, Sam, and Sue Rosen were born in the United States. Meyer, who came to the United States in 1920, uses the original name, Rosenwasser. Charles never married, had *871 no children, and was killed during World War II.

Pete died at the age of 71 on June 14, 1954, and Sarah, 74 years old, died November 17, 1954.

The plaintiffs are Morris Rosen, Rose Silverman, and Meyer Rosenwasser (sometimes referred to as 'plaintiff heirs'), and Frank P. Sebree, as administrator of the Estate of Sarah Rosen, deceased.

The defendants are Jacob Rosen, as trustee of an alleged inter vivos trust agreement of Pete Rosen and Sarah Rosen, and two supplements thereto, as executor of the estate of Pete Rosen, deceased, and individually, Betty Rosen (Jake's wife), Sue Hyken, Carl Hyken (Sue's husband), Mary Bodney, Bernard Bodney (Mary's husband) (sometimes referred to as 'principal defendants'), Samuel Rosen, and fourteen other lineal or in-law relations of Pete and Sarah Rosen, including the grandchildren of the settlors, joined as parties defendant in Counts I and XIV on behalf of themselves and all others of their class yet unborn.

Plaintiffs Morris Rosen, Rose Silverman, and Meyer Rosenwasser, and defendants Jacob Rosen, Sue Hyken, Mary Bodney, and Samuel Rosen are all the surviving children of Pete and Sarah Rosen. We frequently refer to the parties by their first names.

I. Counts I and VIII. The evidence bearing on Count I and Count VIII overlaps.

Count I is an action (a) to set aside an inter vivos trust agreement executed by Pete Rosen and Sarah Rosen, and supplements thereto, collectively referred to as the 'big trust,' on the alleged grounds that Pete Rosen, Jacob Rosen, Betty Rosen, Carl Hyken, and Sue Hyken fraudulently conspired to and did unduly influence and trick Sarah Rosen into executing the same to obtain preferential treatment in the benefits and assets thereof; and (b) for ancillary relief.

The big trust, the original inter vivos trust agreement 'by and between Pete Rosen and Sarah Rosen, husband and wife, hereinafter called the 'Settlors,' and Dr. Jacob Rosen and Pete Rosen, hereinafter called the 'Trustees," was executed and recorded on May 22, 1952, and the supplements thereto, with warranty deeds transferring additional property of the settlors to the trustees, of July 24, 1953, and February 27, 1954, were recorded August 3, 1953, and March 1, 1954, respectively. The corpus of said trust consisted of entirety estates held by Pete and Sarah in real estate. Pete and Jake were named joint trustees and, upon Pete's

death, Jake became the sole trustee. The power of revocation and the right to withdraw or add assets to the trust estate were reserved only during the lifetime of Pete. It contained a spendthrift provision. It was to continue for twenty years after the death of the surviving settlor, the settlors or said survivor being the sole beneficiaries for life. It provided for the distribution of the net income. The remainder interest in the income for the twenty-year period and the corpus upon termination were to be distributed to the settlors' children as follows: Jacob Rosen, 30% of net; Morris Rosen, 15% of net; Sue Hyken, 15% of net; Mary Bodney, 15% of net; Meyer Rosen, 10% of net; Samuel Rosen, 5% of net; Rose Silverman, 10% of net; or to the lineal descendants, if any, per stirpes, in the event of the death of any of said remaindermen, otherwise to swell the shares of the surviving remaindermen or their lineal descendants.

Plaintiffs in seeking to set aside the big trust stress the disparities in the distributions made by the settlors.

Count VIII is an action based on a fraudulent conspiracy between Jacob Rosen, Betty Rosen, Sue Hyken, Carl Hyken, Mary Bodney, and Bernard Bodney to unduly influence, misrepresent, coerce, and trick Sarah Rosen into executing a written document, dated July 13, 1954, referred to as the 'forgiveness agreement,' *872 purporting to forgive, release, and annul various receivables, face amount \$46,000, owed Sarah and allegedly now owed the estate of Sarah Rosen, deceased, by said defendants and by plaintiff Morris and his wife, Dorothy Rosen; to set aside a purported warranty deed to Mary Bodney of real estate described in a contract to sell said real estate, on which there remained a balance unpaid, which constituted a receivable described in said forgiveness agreement; to set aside all purported satisfactions of said receivables, including the aforesaid contract of sale, and cancellations of deeds of trust securing said receivables, whether recorded or not; and to restore the same to full validity and enforceability against the respective makers thereof, and for ancillary relief.

The appealing defendants in their joint and several answers admitted certain allegations of the different counts in plaintiffs' petition but, as stated by plaintiffs, denied some of the formal allegations and all the effective allegations of the petition with respect to each count involved in this review.

By his will, executed February 24, 1954, Pete gave \$5 each to Rose, Meyer, and Sam; then 25% of the remainder to Sarah; and distributed the balance of his estate as follows: 10% to Mary, 15% to Morris, 25% to Sue, 40% to Jake, and 10% to Jewish charities to be determined by his executor. Jake duly qualified as executor of Pete's estate.

All counts involved on this appeal are in equity and for trial de novo. We state our view on some general contentions of the parties.

'Our review is with deference to the findings of the trial chancellor on irreconcilable, directly conflicting, verbal testimony on fact issues, and his findings are usually sustained unless the overwhelming weight of the evidence appears to be against them.

* * * The rule does not extend to evidence in the form of depositions * * * or documents * * *.' Creek v. Union Nat. Bank, Mo., 266 S.W.2d 737, 747[1, 2]. See also Barr v. Snyder, Mo., 294 S.W.2d 4, 8[2–4]; Schlanger v. Simon, Mo., 339 S.W.2d 825, 828[1, 2]. The credibility of the witnesses is for the trier of the facts and the fact that witnesses are not contradicted is not decisive. Mueller v. Mueller, Mo., 318 S.W.2d 365[4–6]; Poole v. Campbell, Mo., 289 S.W.2d 25, 32 [16].

The briefs make many references to the chancellor's findings of fact and conclusions of law, some without citations to the supporting evidence in the transcript. As stated in Lee v. Lee, 258 Mo. 599, 604[I], 167 S.W. 1030, 1032: 'In chancery the question is not what the chancellor instructed himself to do, or how he talked the matter over with himself; the question is: *Did he seek equity and do it?*' References to the chancellor's conclusions should be supported by references to the evidence establishing them.

Plaintiffs say the trial court erred in holding they had the burden of proving the allegations of Counts I and VIII by clear, cogent, and convincing evidence; that a clear preponderance of the substantial evidence is sufficient.

We have said repeatedly in equity cases involving fraud, undue influence, or mental incapacity: 'Further, appellant seeks the cancellation of a deed. Such cancellation requires the exercise of the most extraordinary power of a court of equity, and it ought not be exercised except in a proper case, and the evidence to justify cancellation should be clear, cogent and convincing.'

Dillard v. Dillard, Mo., 266 S.W.2d 561, 563[2–4]. See Mueller v. Mueller, Mo., 318 S.W.2d 365[3, 11]; Gaugh v. Webster, Mo., 297 S.W.2d 444 [2, 3]; Herrold v. Hart, Mo., 290 S.W.2d 49, 55[2, 11]. Hamilton v. Steininger, 350 Mo. 698, 168 S.W.2d 59, 68, reversing a decree setting aside deeds, states: 'While we think the facts and circumstances in evidence in this case were sufficient for a jury in a *873 law case to draw the inference that Steininger induced, suggested or caused deceased to execute the deeds, they are not sufficient in our opinion that a court of equity should draw such an inference in view of all the evidence in the record.' See Early v. Koelbel, Mo., 273 S.W.2d 312, 317[2, 5, 6].

Plaintiffs' cases involved jury trials (Winn v. Matthews, 235 Mo.App. 337, 137 S.W.2d 632[2, 3]; Rex v. Masonic Home, 341 Mo. 589, 108 S.W.2d 72[10, 11]; Berkemeier v. Reller, 317 Mo. 614, 296 S.W. 739[16]). The dictum in Wann v. Scullin, 210 Mo. 429, 109 S.W. 688, 704: '* * * In a suit in equity much less is required to sustain the charge of fraud than in an action at law for fraud and deceit,' is an observation we do not find repeated in later cases. Plaintiffs' authorities do not establish error.

Plaintiffs say the chancellor 'erred in refusing to hold a presumption of undue influence arose from confidential and fiduciary relationships proved, which constituted substantial evidence placing the burden of proof on principal defendants.'

Plaintiffs' case of Loehr v. Starke, Banc, 332 Mo. 131, 56 S.W.2d 772, 776[3], held that where substantial factual evidence permitted of a legitimate inference, raised a factual presumption, of undue influence, the issue remained in the case and did not disappear upon the introduction of rebutting testimony. Proof of a confidential relationship, without more, does not raise an inference of undue influence or fraud, or shift the burden of going forward with the evidence upon the beneficiary, or authorize the cancellation of the instrument. The Loehr case, supra, 56 S.W.2d 778 [6]; Horn v. Owens. Mo., 171 S.W.2d 585, 592[15]; McCoy v. McCoy, 360 Mo. 199, 227 S.W.2d 698, 706[14–19]; Buckner v. Tuggle, 356 Mo. 718, 203 S.W.2d 449, 452[1, 3]. Plaintiffs' cases of Pulitzer v. Chapman, 337 Mo. 298, 85 S.W.2d 400, 409[3], and Been v. Jolly, Mo., 247 S.W.2d 840, 854[4–11], are not out of harmony with the holding in the Loehr case.

'[I]nfluence to be undue must arise to the mark of such overpersuasion, coercion, force or deception as breaks the will power of the person overinfluenced and puts in its stead the will of another. * * * The law does not ban as undue the natural influence of affection or attachment or the desire to gratify the wishes of one beloved and trusted. * * * 'Horn v. Owens, supra, 171 S.W.2d 592[12]. See also Glover v. Bruce, Mo., 265 S.W.2d 346, 353[6, 7]; Rich v. Baer, 361 Mo. 1048, 238 S.W.2d 408, 418[8].

Horn v. Owens also states (supra, 171 S.W.2d loc. cit. 593): 'Notwithstanding the confidential relation between decedent and the defendant [granddaughter], the defendant in urging the conveyance or the gift had the right to exercise influence so long as it was not so coercive or importunate as to deprive decedent of her free agency.' See also Phelan v. Gockel, Mo., 278 S.W.2d 758, 764[4].

The undue influence must be present and sufficient to destroy the free agency of the grantor at the time of executing the instrument to invalidate it. McCoy v. McCoy, supra; Clark v. Leonard, Mo., 232 S.W.2d 474, 478 [2]. Consult Lape v. Oberman, Mo., 284 S.W.2d 538, 542[5].

In Holland v. Anderson, Mo., 196 S.W.2d 175, 192; Shafer v. Hatfield, 359 Mo. 673, 223 S.W.2d 396, 401[3], and Hershey v. Horton, 322 Mo. 484, 15 S.W.2d 801, 808[2], cited by plaintiffs, the decree cancelled the deeds. Consult Sullivan v. Winer, Mo., 310 S.W.2d 917, 922; Phelan v. Gockel, supra; Rich v. Baer, supra, 238 S.W.2d 408, 414[7, 8], affirming decrees sustaining the deeds.

The parties agree that fraud and undue influence may be inferred from facts and circumstances. Herrold v. Hart, Mo., 290 S.W.2d 49, 55[6, 7]. Mere suspicion or opportunity is not sufficient. *874 McCoy v. McCoy, supra, 227 S.W.2d 698, 705[12, 19]; Ulrich v. Zimmerman, 349 Mo. 772, 163 S.W.2d 567, 574[12].

The chancellor considered the plaintiff heirs, their descendants and spouses competent witnesses and defendant heirs and their spouses incompetent witnesses under Section 491.010 RSMo 1959, V.A.M.S., the 'Dead Man's Statute,' to acts or statements of Pete and Sarah bearing on the validity of the instruments involved. There is much hearsay testimony on behalf of plaintiffs, admitted over objections, of statements of decedents, Pete and Sarah Rosen, before and after the execution of the instruments

involved, which was admitted to show only the state of mind of the speaker, his or her feelings toward the plaintiffs or defendants and susceptibility to fraud or undue influence, and not as substantive evidence of the truth of the facts in the statements. State ex rel. Smith v. Hughes, 356 Mo. 1, 200 S.W.2d 360, 361[2]; Edinger v. Kratzer, Mo., 175 S.W.2d 807, 814[15, 16].

Pete first had a small shoe repair shop and second-hand shoe store. In the early 1920's he was operating two stores and becoming interested in real estate. Sarah was at the old store. He later operated other stores. For two or three years Pete and Sarah operated a store in Sedalia, selling out to Morris and returning to Kansas City in 1942. Soon after 1942 Pete devoted his time to dealing in real estate. He would purchase equities, taking the title in Sarah's and his names by the entirety, in income producing properties, usually 'cheap properties,' and let the income pay the taxes, mortgages, and upkeep. In the 1940's Jake, and a little later, about 1946, Carl began investing in partnership with Pete and Sarah in real estate. Carl qualified himself as a real estate agent and through Pete's efforts became associated with the Moffett Realty Company, managing the properties of Pete and Sarah and other members of the Rosen family. Pete understood real estate and worked with and taught Jake and Carl his method of operation.

The family first lived in the rear of the first store, but in 1943 of 1944 Pete and Sarah moved to their six-apartment building at 4006–8 Main, occupying an apartment on the first floor until their deaths. Sue and Carl had an apartment across the hall. Later, perhaps after Sarah broke her hip in 1948, a doorway was made in the kitchen between the two apartments. In 1948 Mary and Ben moved into one of the upstairs apartments and, when Sue and Carl moved to their new home about 1952, they moved to the vacated first floor apartment. Plaintiffs state 'neither Sue nor Mary paid rent.' The transcript reference discloses: 'Q. She [Sarah] did say, I think you testified, that Mary got free rent, isn't that right? A. No, she never told me that.'

Pete was intelligent and successful in business. He officated at Jewish high holy days; read and wrote 'Jewish'; spoke, understood, and read printed English. According to plaintiffs he was a robust, healthy, strong-willed, arrogant man, tolerating no questioning; his decisions were his own, and not the decisions of his family or friends; Jake, Sue, and Carl could not persuade him; he never displayed any affection for Sarah, belittled, insulted, cursed, and otherwise mistreated and abused Sarah.

