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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CHARLES SHEEN et al.,

Plaintiffs and Appellants,

v.

ANTHONY SHEEN, JR. as Trustee
etc.,

NEIL GIELEGHAM et al.,

Objectors and Respondents.

B268762

(Los Angeles County
Super. Ct. No. BP092979)

APPEAL from an order of the Superior Court of Los Angeles County. Daniel A. Murphy, Judge. Affirmed.

Evan D. Marshall for Plaintiffs and Appellants.

Law Offices of Marc B. Hankin, and Marc B. Hankin for Trustee Ad Litem Charles Sheen.

Gielegghem Law Office and Neil Gielegghem for Objector and Respondent Neil Gielegghem.

Law Offices of Gregory A. Cole and Gregory A. Cole for Objector and Respondent Gregory A. Cole.

This appeal arises from a proceeding in equity in which certain beneficiaries of a trust seek to have money or other property of value paid to the trust to replenish its assets. The beneficiaries proceeded by filing a motion to impose a constructive trust against the former, relieved attorneys of record of a former trustee of the trust. The beneficiaries' contended in the motion that the subject attorneys had wrongly obtained and then enforced a money judgment for attorney's fees billed to the former trustee. The beneficiaries maintain that a constructive trust should issue requiring the lawyers to deliver value back into the trust's assets reflecting the allegedly ill-gotten attorney's fees received through the former trustee. The probate court denied the motion for a constructive trust without prejudice for various reasons. Most notable to us, the court ruled that "whether [the attorney's fee] judgment can be set aside . . . will need to be addressed in a separate proceeding." The beneficiaries, joined by a trustee ad litem appointed by the probate court in connection with the proceedings to recover the allegedly ill-gotten attorney's fees, thereon filed the appeal before us today. We affirm the probate court's order.

FACTS

As did the probate court, we start with reference to the facts of this case as we stated them in a prior appeal. (*Sheen v. Sheen* (July 1, 2014, B243847) [nonpub. opn.]

Creation of the Trust

In early 1997, Quinlock Sheen (hereafter Quinlock)¹ declared and established the Quinlock Sheen Living Trust (hereafter the trust). The governing trust instrument stated that

¹ Because of the common last name of many of the actors, we will use first names throughout this opinion for clarity.

the assets held in trust were to be distributed on Quinlock's death in equal shares to her six adult children, and, in the event that a child had died, to the issue of the deceased child.

In 2001, Quinlock, as trustee, deeded certain trust assets, including a house and adjacent duplex on South Spaulding Avenue in Los Angeles, and another real property in Missouri, to one of her children, Dolores Sheen. After the transfers, Dolores encumbered the Spaulding Avenue duplex with loans secured by deeds of trust.

Quinlock died in 2002.

The Foundational Probate Court Proceeding and Appeal

In July 2005, Quinlock's daughter, Eugenia Ringgold, who was then the trustee of the trust and also a beneficiary of the trust, joined other beneficiaries of the trust, namely, Charles Sheen (hereafter Charles) and Deryl Gaylord (hereafter Deryl), the children of a predeceased son, and Derek Hersha (hereafter Derek), a child of a predeceased daughter, in filing a petition in the probate court pursuant to Probate Code section 850 to recover the trust assets that Quinlock had transferred to Dolores in 2001.² The petition alleged that Quinlock was not of sound mind when she deeded the trust's real properties to Dolores, and that Quinlock acted under Dolores's undue influence. Attorney Leslie Howell (hereafter Howell), who eventually became affiliated with the Law Office of Fritzie Galliani (hereafter Galliani or the Galliani law firm), represented Eugenia and the other petitioning beneficiaries in the section 850 proceeding in the probate court.

² All further undesignated section references are to the Probate Code.

In April 2006, Eugenia died. After Eugenia died, the remaining petitioning beneficiaries, represented by attorneys Howell and Galliani, continued prosecuting the section 850 petition through trial.

In May 2006, the probate court (Hon. Judith Chirlin) entered judgment against Dolores in the section 850 proceeding. The judgment set aside the real property deeds from Quinlock, as trustee, to Dolores, ordered all of Quinlock's personal property to be restored to the trust, and awarded \$100,000 in damages against Dolores for losses that resulted from a sale of the Missouri real property to a bona fide third-party, and for other monies that Dolores had received from the proceeds of a mortgage against the duplex property on Spaulding Avenue.