The Moffett Realty Company managed the Rosen properties. Mrs. Fanny B. Moffett, widow of its originator and active in its management, testified she first met Pete and Sarah in 1943 or 1944 when Pete brought Sarah to the office and discussed the purchase of a piece of real estate; she saw them in her office and at their home on different occasions; Pete told her Sarah had taken care of the children, raised a large family, and worked hard in his stores until they accumulated enough money; knew how to cook for him and, for the last five years of his life, told her he tried to go home at or shortly after noon. Sarah never complained of Pete's treatment; *875 said Pete had enough money; wished he would take it easier, and after his death complained of being lonely. There was corroborating testimony from, among others, H. G. Pope, a lawyer who handled Pete's legal real property matters from 1945 until Pete's death, Vassie Hopkins, who performed maid service at the Rosen home once or twice a week for five years, Joseph S. Gardner, a neighbor, and Lonnie J. Wright, who contracted work on the Rosen properties. A will executed by Pete in 1950 gave all his property, real and personal, to Sarah and appointed Jake executor. This and other testimony, the many deeds to Pete and Sarah by the entirety, and Pete's wills (whether valid wills or not) lead to the conclusion Pete was not mistreating Sarah as plaintiffs would have us believe.

There was testimony, mainly from plaintiffs, their spouses, and children, that Sarah could not read or write, including numbers; that she spoke in Jewish and spoke English only in small words and sentences, very brokenly; that she could make change for small amounts, but not for a large bill, \$5 or \$10; and that she worked in Pete's stores from 1914 to about 1942, twentyeight years. Disinterested witnesses, bankers, a doctor, lawyers, realtors, neighbors, maids, most of whom did not understand Jewish, testified to conversations with Sarah in English without complaint from her; that she spoke English with an accent, but could be understood without trouble. Sarah waited on customers in the stores, operated a cash register, and made change. As early as 1924 she was paying help at the home in cash and deducting purchases at the store. She made oral agreements for repairs on property they owned and for improvements at the home. From 1931 to 1954 she had an active checking account and, although her signature was an illegible scrawl, she signed her checks; had savings accounts, and would come to the bank for change at the store, the transactions being in English. We think Sarah was a woman of average intelligence and as time passed that she spoke and understood English adequately for ordinary business transactions. Pete must have considered her qualified to protect their interests.

Plaintiffs had testimony that Sarah was not healthy; suffered from milk leg, which caused her to limp, from about 1914; fell and broke a hip in February, 1948, was in a hospital for a day or two and then at Jake's and Betty's home for six weeks, and afterwards used a cane or held onto something when walking. Dr. Elias E. Zirul, Sarah's personal physician, testified she was hospitalized from April 17 to May 2, 1952, for diabetes (20 years' duration, according to the doctor's history), a diabetic ulcer of the right leg, moderate hypertension and osteoarthritic pains. Subsequent hospitalizations (September 5 to 21, 1952, February 11 to 23, 1954, July 8 to 13, 1954, and November 5 to 14, 1954) were mostly for restabilization of patient's insulin, attributable to failure to stay on diet. Released November 14, 1954, ambulant and in good condition, Sarah's death on the 17th was clinically a cardiac problem. Attorney Charles Rubins testified Sarah was not an invalid when she executed the big trust in his office.

Jake became an osteopathic physician about 1935; attended Pete and Sarah, and administered insulin to Sarah daily at Dr. Zirul's direction for a number of years before her death.

Plaintiffs say Sarah's mental capacity was poor, referring to testimony of an inlaw lay witness. Dr. Zirul testified her mind was clear up to the time she died, and lay witnesses for defendants testified her memory was very good.

Some plaintiffs had information of the big trust, which had been promptly recorded. Plaintiff Rose and her husband testified that about 1952 Pete told them Jake got a lawyer to make a trust for him which went into effect when Pete died; that the City National Bank and Trust Company was trustee, and all the children were equal; that he made it because Jake *876 told him people couldn't take your property away if you had a trust; that the lawyer wanted \$600 for it; that he didn't know what it cost because Jake paid for it. There was corroborating testimony from plaintiff Morris, who stated that Pete told him early in 1952 that he went to lawyer Charles Rubins to make a trust. Rose testified Pete said he did not trust Rubins.

Plaintiffs and their relatives testified that on many occasions, before and after Pete's death, Sarah said she loved all her children equally. Some of the family were at Sarah's on the morning of Pete's funeral when Jake said he had found Pete's will and read it. Rose's husband testified Sarah then started to pound the table and scream (quoting plaintiffs-appellants' brief): 'I don't care what your crazy father did, all my children are my flesh and blood, I want them all to be equal. I haven't got any five-dollar children, Jake, I want you to change it, do you hear, Jake, be sure, Jake, I don't care what your father said.' Several plaintiffs' witnesses stated Jake said he would change Pete's will. Others testified Sarah said she had no 'small coin' children and, on different occasions, 'all my children are alike.' Meyer testified Sarah did not understand the meaning of 'percentages'; thought it was something like interest on money. Rose, Meyer's wife, and Morris's wife gave testimony that Sarah said Jake was taking Pete's place and was 'the boss now.' Rose testified Jake told Sarah Pete wanted her to have \$200 a week, and Sarah answered, 'I thought your father didn't love me'; and later that Sarah told her Jake was giving her \$50 a week and putting \$150 in the bank because she didn't need \$200. Meyer's wife testified Sarah said 'without my signature nobody can do anything' and later said Jake 'didn't need her signature.' Plaintiffs and their relatives testified that Sarah said Morris was her best son; he was handy with little things, like repairing things.

Plaintiffs say Sarah was afraid of Pete and of Jake; but other testimony from plaintiffs of equal weight warrants findings she spoke up in front of Pete and in front of Jake.

Disinterested witnesses testified that Sarah told them Rose neglected her and when Rose visited her she fussed at her, she couldn't do anything to please Rose; that Rose's visits 'upset' her; that Meyer never came to talk to Pete and her; that Morris was a good boy, would do things around the house, but if he wanted money he should work for it; that Dorothy, Morris's wife, only stopped to see her once in a great while; that she liked all her children; that Betty was good to her, took her shopping, as did Sue. Dorothy told Sarah in the presence of one witness: 'I don't kiss anybody's _____.'

Plaintiffs say Sarah never understood the inter vivos trust, didn't know what properties were in it or the extent or value of the Rosen assets. Properties known as the Palace Hotel and 8th and Main were in the trust. The trust received \$66,888.40 September 22, 1954, for the latter in an eminent domain proceeding. Plaintiff Rose testified Sarah told Jake the second day after Pete's death to see that Morris got the Palace Hotel "because he had no way of making a living," and Jake answered, "all right, all right," In September, 1954, Sarah in the presence of Jake gave Rose, Meyer, and Morris a \$2,000 check each, stating, according

to plaintiffs, the money was from the Main Street condemnation, and Jake did not correct her. These checks were from a joint bank account of Sarah and Jake.

In 1950 or 1951, Pete, in the presence of Sarah at the home, listed their real estate holdings, about twenty parcels, the amount owed and the value of the equity in each, to George L. Edwards, a broker, to obtain a loan, all of which was read aloud. These equities amounted to \$150,000 to \$200,000. Mrs. Moffett testified that on any number of occasions Sarah, pete, and she discussed deeds and property transactions, like anybody else; that when she took Pete's and Sarah's acknowledgements to an instrument, she discussed the instrument with *877 them and always had personal knowledge of their signatures. One plaintiff admitted Sarah knew about certain properties. Attorney H. G. Pope testified that on a number of occasions Pete had him come to the home and Pete, Sarah, and he would discuss the transaction and Sarah would express her approval. Sarah told Dr. Zirul: 'Don't worry, we got plenty money.' There was other corroborating evidence. We think Sarah had an adequate knowledge of their property.

We are not impressed with plaintiffs' testimony that Pete would forge Sarah's signature. There is no evidence that Sarah's signature was forged on any instrument involved on this appeal.

Mrs. Moffett testified Pete brought Carl Hyken to her office in 1946 or 1947; that, over the years, Pete said Carl was like a son to him, knew how to run a business, could make money. He wanted Carl in the real estate business and after five years succeeded in getting Carl associated with the Moffett Realty Company. She testified that Pete wanted Dr. Rosen to see properties before he bought; that Pete said that Dr. Rosen was a capable man and he depended on him; Betty Rosen was very kind to Sarah, like a daughter; Sue was very attentive, looked affter her mother; Morris wasn't as successful as the other boys, wasn't able to take care of himself, liked to drink too much, and he, Pete, wanted to arrange it so Morris would be taken care of; he didn't like some things about Dorothy; Rose wasn't very attentive to her parents, didn't come to see her mother very much, Meyer was successful and had plenty of money. Mrs. Moffett testified Sarah told her that Jake came past every morning and gave her insulin, and she didn't know what she would do without him; that Betty was very kind to her, just like one of her own children; that Carl was bright and witness ought to have him in her office, was nice to her and Pete; she didn't know what she would do without Sue and missed Sue after Sue moved; she felt better after Mary moved downstairs and she missed Mary during the day. Pete told Mrs. Lois Silby he had children who would do anything for Sarah and him and other children who did not want to know about them.

Attorney H. G. Pope testified that soon after 1945 Pete instructed him to take transactions up with Jake Rosen and Carl Hyken; that Pete, Jake, Carl, and witness would meet and discuss the transaction; that Pete would ask the advice of Jake and Carl and it would be determined what was best to do; that this continued up to Pete's death; that Pete said he had a lot of confidence in Jake and Carl, and that Pete never instructed him to consult any of the other children.

There was testimony from one or more of the plaintiffs, particularly Rose and her husband, or members of their families that following Pete's death Jake, among other statements, said he made a trust for Pete to protect Pete's property against any lawsuit; that Pete didn't want it, refused to and he, Jake, paid for it; that he knew more about trusts than any lawyer because he helped Pete make a trust; that if it had not been for him Pete would not have made a will, that on June 14, 1954, the date of Pete's death, Jake pounded the table, said he was boss and wanted all the books and papers; that later Jake said Sarah did not understand the trust, nobody understood it except him; that, about five months before Pete's death, Carl said Pete was sick and had given him permission to do anything he wanted to do; that Sue said she could get things from Sarah by pestering her; that Mary told Rose a few months before Pete died they better watch Jake and Carl and when Rose asked what property was in the trust, Mary said it was no use, Jake and Carl would get it any way.

Plaintiff Morris Rosen served two terms in the Missouri Penitentiary for burglary and larceny, which upset Pete. Pete later told Morris to keep out of his sight, and Morris left home. Morris and his wife testified to the effect Jake said there was \$57,000 cash in Pete's lock box, whereas other evidence established there was no large *878 sum in Pete's box and his inventory showed personal property of only \$8,418.06. Notwithstanding Morris's denials, there was evidence, including notations on checks at the time he cashed them, that he borrowed \$1,000 from Carl in March, 1954, and other checks of Carl were issued to him in payment of partnership transactions between them and in settlement of their partnership affairs. Morris, his wife, and her sister testified that from about 1942 up to about Pete's death Morris gave Sarah \$10 to \$20 from week to week on Pete's and Sarah's household expenses. Sarah's bank records alone show that after 1931 she had ample funds in checking and savings accounts and was not

dependent on \$10 to \$20 a week from Morris. A disinterested witness testified that when Morris and he were talking about the fact they could use \$5,000 or \$10,000, Morris said that Sarah was preventing him from getting that kind of money from Pete.

Meyer Rosenwasser testified he left home in 1928 after a violent quarrel with Pete over Morris; that, being the first-born son, he considered himself a double heir, entitled to twice as much as any other child, of Pete's and Sarah's property, and the trust should have been made that way. There was testimony that Meyer, throughout the years, held it against his parents for leaving him in Europe.

Plaintiff Rose and Morris Silverman eloped. This displeased Pete and Sarah. Each testified they visited Pete and Sarah two, three, or four times a week, prior to Pete's death, unless prevented by sickness. Rose testified that she visited Sarah almost daily thereafter; that upon taking Sarah in her automobile, she had to help Sarah up the steps to the apartment; that she saw the driveway at the apartment but did not know it led to the rear where one could enter and avoid going up the steps. They never went to Sedalia during the two or more years Pete and Sarah were there. Rose's husband testified that Pete 'always told me the truth, I know that. Q. You say he always told you the truth? A. No, I wouldn't say that, he never did tell me the truth'; that he would never do anything to vilify Pete's name.

There was testimony that Sam left home after trouble with Pete. Sam became a doctor and lives in Detroit.

Attorney Charles Rubins testified that Pete, for whom he had performed legal work, after two discussions at Rubins' office in November and December, 1951, about preserving his real estate for himself and wife and their children so it would not be sold after their deaths, decided to have an inter vivos and not a testamentary trust, and instructed him to prepare it. Rubins, in response to Pete's request, went to the Rosen apartment in January, 1952, and different provisions of a trust were discussed by Pete, Sarah, and Rubins, and explained to them by Rubins. Rubins testified he understands but does not speak Jewish and their conversation was in English; that Sarah spoke in English and Jewish; that, among other things, Pete wanted the right of revocation as long as he lived; that Sarah, being asked, said that if Pete died she wanted it to stay the way it was; that he told them Pete could be trustee and they could have another trustee, and Sarah suggested Jake, saying he had taken care of the properties and knew about them; that Jake was agreed upon, and other provisions were discussed and agreed upon. Pete brought the names and distributions to the children to Rubins about two weeks before the trust was executed and then some one, Pete according to his best judgment, came in with the legal descriptions of the properties.

Upon finishing the document, Rubins, at Pete's request, delivered a copy to Pete and Sarah at their home, told them to read it and let him know what to do. Under arrangements made by Pete over the telephone, Pete, Sarah, and Jake came to Rubins' office in the early afternoon of May 22, 1952. Rubins testified that, with the exceptions of the caption and descriptions, he read all the provisions of the trust, a sentence *879 or two or a paragraph at a time, stopped and asked them if they understood it and if it was all right, and, upon each agreeing, continued in like manner until he finished the whole of the body of the instrument. Arthur J. Kase and Harold Waxman were called in. The trust was signed by Pete and Sarah (Kase and Waxman witnessing Sarah's 'mark'), and by Pete and Jake as trustees. Waxman took Pete's and Sarah's acknowledgements and also had them swear to their signatures. Rubins testified Jake definitely had not discussed the trust with him; that, a few days before Pete telephoned, Jake asked him when his parents should come to the office to sign the trust; that Jake brought his parents to the office May 22, 1952; that, while not positive, he was of the opinion Jake was not in the room during the whole of the reading of the trust to the parents.

Mr. Waxman testified that over a sixmonth period prior to May 22, 1952, Pete and Jake, separately and sometimes together, on a half-dozen occasions, and Carl Hyken, alone, on one or two occasions came to Rubins' office. Rubins testified Waxman was wrong in stating Jake was in his office more than the one time, and was definitely mistaken in saying Carl was in his office at any time during said period. Rubins' firm received checks signed by Jake as trustee (\$400 in May, 1953, and \$1,050 in December, 1955) for drafting the trust and legal services.

On June 19, 1954, after a family discussion at Sarah's home arrangements were made for placing Sarah's checking and savings accounts in the joint names of Sarah and Jake.

Sarah executed her will on July 4, 1954. So far as material here, she directed the distribution of her residuary estate, real and personal, to her children in equal shares, and in a separate paragraph forgave and released unto her children and their spouses all sums owed by them to her, secured or unsecured, and directed the cancellation and delivery of all their obligations and any securities therefor. She named Jacob Rosen as executor. The probate court denied Jake's application, and appointed Frank P. Sebree, who qualified, as administrator c. t. a. of the estate of Sarah Rosen, deceased. An action contesting Sarah's will is pending.

Mrs. Fanny Moffett testified that Sarah and Acrl came to her apartment that morning and Sarah said she was there to sign her will. H. W. Moffett, Mrs. Moffett's son, and J. W. Edwards, of the same apartment building and who was called by Mr. Moffett, witnessed Sarah's will. Mr. Edwards testified that before Sarah signed the will she had the residuary and forgiveness (which covered the same obligations mentioned in the forgiveness agreement) paragraphs of her will read to her by Carl in their presence; that Sarah stated it was her will and requested them to witness it, and the will was then executed by Sarah and witnessed by Mr. Moffett and him. All this transpired in the English language. Mrs. Moffett returned to the room about the time the men were leaving, and she and Sarah discussed the will. Sarah told Mrs. Moffett that she knew what she was doing; that she had been over it half a dozen times; that Rose and Meyer had been over for two or three nights fussing with her about the way she was dividing her property, but she knew what she was going to do, and they would get their share out of the trust. Mr. Edwards testified that three of four days later he stopped at Sarah's home at her request and, after being informed he had heard about the trust Pete and she had made, Sarah said she had been thinking about her will and 'wanted to make sure that the will she had signed didn't change this trust any.' He suggested she consult the lawyer who drafted the trust and will.

There was testimony from plaintiffs that the principal defendants did not disclose Sarah's will to them, and that Sarah, sometime in August, said she had made a will and all children were equal.

*880 What is known as the forgiveness agreement, involving \$46,000, face amount, of receivables was executed July 13, 1954. Its provisions are stated hereinafter.

Following Pete's death, Sarah invited all her children, grandchildren, and great grandchildren to go with her to Canada, saying she didn't care what it cost. She later went, visiting a niece and her husband in Toronto, Mr. and Mrs. Charles Shore, taking Jake, two of his children, Sue and her daughter. Sidney Hyken, Rose's son-in-law, testified his brother Carl told him Sue had talked Sarah out of taking so many. Sarah told Mrs. Moffett she gave up taking all of her relatives on account of the expense and Sarah told Mr. Shore she was proud of Jake and he was with her on account of her diabetes.

Charles Shore testified by deposition that Sarah, while alone with his wife and him, told them that Pete and she had made a trust in 1952; Jake received the largest and Sam the smallest share because they did not like his marrying a Gentile; Pete and Jake were trustees and, after Pete's death, Jake was trustee; the trust was for 20 years, and the property remained in the blood of the Rosens, and Sarah expressed no dissatisfaction with the trust. He also testified Sarah told them Pete and she bought buildings with the children, taking mortgages for the children's part; that she didn't need the money after Pete's death and cancelled and gave the notes and mortgages back to the children; that he remembered she mentioned Morris but didn't remember it if she mentioned any other child.

Plaintiffs say that Sue, Mary, and Betty isolated Sarah from plaintiffs or would eavesdrop when they visited Sarah. Other testimony from plaintiffs' witnesses established that they visited Sarah when Sue, Mary, and Betty were not present. Meyer and his wife visited Sarah in the hospital in November, 1954, and Sarah was depressed because Jake, Mary, and Sue were not there.

Morris testified that Jake asked him to sign the forgiveness agreement, saying it was to give Mary property in the State of Kansas, and Dorothy, Morris's wife, stated that Carl delivered a copy to Morris and said Mary was the only one getting anything and the papers were useless. Morris said he read it but 'didn't even look for signatures.' Morris testified that, we understand in August, 1954, he went to Sarah's and asked Mary, who was there, about the forgiveness agreement, and Mary said, 'You damn fool * * *. This way we get it all'; that Meyer was there and became very excited; that he, Morris, asked Sarah if she had been signing over mortgages, and Sarah answered: 'I don't give nothing away'; that he said 'Evidently you did'; that Sarah

turned and ran him off the porch, saying 'You get away from here,' and Mary jumped up and said she was going down and beat hell out of Dorothy, Morris's wife.

Rose testified she received a copy of the forgiveness agreement about July 17th; that she talked to Mary and Mary said "They grabbed, I grabbed to too"; that Sarah told her she was not signing away her properties and not to listen to Morris 'because they say'; he doesn't know what he is talking about; "all the children are alike," she only signed for taxes, insurance, and repairs; that was what Jake told her; that if she didn't believe her to get out; and that she (Rose) walked out. Meyer's wife and daughter and Rose's daughter Mrs. Bain gave corroborating testimony that Sarah said she was not signing away property. Meyer's wife and daughter testified, in effect, that they called on Sarah before 8:00 a. m., August 14, 1954, and Sarah complained about Mary's working at the store and not being with her; Jake came in about 10:00, gave Sarah a 'shot of insulin,' and Sarah then went into a rage and shouted for Jake to show them that she was not giving everything away; Jake, after stating if it had not been for him Pete would not have made a will, or left anything in trust for Meyer and Rose, took the big trust out *881 of his pocket, explained other details and, when asked about Rose's property, told them to get a '\$25 lawyer' to explain it to them; that the family never did get along. Sidney Hyken testified that Carl said Sarah was willing to do whatever Jake wanted, and was dumb for destroying the notes and securities.

This case involves the credibility of the witnesses and the weight of their testimony, and the opportunity of the chancellor to observe the witnesses during this lengthy trial and better pass on these matters is to be accorded consideration. The plaintiff heirs and the principal defendants were not on friendly terms, and much of plaintiffs' testimony was hearsay and not substantive evidence of the fact narrated. Edinger v. Kratzer, Mo., 175 S.W.2d 807, 814.

Plaintiffs' charge is that Pete Rosen and defendants Jake Rosen, Betty Rosen, Sue Hyken, and Carl Hyken defrauded and unduly influenced Sarah Rosen into executing the big trust instruments. A preponderance of the evidence established that Sarah was mentally competent. We find no confidential relationship between Sarah and Sue or Carl Hyken or Mary or Ben Bodney or Betty Rosen other than that arising from their mother and daughter or mother- and daughter- or son-in-law relation. We find no substantial evidence of fraud or undue influence exercised by the last mentioned defendants upon Sarah in connection with her execution of the big trust instruments.

A confidential relation existed between Sarah and Jake. Jake accompanied his parents to lawyer Rubins on May 22, 1952, when they executed the big trust, and thereafter paid Rubins' firm for their services by checks against the trust funds, but this does not compel a finding of fraud or undue influence. Shapter v. Boyd, 327 Mo. 397, 37 S.W.2d 542, 550[7, 8]; Wright v. Stevens, Mo., 246 S.W.2d 817, 821 [4, 5]; McCoy v. McCoy, 360 Mo. 199, 227 S.W.2d 698, 707[20–23]. The findings of the chancellor establish that he did not believe the testimony on behalf of plaintiffs of admissions against interest or false statements about plaintiff heirs claimed to have been made by the principal defendants to Pete or Sarah. Any misrepresentation had no effect on Pete and Sarah. For instance, Morris shares in the big trust assets to the same extent as Sue and Mary and Sarah later accorded him equal consideration with the principal defendants in her will and the forgiveness agreement. Jake, notwithstanding the confidential relation, had the right to exercise influence so long as it was not so coercive or importunate as to deprive Sarah of her free agency. Horn v. Owens, Mo., 171 S.W.2d 585, 593 [18].

There is no proof that any defendant unduly influenced or defrauded Pete. Sarah accepted Pete's judgment in business matters, and a confidential relation existed between them, husband and wife. No reason appears for her to act otherwise. There was no reason or necessity for Pete to unduly influence or defraud Sarah. Her approval could have been and we think was obtained by Pete after discussion and disclosure to her. They were on equal terms under the big trust during their joint lives, and upon Pete's death she succeeded to the whole of that joint interest. Attorney Rubins' testimony established that the terms of the trust were determined by Pete and Sarah after consultations with both settlors, and not by Jake or the other principal defendants. The power to revoke the trust on fifteen days' notice for the lifetime of Pete was reserved but was never exercised. Pete and Sarah placed additional properties in the trust on July 24, 1953, and, again, on February 27, 1954, thereby ratifying and confirming their execution of the original trust of May 22, 1952. Sarah, after executing her will on July 4, 1954, 'wanted to make sure' her will did not change the trust and expressed no dissatisfaction with the trust while informing Charles Shore of its existence. She lived over two years after its execution, and *882 made no attempt to repudiate it. Ruff v. Young, 354 Mo. 506, 190 S.W.2d 208, 212. Giving consideration to the care and attention shown by this record to have been bestowed upon Sarah and Pete by

Jake and Betty and by Sue and Mary; Pete's and Sarah's concern over Morris's inability to make a living; that Pete over the years consulted and secured the advice of Jake and Carl on his property transactions, which appear to have been extremely successful, the disparities in the participations of the children in the big trust assets appear based upon reasonable distinctions. The chancellor's finding that Sarah voluntarily executed the big trust is supported by substantial evidence. We fully approve the findings and decree of the chancellor upholding the big trust. McCoy v. McCoy, 360 Mo. 199, 227 S.W.2d 698, 706[17]; Ulrich v. Zimmerman, 349 Mo. 772, 163 S.W.2d 567, 574[12], among others.

The \$46,000 receivables in the forgiveness agreement, payable to Pete and Sarah, became the property of Sarah upon Pete's death. This agreement, executed July 13, 1954, and attacked in Count VIII, is signed by Jacob Rosen, Mary Bodney, Sue Hyken, and Morris Rosen. It states that the parties 'are mutually indebted to the estate of Pete Rosen,' are the 'residuary heirs thereof,' desire to cancel these indebtednesses and, 'in consideration of the mutual promises of the parties,' make a family settlement and agree to 'waive and release any claims or rights that they might have to the proceeds of said indebtedness, if any, from said estate or from each other.' It then specifically describes seven receivables due Pete and Sarah Rosen. It carries the following addendum: 'I, Sarah Rosen, being a residuary heir, confirm, ratify and adopt the foregoing agreement,' which is signed by Sarah.

Plaintiffs say Sarah signed merely as a residuary heir of Pete, and not as a party to the contract or owner of the notes, and the execution of the agreement with the representations that it was a contract between the residuary heirs of Pete's estate and that the notes belonged to Pete's estate, and the securing of Sarah's signature as a residuary heir of Pete's estate in itself evidences a fraud upon Sarah, who could not read.

Section 401.122 RSMo 1959, V.A.M.S., provides that the renunciation by a holder of a negotiable instrument of his rights against the maker 'must be in writing, unless the instrument is delivered up to the person primarily liable thereon.' Defendants point to the provision of Sarah's will directing the cancellation and renunciation of all indebtednesses due her from any of her children and their spouses, her endorsement of the notes listed in the forgiveness agreement, and contend Sarah made an inter vivos gift of said receivables to the makers.

Defendants do not question the existence of confidential relations between Sarah and Jake and Carl at the time of the forgiveness agreement. Following Pete's death and prior to the forgiveness agreement, Sarah's checking and savings accounts and U. S. bonds were placed in the joint names of Sarah and Jake, and Jake was her appointed sole deputy to enter her safe deposit box, her business advisor, her physician and son. He was active in securing the execution of the forgiveness agreement. These notes and deeds of trust securing them were in Sarah's safe deposit box on June 25, 1954, and were removed from the box, taken to Sarah for her endorsement and to the recorder's office for cancellation by Jake on July 13, 1954.

In re Kaimann's Estate, 360 Mo. 544, 229 S.W.2d 527, 529[5, 10], states: 'The law in this state is that a son has the burden of proof of an alleged gift to him by his father in his lifetime. * * * '* * [W]here the relation of trust or confidence exists, it [the gift] is presumptively void—and the burden is upon the donee to rebut this by showing the absolute fairness and validity of the gift, and that it is entirely free from the taint of undue influence. This sound and wholesome *883 doctrine applies as well to suits of law as to proceedings in equity, and is as broad in its scope as the existence of the confidential and fiduciary relation. * * * 'Reed v. Carroll, 82 Mo.App. 102, loc. cit. 108.' See Spencer v. Barlow, 319 Mo. 835, 5 S.W.2d 28, 32; Nelson v. Hammett, Mo., 189 S.W.2d 238, 243.

The testimony of J. W. Edwards and Mrs. Moffett as to what occurred when Sarah executed her will on July 4, 1954, and of Charles Shore on Sarah's statements while in Canada about cancelling the notes of her children, mentioned hereinbefore in connection with the execution of Sarah's will and her trip to Canada, does not establish that her signing of the forgiveness agreement was free from fraud. Sarah's will (Carl was active in its execution), if upheld, will accomplish by express provisions what defendants seek to have accomplished by a construction of the forgiveness agreement. Section 401.122 does not relieve defendants of the burden to 'show the transaction was fair and equitable.' See In re Peterson's Estate, Mo., 295 S.W.2d 144, 151. The forgiveness agreement misrepresents the facts in stating that Jake, Mary, Sue, and Morris were indebted to Pete's estate on the receivables therein mentioned. Its consideration is the 'mutual promises of' Jake, Mary, Sue, and Morris. Sarah signed as a residuary heir of Pete's estate, and not as the owner of any receivable. The agreement contains no provision whereby Sarah

renounces her rights to or makes a gift of any receivable owed her. The testimony in this record on behalf of the defendants and the forgiveness agreement does not meet the burden placed upon them of establishing by competent evidence that Sarah signed said agreement, endorsed the notes and authorized their cancellation without fraud being exerted upon her. One of the receivables is a monthly installment option contract for the purchase of real property by Mary and Ben Bodney from Pete and Sarah Rosen. Under date of June 26, 1954, Sarah executed and acknowledged a warranty deed conveying this property to Mary 'for and in consideration of the sum of One Dollar and other valuable consideration,' paid and receipt acknowledged. The stated consideration tends to disprove the theory of a gift, or a consideration based upon love and affection. Wilkerson v. Wann, 322 Mo. 842, 16 S.W.2d 72, 75[5]. This deed was recorded July 19, 1954, six days after the execution of the forgiveness agreement. It is subject to the attacks the other receivables in said forgiveness agreement are subject to.