Dolores pursued an appeal. On appeal, Galliani's law office, by attorney Leslie Howell, and then joined by attorney Evan Marshall (hereafter Marshall), continued to represent the trust beneficiaries noted above. In Spring 2008, our court affirmed the judgment against Dolores on the section 850 petition, with the exception of the probate court's denial of an award of statutorily prescribed "penalty damages" (see § 859) against Dolores. (*In re Estate of Sheen* (May 15, 2008, B192495 [nonpub. opn.]) We remanded the section 850 cause back to the probate court for reconsideration of the beneficiaries' claim for penalty damages against Dolores. (*Ibid.*)

The Initial Attorney's Fees Motion

Meanwhile, in August 2006, shortly after Judge Chirlin entered judgment against Dolores in the section 850 proceeding, the remaining petitioning beneficiaries who had brought the proceeding (Charles, Derek and Deryl) filed a motion for an order

awarding attorney's fees and costs pursuant to the court's "equitable power under the common fund theory."³ The motion was made on the ground that an award of attorney's fees to pay the Galliani law firm, specifically, attorney Howell, the trial lawyer for the successful petitioners in the section 850 proceeding, was appropriate in that the proceeding had "resulted in the creation or preservation of a common fund to the benefit of persons" other than Charles, Derek and Deryl, namely, the "numerous [other] beneficiaries of the Quinlock K. Sheen Living Trust." The motion requested an award of 40 percent of the value of the assets recovered for the trust based on contingency fee retainer agreements between the original trustee, Eugenia, and the Galliani law firm.⁴

Essentially, the beneficiaries who won the claims against Dolores at trial of the section 850 petition wanted their attorney's fees paid out of trust assets upon the sale of the real and personal

³ As explained in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Foods Markets, Inc.* (2005) 127 Cal.App.4th 387, 397, the common fund doctrine rests on the principle that one who expends attorney's fees in winning a suit that creates a fund from which others derive benefit may require those passive beneficiaries to bear a share of the fees. (See also 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 249, pp. 825-827, and cases cited.)

⁴ The contract terms between the beneficiaries and the lawyers are, of course, a matter between them. Under the common fund doctrine, a court exercises its equitable power to award attorney's fees that are in the interest of justice. The initial motion for attorney's fees only spoke as to attorney Galliani's law office, and not as to attorney Marshall, who subsequently worked for beneficiaries on appeal.

property that were recovered through their litigation efforts in the section 850 proceeding. Stated in other terms, the beneficiaries wanted a judicially-recognized surcharge or lien upon the recovered trust assets to assure payment of the attorney's fees incurred to their attorneys. Further, they wanted the attorney's fees lien to be "made senior to other claims against the [trust]."

The then trustee, Anthony Sheen (who had succeeded Eugenia), on behalf of the trust, opposed the motion for common fund attorney's fees, but only as to the amount claimed. To be more specific, trustee Anthony agreed the Galliani law office was entitled to some measure of attorney's fees, but argued against an award of 40 percent of the trust's assets. Instead, trustee Anthony argued that attorney's fees should only be awarded with a connection to those persons who had actually retained the Galliani law office. Further, trustee Anthony argued that any attorney's fees paid to the Galliani law office should only be paid after an accounting of the trust was completed, and only then as an ordinary creditor. Attorney Gregory Cole (hereafter Cole) represented trustee Anthony in opposing the amount of money sought by the beneficiaries' motion for common fund attorney's fees.

In October 2006, the probate court (Hon. Aviva Bobb) granted the beneficiaries' motion for common fund attorney's fees.⁵ In her October 2006 order, Judge Bobb fixed the amount of attorney's fees as follows: "40% of the proceeds of the entire judgment entered on May 16, 2006"

⁵ It is not clear to this court why Judge Bobb entered the attorney's fee order, rather than Judge Chirlin.

In November 2006, trustee Anthony, represented by attorney Cole, filed a motion to vacate the attorney's fee award for various procedural errors. In January 2007, Judge Chirlin issued a written order vacating Judge Bobb's attorney fee award based on Judge Chirlin's finding that there had been a "failure of complete and proper service" of the beneficiaries' motion for attorney's fees.

In March 2007, the beneficiaries re-filed their motion for attorney's fees in the section 850 proceeding based on the common fund doctrine.

In May 2007, Judge Chirlin entered a case management order in the section 850 proceeding. Among this order's many provisions, Judge Chirlin took the beneficiaries' then-pending renewed motion for common fund attorney fees off calendar until several other pending matters were resolved. We will return to this May 2007 order later in this opinion.