The judgment on Count VIII is reversed and the cause is remanded with directions to enter judgment in conformity herewith.

II. Count VII is an action against Jacob Rosen to enforce the so-called 'little trust,' seeking an accounting and a declaration of rights. Sarah made Jake joint owner of her checking and savings accounts and United States bonds, and on June 19, 1954, Jake voluntarily executed the little trust agreement, acknowledging that any such funds on hand at Sarah's death were held by him in trust for distribution equally to Sarah's seven children. Funds totaling \$24,383.81 were in this trust at Sarah's death. Jake, out of said funds in 1955, paid Pete's 1954 federal income taxes, \$3,424.48; Missouri income taxes, \$301.01; Kansas income taxes, \$16.91, and Pete's federal estate taxes, \$15,342.90, a total of \$19,085.30.

Plaintiffs claim these payments were improper as Jake had only a 1/7 interest in the little trust whereas he had a 40% interest under Pete's will. Jake had a 30% interest under the big trust.

(a) The chancellor considered the income tax payments proper, stating Pete and Sarah filed joint federal income tax returns and consequently Sarah's estate was liable for Pete's unpaid federal income tax, citing 26 U.S.C.A. § 6013(d)(3), p. 307, Internal Revenue Code of 1954 (see I.R.C.1939, § 51(b)(1), 26 U.S.C.A. § 51(b)(1)). The parties are agreed that *884 Pete's and Sarah's income tax returns for 1952, 1953, and 1954 were partnership, not joint, returns and the chancellor was in error. See 26 U.S.C.A. § 701 (I.R.C.1939, § 181, 26 U.S.C.A. § 181), making partners liable for federal income taxes only in their individual capacities. We are directed to no authority for applying the little trust assets to the payment of Pete's federal or state income taxes. United States v. Hutcherson, 8 Cir., 188 F.2d 326, 331[8], held that Missouri estates by the entirety are not subject to the lien authorized for collecting a husband's federal income tax.

(b) The \$15,342.90 federal estate tax. The assets of Pete's probate estate were appraised at \$8,418.06. The chancellor considered the big trust consisted almost entirely of real estate against which plaintiffs had a lis pendens in connection with this suit; that bad faith on Jake's part could not exist by reason of his 40% interest in Pete's estate as there was not sufficient funds therein to pay said taxes, and the only available funds for payment were the funds of the little trust. The trial court ordered the \$5,298.51 balance distributed under the little trust; and, under stipulation between the parties, this \$5,298.51 was paid into the registry of the court pending the final determination of the litigation and the estate tax liabilities of the estates of Pete Rosen and Sarah Rosen, both deceased.

The Internal Revenue Code of 1954 became effective August 17, 1954. 26 U.S.C.A. § 7851(a)(2)(A). The I.R.C., 1939, was in effect at the time of Pete's death, June 14, 1954. The provisions of the two codes here involved are substantially the same, and may be found in 26 U.S.C.A. The property in the big trust was the result of Pete's efforts and earnings. The power to revoke the big trust was reserved therein for the lifetime of Pete, and there was no provision in Pete's will with respect to the payment of any tax. The seven children of Pete and Sarah are beneficiaries under the big trust and also the little trust.

In Carpenter v. Carpenter,364 Mo. 782, 267 S.W.2d 632, 636[1], the question was whether the federal estate tax under the Internal Revenue Code of 1939 on a nonprobate asset of the decedent, an annuity contract in which decedent had reserved the right to change the beneficiary, was to be borne by the beneficiaries of said contract or charged against the residuary legatees in decedent's will, decedent's will being construed to contain no provision covering the payment of federal estate taxes on nontestamentary assets.

It is pointed out in the Carpenter case (267 S.W.2d 637) that what the federal estate tax law taxes is the interest which ceases by reason of the decedent's death and not the interest to which the beneficiaries or heirs succeed by reason of the death; that the statute (I.R.C.1939, § 811) provides that there shall be included in the 'gross estate,' in addition to decedent's real and personal property, revocable transfers, joint interests, estates by the entirety, et cetera (see I.R.C.1954, §§ 2038, 2040); that certain deductions from the 'gross estate' are authorized for arriving at the 'net estate' for computing the federal estate tax (I.R.C.1939, § 812; see I.R.C.1954, §§ 2043, 2053–2056); that the executor is required to pay the tax to the collector (I.R.C.1939, § 822(b); see I.R.C.1954, § 2002; 31 U.S.C.A. § 191); and that the statute provides for a lien upon the 'gross estate' to secure the payment of the tax (I.R.C.1939, § 827; see I.R.C.1954, § 6324). The non-probate asset, the annuity contract in which decedent had reserved the right to change the beneficiary, was held to be a part of the decedent's 'gross estate' for federal estate tax purposes. It follows that the big trust, subject to revocation during Pete Rosen's lifetime, was a nonprobate asset of Pete's 'gross estate' for federal estate tax purposes.

In the Carpenter case we prorated the federal estate tax between the testamentary and non-testamentary estate upon equitable principles, stating (267 S.W.2d 642): 'We *885 have seen that there is nothing in the federal estate tax statutes to prevent a proper application of equitable principles to prevent injustice, where the tax is based upon both testamentary and non-testamentary property. * * * It is our conclusion that the federal estate tax should be prorated, as stated, and that the beneficiaries of the annuity should pay the tax attributable to their respective interests therein. * * * 'See United States v. Traders Nat. Bank, 8 Cir., 248 F.2d 667, 670.

The federal estate tax attributable to the big trust should be prorated among the beneficiaries in accordance with their respective interests therein. In the circumstances of this record the little trust should be made whole by refunding the \$19,085.30; and since Jake acted in good faith and his payment of the \$15,342.90 federal estate tax stopped the running of interest thereon and, perhaps penalties (consult I.R.C.1954, §§ 6601, 6651), the adjustment should be upon equitable principles with appropriate steps taken to secure the ultimate payment by all beneficiaries of their respective shares of the federal estate tax discharged by said payment.

Plaintiffs say Jake never alleged or asserted any claim against plaintiffs in the trial court in connection with the payment of the federal estate tax. The Carpenter case, quoted supra, considered the ruling 'a proper application of equitable principles to prevent injustice'; and we hold this a matter affecting substantial rights within Civil Rule 79.04.

III. Count III, in the alternative if the big trust be held valid, is an action for (a) an accounting from the joint trustees up to Pete Rosen's death, June 14, 1954, and from the surviving trustee, Jacob Rosen, thereafter, and for the appointment of a referee to take said accounting; (b) for recovery from Jacob Rosen, individually and as executor of the estate of Pete Rosen, deceased, of all losses to and improper disbursements from said trust estate; (c) for forfeiture of all compensation withdrawn by the joint and surviving trustees from said estate; and (d) for the removal of Jacob Rosen as the trustee because of mismanagement, misconduct, and fraud.

The court removed Jake as trustee on the ground that the hostility existing between the plaintiffs, representing 35% of the beneficial interest in the trust, and the trustee prevented the trust purposes being effectually administered, and appointed the City National Bank and Trust Company of Kansas City as trustee, the settlors' named successor trustee upon the death of the individual trustees. The trial court retained jurisdiction to superintend and enforce the accounting between the removed and successor trustees and to determine any and all issues arising in connection therewith. Both sides have appealed. Plaintiffs contend additional grounds, involved in any accounting between the trustee and his successor, exist for the order of removal. Defendants claim the appointment of a successor trustee was error.

(a) In October, 1954, a furnace was installed on property in which Jake and Betty owned the fee but one-half of said fee was in remainder, subject to a life estate in Sarah. Sarah's life estate was in the big trust. The furnace cost \$3,666.68 and had a life of 25 years. Notwithstanding Sarah's death on November 17, 1954, Jake had the big trust pay \$1,833.34 on the cost of the furnace, payments being made in November, December, January, and February. Sarah lived for about a month after the installation of the furnace. The apportionment of one-half of this cost to the trust was improper.

- (b) Plaintiffs claim Jake failed to establish the following payments as proper charges against the big trust, to-wit: \$1,500 for the Karbank-Moffett appraisal, and \$3,000 for the Skeer-Flanagan appraisal of properties constituting a part of the federal *886 estate tax return in the estate of Pete Rosen, deceased, and also \$6,000 to Roven and Bold, accountants. There was evidence of record that this \$6,000 total included payments for services in connection with the federal estate tax return and the federal, Missouri, and Kansas income tax returns in the estate of Pete Rosen, the preparation of three reports to the big trust beneficiaries, bookkeeping in connection with the big trust, and the preparation of imcome tax returns for Jake. Defendants direct us to the chancellor's refusal of plaintiffs' requested findings of fact to the effect that the above items were not chargeable against the big trust. In view of the documentary evidence that these payments were so charged and evidence that they were not incurred, at least in part, on behalf of said trust and the absence of evidence allocating said payments between said trust and other services involved, these disbursements should be considered when the chancellor supervises the accounting between Jake and his successor trustee.
- (c) The records kept by Pete fail to disclose any distribution of the net income to Sarah during Pete's lifetime, and plaintiffs contend Jake is personally liable for Sarah's share thereof, which they place at not less than \$44,049.17. The net income from the trust estate was payable to the 'Settlors'; that is, to 'Pete Rosen and Sarah Rosen, husband and wife,' 'so long as both settlors shall live.' Pete, as Sarah's husband, was head of the family. He, as plaintiffs state in their brief, acted as her agent in business and financial affairs. It is to be assumed that Pete paid the family living and other expenses. At Pete's death there was \$24,507.86 in a joint bank account of Pete and Sarah, which Sarah received. There was testimony that Pete and Sarah placed all of their real estate in the big trust at the time of its execution. These settlors thereafter placed their interests in five additional pieces of real estate in the big trust, the last conveyance being in February, 1954. We find no fraud by Pete upon Sarah. She made no claim that there was any trust net income due her. She acquiesed in Pete's handling of the trust income, and she is bound by his acts, as are those claiming through her. As we view the record the evidence does not compel a finding that Sarah had a claim against the assets of the big trust or against Jake based upon Pete's handling of the big trust net income during Pete's lifetime. The chancellor's holding to that effect is sustained. Zahner v. Voelker, Mo.App., 11 S.W.2d 63[3]; Harrellson v. Barks, Mo.App. 326 S.W.2d 351,361.
- (d) So far as material to issues discussed under this subdivision, the trust instrument provides (Second, (c)): 'It shall rest in the absolute discretion of the Trustees to use either the principal or income of the Trust Estate, or proceeds of * * * condemnation proceedings, or any part thereof, for taxes, * * * improvements, repairs, rebuilding of real estate * * *, employment of agents or attorneys to take charge or care of real estate and/or other property, or otherwise for the benefit of the Trust Estate. The Trustees shall determine whether accretions to the Trust Estate shall be treated as principal or income. The Trustees may determine in their discretion whether receipts of money or other property shall be treated as principal or income and whether disbursements made by them for any purpose whatsoever shall be chargeable to principal or income. All decisions made by the said Trustees in *their* regard, in good faith, shall be final and conclusive upon all parties in interest.'

Paragraph Second, (h) states 'net income' 'shall be the income left after deducting all charges, disbursements, and expenditures authorized hereunder or by law in connection with the administration of the Trust Estate, including a fee of 5% to the Trustees for services * * *, provided the Trustee shall have, in its discretion, charged these items to income instead of principal, as herein above set out.'

We construe the trust provisions to authorize a commission upon the amount of *887 'yearly income' received and paid out by the trustee. In re Buder, 358 Mo. 796, 217 S.W.2d 563, 573[11], citing authority. See Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333, 342[12, 13].

The trust sold its property at 8th and Main for \$80,000, and at 41st and State Line for \$10,000. Jake paid himself a trustee's commission of 1% on each sale. These properties were trust principal, as was the money received for them, including any gain. Jake in his reports treated them as trust principal. Proper and allowable real estate commissions were paid on each sale; and we conclude that this \$900 for trustee's commissions was not 'in good faith' payable. Mercantile-Commerce Bank & Trust Co. v. Morse, 356 Mo. 336, 201 S.W.2d 915, 922[10]; In re McKinney's Estate, 351 Mo. 718, 173 S.W.2d 898[7].

(e) On September 15, 1954, Jake issued a \$4,559.22 check to himself for trustee's fees 'till May 31, 1954.' The chancellor held this was improperly charged against the net income due Sarah as the period covered was at a time when Sarah was entitled to only one-half of the net income. This item and others were held for adjustment upon Jake's accounting to the successor trustee. We approve.

(f) Jake's trustee's reports show depreciation deducted from income as follows: \$14,123.57, report covering June 14 to December 31, 1954; \$37,876.62 for the year 1955, and \$39,137.56 for the year 1956. Ordinarily, and plaintiffs contend, depreciation should be borne by the remaindermen (Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 378[14]), as should mortgage principal payments (Estey v. Commerce Trust Co., 333 Mo. 977, 64 S.W.2d 608, 616). Defendants say that said reports were intended to show depreciation deducted for income tax purposes, which is proper; and that Jake as executor of Pete's estate and surviving trustee was faced with complicated tax problems at Pete's death and soon thereafter with this litigation and did not attempt to make any distribution, which action was approved by the chancellor (Rossi v. Davis, supra, 133 S.W.2d 377[12]). If depreciation be not deductible, said reports indicate there was net income for distribution by Jake to Sarah up to her death and to other beneficiaries thereafter. Plaintiffs adduced testimony that Pete's method of business was to make a small down payment for the equity in 'run down' income producing property, and let the rent pay the taxes, mortgages, and upkeep. A reading of the trust provisions (Second, (c) and (h), quoted supra) vesting 'absolute discretion' in the trustees 'to use either the principal or income * * * for taxes, * * * improvements, repairs, rebuilding of real estate * * *, or otherwise for the benefit of the Trust Estate,' and discretion to determine whether accretions to the trust estate or receipts of money or other property were to be treated as principal or income, leads to the conclusion, in the light of the settlors' handling of the trust assets (a significant factor) before the execution of the trust, that the settlors intended a reasonable reserve be maintained to meet depreciation and mortgage principal payments out of income and accretions for the preservation of the trust assets during the life of the trust. Such action accords with a realistic business policy, and is advantageous to life beneficiaries and remaindermen alike to prevent the deterioration of the trust assets (buildings used for business purposes, hotels, and apartment houses) and loss of assets to the trust through mortgage principal payments coming due. There was testimony that maintaining a reserve of \$10,000 to \$15,000 would be sufficient. The broad powers conferred upon the trustee and the record before us warrant the continuation of the settlors' method of preserving said assets, subject to supervision and adjustment by a court of equity. Raffety v. Parker, 8 Cir., 241 F.2d 594, 604[3, 4]; Scott on Trusts, 2d Ed., §§ 188.2, 233.2, 233.3, n. 4, 239.4, nn. 5, 13; Restatement, Trusts, 2d, §§ 188, 239(h). The accounting between the trustee and his successor should give consideration to these matters.

*888 (g) Plaintiffs contend the purchase and operation of the St. Regis Hotel as a going business was a breach of the trust because, among other grounds, the trust instrument does not authorize the conduct of a trade or business, the trustee dealt with his relatives, the purchase benefited the trustee and certain of his relatives, and created a conflict of interests between the trustee and the trust beneficiaries. Prior to reaching that issue, another of plaintiffs' contentions should receive comment.

Property in the big trust, referred to as to Main Street property, was taken in eminent domain proceedings. The top offer for the condemnor to Jake was \$55,000. Jake then contracted with Carl Hyken to give him 1/3 of all over \$55,000 he could obtain for the property. Hyken sold the property of \$80,000 in September, 1954, and accepted \$8,000, a little less than the 1/3, for his services. The Rosen trust received, after the satisfaction of mortgages against the property and incidental expenses, \$66,888.40. Pete during his lifetime consulted Carl on real estate transactions and paid him commissions; and a plaintiffs' witness testified it was not uncommon to make contracts of this nature upon said 1/3 basis with real estate agents. We agree with the chancellor that the \$8,000 payment was authorized.

The forced sale of the Main Street property occasioned, according to certified public accountant Joseph Bold, a capital gains tax of about \$7,500, which could be postponed by reinvesting the proceeds in similar property within a certain time. Consideration was given to the purchase of the St. Regis Hotel, which rents apartments by the month or week and has twenty-seven hotel sleeping rooms. Without detailing the figures, Bold testified the Government would allow the following values for the St. Regis property: Land, \$10,000; furniture, \$150,000, and building, \$178,000; that he advised the trustee, Jake, such purchase would postpone payment of said \$7,500.00 tax; that for income tax purposes depreciation would be allowed at the rate of 4% on the building and 20% on the furniture, and with a trustee's fee of 5% (\$4,950.00 based on estimated \$99,000 annual gross

revenue), a saving of \$8,751.56 would be effected on the big trust income passing to Sarah. On the advice of accountant Bold and attorney Charles Rubins, the big trust purchased the St. Regis Hotel October 23, 1954, for \$338,327.77, paying \$65,000 cash. The purchase was subject to a first mortgage of \$178,270.48, a second for \$13,039.53, and a third for \$82,017.76. The trust is not liable on these mortgages. There was testimony that the market value of the St. Regis was \$341,500. We understand the second mortgage, payable \$500 monthly, was paid off in March, 1957.

The St. Regis was owned by a partnership. Jake's brother-in-law Phil Sweet was a member of the partnership and manager of the St. Regis, and Jake's mother-in-law was maker of the note secured by the third deed of trust. Sweet made a profit on the sale of \$4,250.00 and Bold, also a partner, \$1,000. The vendors paid Carl Hyken \$2,128.30 for selling the St. Regis. Jake pays Carl 5% of the St. Regis gross revenue as manager of the St. Regis. Two of defendants' expert witnesses testified this payment was not necessary. Jake draws an additional 5% of the gross for trustee fees. He knew little of the operation of the St. Regis, and it appears that others performed a number of his duties as trustee.

The continuance of a going business is always subject to the usual hazards of the trade; and this 10% take of the gross revenues for management and trustee's fees caused, we think, the operation of the St. Regis to be speculative and detrimental to the interests of the beneficiaries. See Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 381[18], 63 A.L.R.2d 504. A difference exists between income from rents, interest and dividends and income from the conduct of a business or trade. In the latter case, for instance, there is repeated use of the same money. See, among others, *889 In re Larrabee, 98 N.J.Eq. 655, 130 A. 195[1, 2]; In re Sidenberg's Estate, 204 App.Div. 255, 197 N.Y.S. 767; Restatement, Trusts, 2d, § 242, c; Scott on Trusts, 2d Ed., § 242.1; Bogert, Trusts and Trustees, 2d Ed., § 578, nn. 57, 58. A separate bank account was maintained for the operation of the St. Regis Hotel. During 1956 Jake transferred \$11,500 from the big trust account to the St. Regis Hotel account because the St. Regis Hotel had to have money to operate.

The trustee conducted the St. Regis Hotel as a going business. The chancellor approved this on the ground the broad provisions of paragraph 'Second, (a)' of the trust instrument authorized the purchase and conduct of a hotel business, stating four former hotel properties were in the trust. Said paragraph '(a)' reads:

'(a) The Trustees are authorized and empowered to take charge, care, management and control, and to hold, maintain and operate the Trust Estate, and any and all property which may become a part thereof, according to their own judgment and discretion. As long as such property shall be in their possession, control or disposition, the Trustee shall have the full power and authority to invest and reinvest and to keep the Trust Estate invested; to convert and reconvert the same; to insure, improve, pledge, mortgage, exchange, sell or lease the Trust Estate or any part thereof for a period of ninety-nine (99) years or less, upon such terms and conditions, and when and as often as, in the judgment of the Trustee, it shall deem best; and to vary and change the investments thereof, whether original or subsequent. The said Trustee shall not be liable for any loss resulting from depreciation or shrinkage in the value of any security or property herein authorized to be held and retained as an investment of the Trust Estate.'

'It is an elementary principle of law that a fiduciary may not risk trust property in trade or speculation, and this rule applies even where he simply continues the business or trade of the cestui que trust [a ward].' W. T. Sistrunk & Co. v. Navarra's Committee, 268 Ky. 753, 105 S.W.2d 1039, 1040[2].

'In the absence of an express and sufficient authority therefor, the employment of trust property in trade or speculation, or in manufacturing, is a gross breach of trust on the part of the trustee, even though such investment is approved of by his own judgment, and is made with honest intent.' 90 C.J.S. Trusts § 324, p. 516; Restatement, Trusts, 2d, § 227, f, § 230, m; Scott on Trusts, 2d Ed., § 227.6, § 230.4, stating it is the duty of a trustee to dispose of a testator's business and invest the proceeds in proper trust investments unless he is authorized to carry on the business by the terms of the will. An intent on the part of the settlor to continue his business 'must be clearly proved.' Bogert, Trusts and Trustees, 2d Ed., § 571, nn. 15, 16; § 577, n. 48. A stated reason is that 'the trustee would have to be gifted with special business talents' not usually or reasonably expected of trustees in general. Id., § 678. See Eufaula Nat. Bank v. Manasses, 124 Ala. 379, 27 So. 258, 259; In re Wind's Estate, 1 Misc.2d 260, 145 N.Y.S.2d 188[2]; Clark v. Tennessee Chemical Co., 167 Ga. 248, 145 S.E. 73[4].

The objects of trust investments are safety and income, safety being the primary and income the secondary consideration, that the trust assets pass without loss and with profit to the beneficiaries. Defendants say the dominant purpose of this trust was to take over the real estate acquired through Pete's efforts and to keep the same or a similar body of real estate for a period of 20 years after the death of the surviving settlor. Pete ceased to conduct a trade or business about 1942, and thereafter devoted his time to acquiring income producing real estate by small down payments and letting the rents pay the taxes, mortgages, and upkeep. He trained Jake and Carl in this business. 'The Trustees are in duty bound to administer the trust so far as possible in the same manner as the *890 testator would have done had he been living.' Bakewell v. Mercantile Trust Co., Mo., 319 S.W.2d 600[3], 605.

Eack of the four hotel properties in the trust was rented to a tenant who, not the trustee, operated the hotel.

We do not have a trustee continuing the business of the settlor; but a trustee, without the consent of all the beneficiaries or the approval of a court having jurisdiction, investing trust funds in and engaging in a different trade or business from that in which the settlor had engaged.

The trust instrument does not in express terms authorize the operation of a going trade or business with trust assets. Notwithstanding it speaks of the trustees' operating the trust estate according to their own judgment and discretion, a reading of the whole of paragraph '(a),' including the authority to 'vary and change the investments thereof, whether original or subsequent' reveals that said paragraph refers to investments, and the investments referred to are securities and property, the latter referring to real estate yielding an income in the form of rent. These may depreciate or shrink in value for reasons not chargeable against any action on the part of the trustee. There is no showing that Pete, as trustee, employed the trust assets in operating a going business or trade. Defendants' construction of the trust instrument as authorizing a trustee's fee of 5% on the amount of 'yearly income' (gross rentals) is not in harmony with a 5% fee on money which, in effect, is repeatedly used in the conduct of a going business or trade. A reasonable construction of paragraph '(a),' in the light of the circumstances surrounding the settlors and other provisions of the trust instrument, results in the conclusion that the operation of the St. Regis Hotel as a going business was not authorized by the settlors. Garesche v. Levering Inv. Co., 146 Mo. 436, 445(I), 48 S.W. 653, 655(I), 46 L.R.A. 232, is in harmony with the above result.

(h) Exhibits filed here show the big trust gross income and trustee's fees paid Jake, respectively, as follows: June 14 to December 31, 1954: \$21,266.69 and \$7,160.22 (which, we understand, included \$4,559.22 for the period Pete was administering the trust assets); 1955: \$60,918.56 and \$8,951.38; 1956: \$49,666.04 and \$7,513.85.

We conclude the best interests of the trust estate require the removal of Jacob Rosen as trustee for the breaches of the trust hereinbefore mentioned. The chancellor removed him on the ground that, considering all the circumstances involved, his actions tended to engender suspicion and hostility on the part of plaintiffs and resulted in a bitter schism within the family. We are of the view that the chancellor's holding is supported by the evidence, but it is unnecessary to burden this opinion with a narration of the facts involved.

(i) The chancellor, although removing Jake as trustee, considered Jake was not guilty of fraud, dishonesty, bad faith, or willful violations of his duties, and found the issue of Jake's forfeiture of all compensation under Count III against plaintiffs. We approve, considering the court did not abuse its discretion in so ruling. Restatement, Trusts, 2d, § 243, states: 'If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation.' See Scott on Trusts, 2d Ed., § 243; Bogert, Trusts and Trustees, 2d Ed., § 979; 90 C.J.S. Trusts § 407, p. 756; 54 Am.Jur. 424, § 539; Annotation, 110 A.L.R. 566, 577 (citing Garesche v. Levering Inv. Co., 146 Mo. 436, 48 S.W. 653, 658, 46 L.R.A. 232, and Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333, 343[13]); Vest v. Bialson, supra, 293 S.W.2d 369, 383 [25]. However, any compensation allowed Jake should be conditioned upon all losses his administration occasioned the trust estate being made good. See Garesche and Cornet, supra.

With the exception of such matters as may arise in the accounting between the removed *891 and successor trustees, the findings and holdings of the chancellor on matters involved in Count III not herein specifically disapproved are affirmed.

IV. The chancellor allowed, payable out of the big trust estate, \$20,000 each to Walter A. Raymond and Arthur J. Kase, defendants attorneys, 'for services in the defense of the Rosen trust herein.' No point is presented covering the allowance to Daniel S. Millman and Terence M. O'Brien, plaintiffs' attorneys, 'of \$7,500.00 jointly' for services under Count III, resulting, among other things, in Jacob Rosen's removal as trustee. The main controversy is whether said allowance to defendants' attorneys is inadequate or excessive.

Plaintiffs first say defendants' attorneys are not entitled to compensation out of the trust assets because Jake breached the trust, stressing Lipic v. Wheeler, 362 Mo. 499, 242 S.W.2d 43, 50[12], which cites, without developing, the texts and annotation mentioned in the third paragraph above. The settlors authorized the trustee to employ attorneys 'for the benefit of the trust estate.' Paragraph 'Second, (c)' supra III, (d). Defendants' attorneys are entitled to compensation out of the trust assets for their successful defense of the trust. Murphey v. Dalton, Mo., 314 S.W.2d 726, 730[3–5], 67 A.L.R.2d 1278; City of St. Louis v. McAllister, 302 Mo. 152, 257 S.W. 425, 426[1]. The criterion for an allowance of attorney fees out of a trust estate is the reasonableness of such compensation, whether one or more attorneys necessarily participate. See 54 Am.Jur. 415, § 523; 90 C.J.S. Trusts § 284, p. 399; Annotation, 66 A.L.R.2d 1172.

There was testimony that 200 hours were devoted to the actual trial of the case. Mr. Raymond estimated that 1/3 of his working time between February 15, 1955, and September 11, 1958, the date of the hearing on the allowances, was devoted to the case. There was testimony to support a finding that Mr. Kase devoted 1,100 to 1,150 hours to the case. Mr. Millman and Mr. O'Brien estimated they had devoted a total of 3,200 hours to the case, and allocated 800 hours of this to the removal of the trustee. We conclude defendants' attorneys devoted approximately the same time to the case, perhaps 300 or more hours less, that plaintiffs' attorneys did, although defendants' proof was not as satisfactory as it might have been. All the attorneys involved, the principals and their expert witnesses, stand high in their profession.

Defendants say, had the counts of plaintiffs' fourteen count petition not directly attacking the big trust been omitted, that almost all of the same evidence and the main litigated issues would have been for considration under plaintiffs' claim of conspiracy, fraud, duress, and lack of mental capacity on the part of Sarah, and also on the removal of Jake as trustee, particularly on the hostility issue.

Mr. Raymond considered \$30,000 to \$35,000 a reasonable fee for his services. He was employed by Mr. Kase. He estimated that 1% of his time was devoted to the individual defendants and 99% in defense of the big trust. He had received \$14,000 from the big trust and \$3,500 which he considered adequate, from the individual defendants. He furnished each of his expert witnesses with a statement (exhibit 606) of his services to the big trust, which conformed to defendants' position, stated above, on this issue. Mr. William S. Hogsett and Mr. Paul Barnett each considered a \$30,000 fee to Mr. Raymond reasonable. Each based his opinion on Mr. Raymond's exhibit 606. Mr. Kase considered his services were reasonably worth \$35,000. He had received \$10,000 from the big trust and \$2,500 from the individual defendants and would bill them for \$1,500 additional. He too furnished a statement (exhibit 607) similar to Mr. Raymond's to his expert witnesses. Mr. Reed O. Gentry placed a reasonable fee to Mr. Kase at between \$34,000 and \$35,000. and Mr. Paul Sprinkle put it at \$50,000. Each based his opinion on Mr. Kase's exhibit 607. Mr. Sprinkle thought the case involved a trust estate of approximately *892 \$1,000,000 in which all the defendants were beneficiaries of the trust. For factors taken into consideration see Scheufler v. Continental Life Ins. Co., 350 Mo. 886, 169 S.W.2d 359, 363, 364.

We have hereinbefore stated the purposes of Counts I, III, VII, and VIII. We briefly state the purpose of some of the other counts. Mr. Raymond considered Count XIII, charging Mary and Ben Bodney with the conversion of \$3,000 allegedly taken from the dead body of Pete Rosen, not involved, but Mr. Kase differed. Mr. Kase considered the following counts not involved: Count XII, an action to declare Jake held the proceeds (\$2,001.26) of a policy on Sarah's life as trustee for her estate instead of individually; and Count XIV, an action to recover the proportionate share of the federal estate and Missouri inheritance taxes on Sarah's estate from each defendant. Count XIV was not ready for and was not tried. Count XI was an action by Morris Rosen to be declared the owner of a 1/2 interest in certain real estate standing in the name of the Rosen trust. Count IV was to set

aside six deeds from Pete and Sarah to Jake and Betty and three deeds to Sue and Carl. Count V was to set aside three deeds from Pete and Sarah to Jake and Betty, five deeds to Sue and Carl, and one deed to Jake and Betty and Sue and Carl. Count VI was to recover from Sue and Carl the value of two parcels of land similarly conveyed to them but subsequently disposed of. The value of the property involved in Counts IV, V, and VI was alleged to exceed \$297,000. Count IX was for partition of the various lands if the court set aside the big trust and the deeds under the prior counts. The individual defendants reaped the benefit of the rulings in their favor under Counts IV, V, VI, and IX and other counts and should stand a reasonable charge for the services of their attorneys. Plaintiffs, not defendants, prevailed on the issue of the removal of Jake as trustee under Count III. Jake's administration of the \$24,383.81 in the little trust following Sarah's death (Count VII) had no effect on the validity of the big trust. We do not agree with Mr. Raymond's allocation of 1% of his services to the interests of the individual defendants. His \$3,500 charge against them refutes his position as does Mr. Kase's charge of \$4,000. The services of the attorneys in preparing for and in the trial of some of the counts in plaintiffs' petition overlapped, but not to the extent claimed by defendants.

We conclude the allowances chargeable against the big trust for the services of Mr. Raymond and Mr. Kase, perhaps somewhat liberal, should be and are approved.

The judgments on Count I and the allowance of attorney fees are affirmed. The judgments on Counts III, VII, and VIII are reversed and said counts remanded for further proceedings in conformity herewith.

BARRETT and STOCKARD, CC., concur.

PER CURIAM.

The foregoing opinion of BOHLING, C., is adopted as the opinion of the court.

All concur.

On Motion for Clarification and Modification of the Opinion

PER CURIAM.

Plaintiffs filed no motion for rehearing but have filed a motion 'for clarification and modification of the opinion.' They say that the St. Regis purchase was unauthorized, and the trustee should be surcharged with the purchase price of the St. Regis investment because it was the purchase of a going business. This may be the situation in certain circumstances, but the issue of the purchase of the St. Regis property and the issue of its operation stand on different footings under the provisions of the 'big trust.' Giving consideration to the settlors' method of doing business, the *893 big trust provisions vesting broad powers in and exonerating the trustees from liability for any loss resulting from depreciation or shrinkage in the value of any property authorized to be held and retained as an investment of the trust estate, the facts of record and the findings and conclusions of the trial chancellor, we have held and reaffirm that the purchase of the St. Regis Hotel as a parcel of real estate was proper. Plaintiffs' said motion is overruled.

All Citations

349 S.W.2d 865

Footnotes

Thirty-one court days were devoted to hearing the merits. The record here, which includes the hearing on allowances to the attorneys, consists of about 4,500 typewritten pages, covering the testimony of 69 witnesses and 607 exhibits, separately filed, with 299 requested findings of fact and 199 requested conclusions of law. The briefs filed here approximate 400 pages in length.

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331 Mo. 1038 Supreme Court of Missouri, Division No. 2.

SELLECK et al.

v.

HAWLEY et al.

No. 29641. | Dec. 14, 1932.

Appellants' Motion for Rehearing Overruled Dec. 31, 1932.

Synopsis

Appeal from St. Louis Circuit Court; George E. Mix, Judge.

Suit by Bessie King Selleck and husband against Nelson J. Hawley and others. From a judgment of dismissal after the court sustained a demurrer to the fifth amended petition, plaintiffs appeal.

Reversed, and remanded for trial.

Attorneys and Law Firms

**389 *1039 Chas. M. Hay and Ellroy V. Selleck, both of St. Louis, for plaintiffs.

*1041 James T. Blair, Jr., of Jefferson City, and H. A. Loevy and Matt. J. Scherer, both of St. Louis, for respondents.

Opinion

*1043 WESTHUES, C.

On the 10th day of February, 1928, appellants, plaintiffs below, filed their fifth amended petition in this case in the circuit court of the city of St. Louis, Mo. Respondents, defendants below, filed a demurrer, which the court sustained. Plaintiffs declined to plead further. Judgment was rendered against plaintiffs, and they appealed. The petition covers seventy-nine printed pages of the abstract of the record and the demurrer thirtysix pages.

The question presented is the sufficiency of the petition. In order to properly understand the issues raised by the pleadings, it will be necessary to make, if possible, a short concise statement of the facts alleged in the petition. We will undertake to do this by first giving a general outline of the parties and their relation to each other with reference to the subject-matter in this suit. We will then attempt *1044 to classify the various charges of the petition and dispose of them accordingly.

We learn from the petition that the controversy in this case arose out of the last will and testament of Henry King, who departed this life in March, 1915. The wife of Henry King and a son preceded him in death. There survived one son, named Henry L. King, and two grandsons, Albe W. King and Harry L. King. The petition alleges that Henry King contracted with the mother of plaintiff Bessie King Selleck, when the named plaintiff was 3 years old, to adopt plaintiff as his (Henry King's) own child and daughter. Later Bessie King Selleck married Nelson J. Hawley, to which union a daughter was born, named Henrietta, who intermarried with one Mark Renick and was named as a defendant under the name of Henrietta Renick. Plaintiff Bessie King Selleck was divorced from Nelson J. Hawley and later intermarried one Ellroy V. Selleck, the other plaintiff in the case. Plaintiffs in this case are Bessie King (Hawley) Selleck, the alleged adopted daughter of the testator, Henry King, and her present

husband, Ellroy V. Selleck. The defendants are Nelson J. Hawley, the first husband of plaintiff Bessie King Selleck, Harry L. King and Albe W. King, grandsons of the testator, Henry King, Henrietta (Hawley) Renick, daughter of plaintiff Bessie King Selleck and defendant Nelson J. Hawley, and Mark Renick, husband of Henrietta (Hawley) Renick. Henry L. King, mentioned in the will, was the son of the testator and the father of Albe W. King and Harry L. King. Henry L. King died in July, 1926. Max Kotany was named as a trustee in the will, but refused to act. The circuit court appointed Harry L. King as a trustee on March 15, 1917, in lieu of Kotany. James L. King and Nelson J. Hawley accepted the trusteeship. James L. King died on November 22, 1919, and Nelson J. Hawley and Harry L. King, claiming to act under the will, appointed, over the protest of plaintiff, Albe W. King as a trustee in place of James L. King. The acting trustees, at the time the amended petition was filed, were Nelson J. Hawley, the first husband of plaintiff Bessie King Selleck, Harry L. King and Albe W. King, the two grandsons of the testator. These two grandsons are remaindermen under the will of Henry King. No bond was given by any of the trustees named. When speaking of plaintiff in the opinion, we will have reference to Bessie King Selleck only.

The will of Henry King is copied in full in the petition. It is very lengthy, and it would serve no good purpose to copy it in full in this opinion. The parts we deem pertinent to the issues will be quoted, and read as follows:

"Article III. I give and bequeath \$1.00 to my son Henry L. King and \$1.00 to Mrs. Bessie King Hawley, who lived with me and my *1045 wife during the latter's lifetime as our daughter and in whose home I have lived since my wife's death, although she was never adopted **390 by either of us as a daughter in accordance with the law.

"Article IV. The rest, residue and remainder of my estate, real, personal and mixed, I give, bequeath and devise to James L. King of Topeka, Kansas, Dr. Nelson J. Hawley and Max Kotany, the two latter both of St. Louis, as Trustees and to their successors in trust and not otherwise in trust for the use and benefit of my said grandsons Albe W. King and Harry L. King and of Henryetta Hawley (daughter of said Mrs. Bessie King Hawley), share and share alike, upon and only upon the following terms and conditions:

"Said Trustees are to have the absolute control of and power to sell said property, if necessary, and are to manage and dispose of the same in their discretion, subject only to the provisions hereof, but only by and upon concurrence of all three therein. * * *

"Said Trustees shall semiannually render to the beneficiaries of said trust a written statement and report of the transactions of the trust estate and fund during the then preceding half year. Said Trustees are, if they claim it, to be allowed jointly compensation for their services in the management of the trust not exceeding five (5%) per cent of the income of the trust estate and fund, to be paid out of the income, and not exceeding five (5%) per cent on the conveyance, transfer and delivery of the trust estate, to be deducted from the principal.

"The said Trustees are authorized to incur the usual and customary expenses for management of property, shall keep a true, correct and faithful account of all money received and disbursed by them as such and shall keep a true, correct and faithful book account, and (with) vouchers for disbursements, which shall be open and subject to inspection by the beneficiaries herein or their agents or attorneys during usual business hours with the right and power on their part to take copies thereof.

"Article V. I further direct and provide that upon the death of either of my said grandsons or said Henryetta Hawley, before the probate hereof, his or her share of my estate to which he or she would otherwise have hereby become entitled shall pass to and vest in and become the property of the survivors of them in equal shares and if any two of them shall have died before the probate hereof, the same shall pass to and vest in and become the property of the sole survivor of them, but nevertheless and in either event, the payment to my son and his wife Mary W. King as herein provided, shall be made and the net income of one-third of my estate shall be paid to said Mrs. Bessie King Hawley as berein provided. In other words, the death of either my said grandsons or said Henryetta Hawley, shall not *1046 affect or cancel the bequests herein made to my said son and to said Bessie King Hawley and to Mrs. Mary W. King, wife of my said son, if they are living at the time of the probate hereof.

"Article VI. I direct and provide that out of the net income from the property and estate herein and hereby given and bequeathed to my said grandsons and to said Henryetta Hawley, said Trustees shall reserve for and pay annually to my son Henry L. King, if living at the date of the probate hereof, the sum of six hundred (\$600) dollars per annum, during his lifetime. Two hundred

(\$200) dollars of which legacy shall be charged to each of them (my said grandsons and said Henryetta Hawley). Same is hereby declared to be a charge and lien on all their said shares during his lifetime. Upon his death all such payments shall cease and this bequest shall be thenceforth null and void.

"I direct and provide that out of the net income from the property and estate herein and hereby given and bequeathed to my said grandsons, said Trustees shall reserve for and pay to Mrs. Mary W. King, wife of my son Henry L. King, the sum of nine hundred sixty (\$960) dollars per annum during her lifetime, semi-annually, if possible, one-half of which legacy shall be charged to each of them my said grandsons. Upon her death all such payments shall cease and this bequest shall be thenceforth null and void. Said legacy is hereby declared a charge and lien on their said shares during her lifetime.

"I further direct and provide that the entire net income and profit of the one-third share of my estate hereby given and bequeathed to said Henryetta Hawley shall be paid by the Trustees herein named to her said mother, Mrs. Bessie King Hawley, if living at the time of probate hereof, during the lifetime of the latter less one-third of said six hundred (\$600) dollars (namely), the sum of two hundred (\$200) dollars, which is payable as hereinbefore provided to my said son Henry L. King. Same is hereby declared to be a charge and lien on her said share during the lifetime of her, said Bessie King Hawley. * * *

"Article IX. Should any of said Trustees die before the probate hereof or the expiration of said Trusteeship, the survivors or survivor of them, shall, in writing appoint a successor trustee or trustees who shall be and become successors forthwith to and of the title to said trust estate hereby vested in the deceased trustee or trustees or his or their successors, so that there shall always be three trustees of the trust hereby created. * * *

"Article XI. The trust herein created shall continue during the lives of my said son and of said Mary W. King and of said Bessie King Hawley, but if all of them shall have died before the probate hereof, then it shall not come into existence at all and all the rrovisions *1047 herein contained concerning same are and **391 shall be ineffective and void, and my estate shall at once be distributed in accordance with the laws of the State of Missouri.

"Article XII. I nominate and appoint my said grandsons Albe W. King and Harry L. King and Mrs. Bessle King Hawley, executors and executrix respectively of this my last will and testament, with request that they as such and that said James L. King, Dr. Nelson J. Hawley and Max Kotany as Trustees hereunder, be not required to give bond. But this waiver of bond shall not apply to any other person or persons."

The petition then charges that plaintiff was bequeathed one-third of the net income and profit of the trust estate; that plaintiff was entitled to the net income and profit from the date of the death of the testator, March 15, 1915. The estate was finally closed on the 4th day of April, 1917. Plaintiff alleges that during the period of administration there was a net income and profit of over \$30,000, and claims she was entitled to one-third of this amount. Plaintiff alleges that Harry L. King and Albe W. King, as executors, and the trustees, have refused to pay to her any part of the net income and profit that accumulated during the period of administration; that the trustees knew that the executors were withholding more than \$10,000 from plaintiff; that the trustees wrongfully and with intent to cheat, wrong, and defraud her failed and refused to file exceptions, as her trustees, to the final settlement made by the executors. The petition charges that the executors wrongfully paid to the state of Missouri the sum of \$1,975.20, as an alleged inheritance or stock transfer tax, that \$236.28 was so wrongfully paid, by the trustees, to the state of New Jersey, and in like manner the sum of \$161.38 was paid to the state of Minnesota. The applicable statutes and laws of New Jersey and Minnesota are pleaded in the petition. The basis of plaintiff's contention, that these alleged inheritance taxes were wrongfully paid, was that the laws of these three named states did not require the payment of an inheritance or stock transfer tax in case the property was inherited by a child, and that for all intents and purposes plaintiff Bessie King Selleck was the adopted child of the testator, and therefore exempt from the tax. Plaintiff's also plead that the amount of the tax was charged to her and deducted from her income, when in fact it should not have been paid out of her portion of the income.

Quoting from plaintiff's petition, it further alleges:

"13. Plaintiffs further state that since the creation of said trust estate, there have been declared out of the net profits, earned by three different corporations hereinafter mentioned, after the creation of said trust estate on the 15th day of March, 1915, upon eight different *1048 occasions, stock dividends upon certain stock held by the trustees of said trust estate as hereinafter set out, that all of said stock dividends, representing net profits of said three corporations, have come under the control and supervision of Nelson J. Hawley, Harry L. King and Albe W. King, whilst acting as such trustees of said trust estate, created by the will of the said Henry King, deceased; that said stock dividends were declared by corporations organized and existing by virtue of the laws of the States of New Jersey, New York and Pennsylvania; that by the statute laws of said states, all corporations existing by virtue of said laws, can declare dividends only from its surplus or out of the net profits and earnings of said corporations.

"14. Plaintiffs state that, in so far as same is material to the issues in this case, the laws of the State of New Jersey relative to corporations declaring dividends referred to above, and which were in full force and effect at the times the stock dividends of the R. J. Reynolds Tobacco Company, hereinafter referred to, were declared, provide as follows:" (The petition then recites in full the statutes of New Jersey, New York, and Pennsylvania with reference to stock dividends.)

The petition then proceeds:

"Plaintiffs further state that said stock dividends, declared by said corporations aforesaid, are hereby designated as follows:

"Stock Dividend No. 1. Being a stock dividend of 200 per cent declared August 16, 1920. upon 272 shares of stock of the R.J. Reynolds Tobacco Company, incorporated under the aforesaid laws of the State of New Jersey, held by said trustees at said time, and representing a portion of the net profits, earned by it after the creation of said trust estate, said shares of stock being of the par value of \$25 per share; that 136 of said 272 shares were held by Henry King at the time of his death on March 15, 1915, which consisted originally of 34 shares of the par value of \$100 each, but which shares, sometime after the creation of said trust estate had been converted into 136 shares of the par value of \$25 each; that 136 shares were purchased at par by the trustees for \$3,400 during the year 1918; that said stock dividend represented a portion of the net profits of the R.J.Reynolds Tobacco Company, earned upon, and declared upon said 272 shares of stock which said profits were so received by said trustees, in the form of said stock dividend and amounted to 554 shares of the par value of \$25 per share, or \$13,600. * * *

"22. Plaintiffs further state that at the time of the declaration, payment and distribution of the surplus or net profits, earned by the above mentioned corporations and each of them, and distributed by each of them, and received by said trustees, in the form of stock dividends, *1049 and which were declared upon certain shares of stock held by the said Nelson J. Hawley, Harry L. King and Albe W. King, **392 as acting trustees under the said will of Henry King, as aforesaid, and representing a portion of the surplus or net profits, earned by said corporations, and each of them, after the creation of said trust estate, as above set out, were paid in said shares of stock to them, as such acting trustees, as income and profits of said trust estate earned since its creation; that the whole of the surplus or net profits represented by said stock dividends and earned by said corporations after the creation of said trust estate, as above set out, were paid in said shares of stock to them, as such acting trustees, and was so received by said trustees, as income and profits of said trust estate; that the whole of the surplus or net profits represented by said stock dividends and earned by said corporations, and each of them, after the creation of said trust estate, so distributed, and delivered by said corporations to said acting trustees, and so received by said trustees, as aforesaid was, by the said trustees, willfully, wrongfully, and knowingly diverted by them and credited and applied to the corpus of said trust estate, thereby wrongfully depriving plaintiff, Bessie King Selleck, of her one-third portion of the entire net income and profits of said trust estate, as provided by said will, and to which she was and is justly entitled."

The petition sets forth in detail the various transactions with reference to the stock dividends declared by the corporations in which the trustees held stock, which constituted the corpus of the estate. Plaintiff then alleges that, according to the decisions of the courts, under the laws of the states of New York, Pennsylvania, and New Jersey, stock dividends are declared to be net income and profit; that the corporations, which declared the stock dividends here in question, are corporations of the three named states.

The petition then charges that the trustees are unfriendly, hostile, and unfair toward plaintiff; that the trustees have willfully and knowingly misappropriated and diverted to the corpus of the estate a large portion of the one-third share of the net income and proceeds due plaintiff by the terms of the will, with the corrupt purpose of benefiting Harry L. King and Albe W. King, remaindermen and trustees and the remainderman Henrietta Renick, the daughter of Nelson J. Hawley, the third trustee. The petition then enumerates and details numerous instances wherein it is alleged the actions of the trustees were contrary to the provisions of the will and antagonistic to plaintiff's interests. The charges detailed are in the main the same as those above referred to. For example, it is charged that the trustees Harry L. King and Albe W. King, were also the executors of the estate, and that the one-third income and profit, which *1050 accrued during the period of administration and amounted to about \$13,000 to which plaintiff was entitled, was diverted into the corpus of the estate, resulting in a benefit to the remaindermen, being the two trustees named and the daughter of the third trustee. Another transaction, alleged to have been antagonistic to plaintiff's interests, was the payment of the inheritance or stock transfer tax.. It is also alleged that the trustees have paid to Harry L. King and Albe W. King each a sum equal to one-third of the net cash income of the trust estate which had accrued between April, 1917, and September, 1927, amounting to about \$60,000; that these payments were made contrary to the terms of the will, in breach of the trust, and constituted a willful fraud upon plaintiff and her daughter Henrietta Renick, one of the three remaindermen. If necessary, other charges made will be referred to in the opinion.

The petition concludes with a long prayer for relief, the substance of which is as follows: That the court decree plaintiff to be the adopted daughter of the testator; that the trustees be removed as trustees and the court appoint suitable persons in their places; that the court construe the provisions of the will with reference to the net income and profit of the trust estate to which plaintiff is entitled and so construe the same as to mean and include surplus profits earned by the corporations in which the trust estate owned stock distributed in the form of stock dividends; that the trustees be ordered to pay plaintiff all undistributed cash income in the trustees' possession; that the court order the trustees to make certain monthly payments to plaintiff out of the income received by them. Plaintiffs also prayed that an accounting be had and the trustees be held and required to pay plaintiff any sum or sums, with interest, found to be due her according to the terms of the will; that the trustees be required to restore to the corpus of the estate sums wrongfully paid out as alleged attorneys' fees and sums paid to Harry L. King and Albe W. King; that the trustees be restrained from making any further payments to Harry L. King and Albe W. King as income until the final disposition of the case. Plaintiffs also prayed that the court decree that the laws of New Jersey and Minnesota be followed in the matter of the transfer and inheritance tax and that the laws of the states of Pennsylvania, New Jersey, and New York be followed in determining the question as to what constitutes income and profit with reference to the stock dividends.

To this petition defendants filed what is denominated a speaking demurrer. The demurrer covers thirty-five pages of the abstract of the record.

Upon examination of the demurrer, we find it sufficient as a general demurrer. In addition to the general demurrer there is a special *1051 demurrer to each separate item of the petition. The allegations of the petition **393 must be, for the purpose of a demurrer, taken as true.

The order of the court, after sustaining the demurrer, reads: "Now at this day come the plaintiffs by attorneys and in open Court state that they stand upon the fifth amended petition and decline to plead further; and it appearing to the satisfaction of the Court that a general demurrer was sustained on the first petition and said petition adjudged wholly insufficient on the 27th day of December, 1921; that on the 9th day of May, 1927, the motion of defendant to make plaintiffs' amended petition more definite and certain was sustained, and that on the 26th day of September, 1927, plaintiffs were granted leave to withdraw their third amended petition; and that a general demurrer of defendants to the fifth amended petition was sustained, and said petition adjudged wholly insufficient on the 8th day of October, 1928, during the October term, 1928. It is therefore adjudged by the court that this suit be dismissed as to defendants and that said defendants recover from plaintiffs their costs in this behalf expended by them and that they have execution therefor."

The major portion of the elaborate briefs filed in this case is devoted to the question as to what is or should be included in the term "income and profit," as that term was employed by the testator in articles V and VI of the will. It will be noted that in article V the following language is used: "And the net income of one-third of my estate shall be paid to said Mrs. Bessie King Hawley,

as herein provided." In article VI we read as follows: "I further direct and provide that the entire net income and profit of the one-third share of my estate hereby given and bequeathed to said Henrietta Hawley shall be paid by the trustees herein named to her said mother, Mrs. Bessie King Hawley." It is appellant's contention that, according to the language used, it was clearly the intention of the testator that stock dividends are income and profit and should go to plaintiff and not to the corpus of the estate. Respondents on the other hand contend that, by the terms of the will, stock dividends belong to the corpus of the estate, and the trustees should treat is as such and not deliver to plaintiff stock dividends derived from the stock held by the trust estate. This question was first presented to this court in the case of Hayes v. St. Louis Trust Co., 317 Mo. 1028, 298 S. W. 91, 93, 56 A. L. R. 1276. Division 1 of this court, in an exhaustive opinion prepared by Ellison, C., held that the term "income" did not include stock dividends. In that case the testator employed the following language: "Said trustees shall take charge and possession of said rest and residue of my estate, collect the income, rents, issues and profits thereof and therefrom, and after deducting all proper and legal charges *1052 and expenses incident to the management of said property and the execution of the trusts herein and hereby created, dispose of the net income from said trust property as follows. * **"

In the Hayes opinion this court reviewed and considered at length the decisions of the courts on this subject, throughout the land. Three different rules seem to have come to life by reason of the diversity of opinions. The Pennsylvania rule treats alike stock dividends and cash dividends. But, under this rule, the earnings from which the dividend is declared must have accrued since the creation of the trust estate in order that the life tenant may be entitled thereto. The Kentucky rule also makes no distinction between stock and cash dividends, and under this rule it does not matter when the earnings were accumulated. All dividends declared after the creation of the trust estate are treated as income. The Massachusetts rule treats stock dividends as part of the corpus of the estate and cash dividends as income. This court followed the Massachusetts rule in the Hayes Case. Appellants insist that the Hayes Case does not apply to the case at bar. They point out that the testator in the Hayes Case used the term "income," while in the case now before us the testator used the term "income and profit," which appellants insist is a broader term and plainly includes stock dividends. Appellants, however, seeing the force and effect of the Hayes opinion, insist that it is not sound in principle and that the Pennsylvania and Kentucky rules are more in harmony with justice. Since this is, relatively speaking, a new question in this state, we have again spent much time and labor examining the authorities upholding the different theories or the so-called Pennsylvania, Kentucky, and Massachusetts rules. The opinion in the Hayes Case fully answers every argument made against the Massachusetts theory or rule. We think it unnecessary to again write at length on this question, and content ourselves with reaffirming the holding and reasoning in the Hayes Case. The Hayes Case was later followed by Division 1 of this court in Macdonald v. O'Day, 319 Mo. 857, 5 S.W. (2d) 374; Robert v. Mercantile Trust Co., 324 Mo. 314, 23 S.W.(2d) 32.

Turning our attention now to the case before us, we do so with the thought in mind that the intention of the testator is paramount. This intention, so to speak, must be gathered from the four corners of the will itself. By article IV of the will, the residue, which in this case is the bulk of the estate, is given to three trustees for the use and benefit of the testator's two grandsons and Henrietta Hawley, the daughter of plaintiff, share and share alike upon certain conditions. In article V the testator made a provision that, in the event of the death of one or two of the three named beneficiaries before the probate of the will, the estate should pass to **394 the survivors *1053 or survivor, but that, in any event, the payments, provided for by the will, to the testator's son and his wife, should be made and the net income of one-third of the estate should be paid to plaintiff. In article VI of the will the testator directed the trustees to pay his son the sum of \$600 per year during his lifetime and \$960 per year to his son's wife during her lifetime. Article VI also provides that the entire income and profit of the one-third share given to Henrietta Hawley shall be paid to her mother, plaintiff herein, during her lifetime, less \$200, which was to be paid to the testator's son, being onethird of the \$600 given to him by the will. Direction is made that out of the net income from the property given to the grandsons the trustees shall pay to Mrs. Mary W. King, wife of the testator's son, the sum of \$960 and also the sum of \$200 out of each grandson's share to the testator's son. So, as we view it, the testator's intention, which to us is clearly expressed, was that the estate be given to the trustees for the use and benefit of the three persons named. The testator burdened the one-third share of Henrietta Hawley with the sum of \$200 per year during the life of the testator's son, and further burdened it in that the entire income from this one-third share less the \$200 mentioned should be paid to her mother. The two grandsons' shares were each burdened with the sum of \$200 per annum during the life of the testator's son, and a further sum of \$960 per year was charged one-half against each share to be paid to the wife of the testator's son. The will, when considered as a whole, clearly indicates that it was the intention of the testator that the corpus of the estate should in all events go to the three named, as beneficiaries of

the trust. The only reason that a trust was created at all was to provide for the payment of the annuities. The testator expressly provided that, in case of the death, prior to the probate of the will, of the three named, who were to receive the life annuities, the trust created by the will should not come into existence. The testator also provided that the trust should cease with the death of the three life annuitants.

There is nothing in the will to indicate an intention on the part of the testator that Henrietta Hawley should not share equally with testator's grandsons. Rather the contrary appears. Provision is made in the will that in case of the death of one of his grandsons such share should go to the survivors share and share alike.

The petition alleges that the testator's son, one of the annuitants, died since the trust was created. It therefore, so happens that the share of Henrietta Hawley is carrying the greatest burden, and that the entire income derived from her share must be paid to her mother. However, had Divine Providence so willed that plaintiff, the mother of Henrietta Hawley, should have been the first to answer the Eternal Summons, the share of Henrietta Hawley would have been relieved *1054 of this burden. Neither do we find anything in the will that tends to show that the testator intended that one-third of the stock dividends, derived from the stock held by the trust estate, should be delivered to plaintiff. Such a course would be entirely out of harmony and inconsistent with the general scheme of the testator's will. It would not permit Henrietta Hawley to share equally with the grandsons. The will itself discloses that the testator was thoroughly acquainted with the manner in which corporations transacted business. Had he intended that plaintiff should receive stock dividends, he would no doubt have made an express provision therefor. The will is lengthy, and gives detailed instructions to the trustees with reference to the management of the estate, yet net a word to indicate that the stock dividends should go to plaintiff. The following statement of the court in Gibbons v. Mahon, 136 U. S. loc. cit. 559, 10 S. Ct. 1057, 1058, 34 L. Ed. 525, is appropriate to the occasion: "In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares."

We hold that, by the use of the term "income and profit," the testator in his will did not intend to include stock dividends. Hayes v. St. Louis Union Trust Co., 317 Mo. 1028, 298 S. W. 91, loc. cit. 94, 95 (2), 56 A. L. R. 1276; Macdonald v. O'Day, supra; Robert v. Mercantile Trust Co., 324 Mo. 314, 23 S. W.(2d) 32, loc. cit. 41 (4); Buder v. Franz (C. C. A.) 27 F. (2d) 101, loc. cit. 113, 114 (7, 8) (9) (10); Long v. Rike (C. C. A.) 50 F. (2d) 124, loc. cit. 131; Chase v. Union Nat. Bank of Lowell, 275 Mass. 503, 176 N. E. 508, loc. cit. 510 (4-6). The terms "profit" and "income" are often used interchangeably, and to a great extent have the same meaning. 31 C. J. 400, s 5, and cases cited under note 18. See, also, Chase v. Union Nat. Bank of Lowell, supra. Plaintiffs insist that the laws of the domicile of the corporations in which the trust estate owns stock should govern in determining the intention of the testator with reference to the meaning of the words "income" and "profit." In this we think plaintiffs are in error. The general rule is that the laws of the testator's domicile must be applied in determining the intention of the testator. It is apparent that any other rule would result in confusion. **395 Jones v. Park, 282 Mo. 610, 222 S. W. 1018; In re Riesenberg's Estate, 116 Mo. App. 308, 90 S. W. 1170; Freund v. Schilling, 222 Mo. App. 901, 6 S.W.(2d) 673; Long v. Rike, supra; 40 Cyc. 1382, 1383.

*1055 Plaintiff's petition asserts that the trustees have wrongfully and contrary to the terms of the will paid to Harry L. King and Albe W. King, two of the beneficiaries under the will, two-thirds of the cash net income of the trust estate less the annuities with which their shares were charged. Plaintiffs contend that this net income should have been added to the corpus of the estate until such time as the trust is ended, when the whole of the estate should be divided between the three remaindermen. Plaintiffs plead that by these payments plaintiff and plaintiff's daughter, Henrietta Hawley, have been defrauded of large sums of money to which they are entitled.

The determination of this question depends entirely upon the intention of the testator as expressed in the will. In construing wills, courts should if possible give effect to every provision made by the testator. Snow v. Ferril, 320 Mo. 543, 8 S.W.(2d)

1008, loc. cit. 1012 (1, 2). In this case the testator devised his estate to three beneficiaries. The testator, by his will, created a trust estate so as to hold the corpus of the estate intact to insure the payments of certain life annuities. By the will the estate is divided into three parts. One part is charged with the entire income during the life of a certain person. The other two shares are charged with certain separate amounts during the lives of two annuitants. If the will should be so construed that the testator intended that the trustees should retain all net income derived from the trust estate in excess of the amounts necessary to pay the life annuities and at the end of the trust the estate be divided into three equal parts, it would entirely destroy those provisions of the will that specify the share against which the life annuities shall be charged. The testator especially provided in his will that the life annuities created should be a charge and lien on the shares designated, during the life of the annuitants. It seems clear that the testator desired to bequeath his property one-third to Henrietta Hawley and the remaining two-thirds to his grandsons; the mother of Henrietta Hawley to receive the income of the one-third devised to her daughter less \$200 per year devised to Henry L. King. The two-thirds devised to the grandsons was charged with a total of \$1,360 per year to be paid to the parents of the grandsons. By article IV of the will, the trust is expressly declared to be for the benefit of the grandsons and Henrietta Hawley, subject to certain conditions. Those conditions are the payments of the life annuities. Those payments have been made and the charge and lien, created by the will against the grandsons' shares, have been discharged. The law does not favor postponement of the enjoyment of a beneficial interest in an estate. Hamilton v. Lewis, 13 Mo. 184. The payments to the grandsons of the net income derived from their shares of the estate was therefore in *1056 entire accord with the intention of the testator as expressed by his last will and testament.

Plaintiff alleges that during the period of administration there was a net income of \$30,000; that the trustees have refused to pay plaintiff one-third of this sum to which she is rightfully entitled and have wrongfully added that sum to the corpus of the estate. By the will of the testator, the trust estate consisted of the residue and remainder of the testator's estate, after the payment of the testator's debts and the payment of certain specific bequests. The trustees' duties did not commence until the executors paid the residue over to them. It was not the duty of the trustees to make an accounting and ascertain the net income, if any, that might have accrued during the period of administration. So far as the trustees were concerned, whatever they received from the executors constituted the corpus of the estate, as was recently said in a similar case. In re Holmes' Estate, 328 Mo. 143, 40 S.W. (2d) 616, loc. cit. 618: "The trust estate provided for could not be determined and did not come into existence until the administration was completed and final settlement made." We do not mean to say that under the terms of the will plaintiff was not entitled to one-third of the net income accruing during administration. Plaintiff alleges that the executors in fact did pay her certain amounts, but that only a small part of her share was paid to her by them. If the executors in fact did not pay plaintiff all she was entitled to, she should have filed exceptions to the settlements made by the executors in the probate court.

Plaintiff's complaint with reference to the executors' payment of \$1,975.20 to the state of Missouri cannot be litigated in this proceeding. The executors had been discharged four years prior to the filing of plaintiff's suit. If plaintiff desired to object to the payment of this sum, she should have filed exceptions to the final settlement of the executors in the probate court. In re Holmes' Estate, 328 Mo. 143, 40 S.W.(2d) 616. The trustees were under no duty to file exceptions for her. The trustees' duties began when they accepted the trust and received the corpus of the estate from the executors. One of the trustees named in the will, Kotany, did not accept the trust. How, under the law, could he be held responsible for the acts of the executors? Neither can the trustees, who accepted the trust, be held responsible for the actions of the executors.

Trustees of an estate are charged with the management thereof. In many respects **396 they must of necessity exercise their discretion as to what course to pursue for the best interest of the estate. It is the duty of the trustees to pay all taxes and assessments against the estate. 39 Cyc. 337. By the petition, the trustees are charged in this case with having wrongfully paid to the state of New Jersey the sum of \$236.28 as an inheritance or stock transfer tax and a like tax to *1057 the state of Minnesota in the sum of \$161.38. Considering only for the purpose of this argument that the validity of the tax was a debatable question, to have litigated these questions would in all probability have cost the trust estate, even if successful, more than the amount of the tax. The trustees ought not, under the facts pleaded, be made to account for the taxes so paid. The petition charges that these payments were made for the corrupt purpose of cheating, wronging, and defrauding the plaintiff. These allegations, without pleading facts, do not lend any force to the petition.

With reference to the bond of the trustees, the will requested that the executors, as such executors, and the named trustees, be not required to give bond. The will further provided: "But this waiver of bond shall not apply to any other person or persons." Defendants Albe W. King and Harry L. King were named as executors. They were appointed trustees after their discharge as executors in lieu of two of the trustees named in the will. Plaintiffs contend that the waiver of bond contained in the will applied to the defendants as executors but not as trustees. In this we think plaintiffs are correct. By the terms of the will the testator plainly indicated that only the named trustees should act without bond. The two trustees, Harry L. King and Albe W. King, should be required to give bond if they are to continue as trustees. The circuit court should fix the amount of the bond and require the trustees to make annual reports to the court. Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669.

Plaintiff also prayed the court to decree that she be declared the adopted daughter of the testator. The petition alleges that the testator agreed to adopt plaintiff as his daughter. The will of the testator stated that plaintiff "lived with me and my wife during the latter's lifetime as our daughter and in whose home I have lived since my wife's death, although she was never adopted by either of us as a daughter in accordance with the law." Defendants contend that by the quoted clause the testator expressly declared that plaintiff was never adopted and that she be not considered as a child. Plaintiff contends that by this clause the testator expressly declared that plaintiff should have been adopted and construed the words of the testator as an apology for not having done so. It is evident from the terms of the will that the testator held the plaintiff in high esteem. His affection and love for her are revealed by the provisions of the will wherein plaintiff and her daughter are placed on a par with his own children. However, an equitable decree of adoption in plaintiff's favor could not affect plaintiff's rights. Plaintiff accepted the terms of the will. We have held that the trustees did not abuse their discretion by paying the stock transfer or inheritance tax without first litigating the question of their legality, which depended upon *1058 the question of whether plaintiff was a child of the testator. No substantial rights could be gained for plaintiff by an adoption decree. In 21 C. J. p. 157, s 138, we read: "A court of equity will not entertain a bill simply to vindicate an abstract principle of justice, where no actual benefit is to be derived by the party who seeks to exercise such right, nor injury suffered by the commission of the wrong complained of, or where the injured party would be entitled, at most, only to nominal damages. To justify relief it must be sought in good faith to protect a substantial right and redress or prevent an appreciable wrong." See, also, Bouchard v. Zetley, 196 Wis. 635, 220 N. W. 209, loc. cit. 213 (6-8); In re Hawkins Mortg, Co. (C. C. A.) 45 F.(2d) 937, loc. cit. 939, 940 (2-4); Mason v. Madson, 90 Mont. 489, 4 P. (2d) 475, loc. cit. 478 (5, 6) (7) (8); Collins v. Martin (Mo. Sup.) 248 S. W. 941, loc. cit. 946 (2, 3). To litigate this question would entail a long trial. No substantial benefit could in any event inure to plaintiff. A court of equity should therefore not take jurisdiction.

Removal of trustees: The testator by his will appointed defendant Nelson J. Hawley, the then husband of plaintiff, as one of the trustees. Kotany was also named as a trustee, but refused to act. Kotany, so far as the petition discloses, had no interest whatever in the estate. James L. King, of Topeka, Kan., the other trustee named by the testator, had no interest in the estate. The testator, it seems, intended that the trust estate should be administered by disinterested trustees. The testator had the opportunity but did not name his own son, Henry L. King, a beneficiary under the will, as a trustee. Nor did he appoint as trustees his two grandsons, who were beneficiaries under the will. So the trust estate, in so far as plaintiff was concerned, as created by the will, was to be administered by trustees who were either disinterested in the estate or friendly to plaintiff. Subsequent events rapidly changed this situation. At the time the fifth amended petition was filed, the trustees were Nelson J. Hawley, who was then the divorced husband of plaintiff, and Albe W. King and Harry L. King, two of the principal beneficiaries of the estate. The petition alleges that the grandsons of the testator, now trustees, rebuked plaintiff for referring to the testator as her father. The petition also alleges that **397 Albe W. King was appointed trustee over plaintiff's protest. It is alleged that the trustees retained \$500 out of plaintiff's income for attorneys' fees, when in fact no attorneys' fees had been allowed by the court. The petition also charges that the trustees have paid large sums as attorneys' fees and wrongfully deducted such charges from the net income of plaintiff's share. It is charged in the petition that the trustees have refused to permit plaintiff to inspect the accounts of the trustees, contrary to the provisions of the will. It will be noted that the will *1059 expressly grants the right of inspection to the beneficiaries. Many of these allegations of the petition, charging the trustees with being unfriendly, are not of a serious nature standing alone, but they imply that the trustees are hostile and unfriendly toward plaintiff. The interests of the trustees in the estate are antagonistic to the interests of plaintiff.

Albe W. King, it is alleged, was appointed as trustee over plaintiff's protests. Persons having a beneficial interest in a trust estate should not be appointed to fill a vacancy, especially where there are conflicting interests between such person and the cestui que trust. 39 Cyc. pp. 275, 283. Considering the feeling that existed between plaintiff and the grandsons of testator, as alleged in the petition, the grandsons should not have been appointed as trustees.

The petition asks that the trustees be removed and that suitable persons be appointed in their places. Courts of equity are reluctant to remove a trustee. However, if it is manifestly for the interests of the estate of the cestui que trust, a court should exercise that power and remove the trustee. In 39 Cyc. p. 263, we read: "Where the trustee occupies antagonistic relations to the trust property because of his personal interest therein, or where inharmonious or unfriendly relations exist between the trustees, or between them and the cestui que trust, there may be sufficient reason for removal."

It is usually a question of fact whether or not just cause exists for the removal of a trustee. Taking the allegations of the petition as true, which we must do for the purpose of the demurrer, a court would be authorized to remove the trustees in this case. Had the circumstances of the parties and their relations to each other, as revealed from the facts pleaded in the petition, been such at the time the testator executed his will as they stood when the amended petition was filed in this case, the testator certainly would not have named the present trustees to administer the trust estate. The testator would not have placed the plaintiff in such an embarrassing position. We must presume that the testator intended the plaintiff to enjoy in its fullest extent the net income of the one-third share of the trust estate. Peace of mind is of more value in the enjoyment of life than property or money. The relations existing between the trustees and the plaintiff, as the cestui que trust in this case, as pleaded in the petition, tend to destroy that peace of mind and defeat to a great extent the intention of the testator when he created the trust estate.

The trial court should have heard the evidence, if any, plaintiff had to sustain the allegations of that part of the petition alleging that the trustees were unfriendly and hostile and that their interests were antagonistic to plaintiff's. 26 R. C. L. 1276, s 126. The *1060 circuit court should, in case the trustees are not removed, require Albe W. King and Harry L. King, trustees, to give bond as trustees. The petition alleges facts sufficient to state a cause of action authorizing the court to determine upon a hearing whether or not the trustees should be removed. 39 Cyc. 263; Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669; Ronald McDonald v. Mary O'Donnell, 56 App. D. C. 31, 8 F.(2d) 792, 45 A. L. R. 328; In re Dreier's Estate, 204 Wis. 221, 235 N. W. 439, loc. cit. 442 (6); Overell v. Overell, 78 Cal. App. 251, 248 P. 310; May v. May, 167 U. S. 310, 17 S. Ct. 824, 42 L. Ed. 179.

The general demurrer should not have been sustained. We have indicated, for the guidance of the trial court, wherein and as to what items the petition does not state a cause of action.

The judgment of the circuit court should be reversed, and the cause remanded for trial. It is so ordered.

COOLEY and FITZSIMMONS, CC., concur.

PER CURIAM.

The foregoing opinion by WESTHUES, C. is adopted as the opinion of the court.

All concur.

All Citations

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