In June 2007, the Galliani law office substituted out as the beneficiaries' attorney of record in the section 850 proceeding, and attorney Marshall became the beneficiaries' sole attorney of record.

Further Litigation and Appeals

As noted above, Anthony succeeded as trustee of the trust sometime around mid-2006, following Eugenia's death. During the ensuing course of Anthony's trusteeship, he and the beneficiaries who had successfully obtained the judgment against Dolores in the section 850 proceeding "pursued adverse proceedings against one another." (See *Sheen v. Galliani* (Feb. 24, 2010, B206086 [nonpub. opn.].) Throughout the course of these adverse proceedings, trustee Anthony continued to be

represented by attorney Cole, who was later joined by another attorney, Neil Gielegem,⁶ while the beneficiaries were first represented by attorneys Galliani and Marshall, and then by attorney Marshall alone.

The adverse proceedings included efforts by the successful beneficiaries in the section 850 proceedings seeking to remove trustee Anthony as trustee of the trust, and efforts in the name of trustee Anthony to disqualify the attorneys Galliani and Marshall, who were representing the beneficiaries. In connection with the efforts to oust the attorneys for the beneficiaries, trustee Anthony pursued efforts to obtain orders directing the attorneys for the beneficiaries to turn over to him their case files from the trial of the section 850 proceeding, and the then-pending appeal from the final judgment in the proceeding.

In October 2006, Judge Bobb entered an order denying trustee Anthony's motion to disqualify the attorneys for the beneficiaries in the section 850 proceeding. Trustee Anthony filed an appeal.

In April 2007, trustee Anthony, represented by attorneys Cole and Gielegem, filed a complaint for legal malpractice against the Galliani law office, the trial lawyers who represented the beneficiaries in the successful section 850 proceeding summarized above. (See L.A. Sup. Ct., No. BC370267.) This malpractice action was voluntarily dismissed in 2009.

In July 2007, shortly after the Galliani law firm substituted out of the section 850 proceeding as the beneficiaries' attorney of record, Judge Chirlin entered another order in the section 850 proceeding, in what appears to be another case management

⁶ Attorney Gielegem associated in as counsel with Cole in October 2006.

order. (See *ante.*) Judge Chirlin’s July 2007 order concerned matters such as having property deeds signed and delivered by Dolores, sales of properties arranged, and disbursement of trust funds to pay costs associated with the property sales and for the regular maintenance of the properties. Further, Judge Chirlin’s July 2007 order expressly provided that no other disbursements would be made from the trust without court approval.

At a status conference in October 2007, Judge Chirlin issued an order to show cause to attorneys Galliani, Marshall, and Marc Hankin — the then previous or current attorneys for the beneficiaries in the section 850 proceedings. The OSC concerned the issue of whether attorneys Galliani, Hankin, and Marshall should turn over their legal files to trustee Anthony. This resulted in a further slew of briefing.

In December 2007, Judge Chirlin entered an order directing attorneys Galliani, Hankin and Marshall to turn over to trustee Anthony all records and files concerning the section 850 proceedings, including the appeal from the judgment against Dolores in the proceeding. An appeal from the December 2007 “file turnover” order ensued, and we eventually modified the order, and affirmed. (See *Sheen v. Galliani* (Feb. 24, 2010, B206086 [nonpub. opn.].) Our disposition read: “The order of December 24, 2007 is modified to provide that the production shall be to [trustee] Anthony . . . and his attorney only, and shall be limited to Howell’s and Galliani’s files and papers that were prepared on or before April 30, 2006. As so modified, the order is affirmed. . . .” (*Ibid.*)

In July 2008, trustee Anthony, represented by attorneys Cole and Gielegem, filed another motion to disqualify attorneys Howell and Galliani as the beneficiaries’ attorney of record in the

section 850 proceeding. The beneficiaries opposed the motion. In any event, this motion was later denied on the ground that a motion to disqualify had been denied previously, and was then the subject of a pending appeal, and that trustee Anthony had failed to present any new facts justifying a different result on his renewed motion.

In November 2008, the trial court (Hon. Mitchell L. Beckloff) entered orders granting motions by attorneys Cole and Gielegem to be relieved as counsel for trustee Anthony.⁷

The Attorney's Fees Collection Action

In January 2009, the former, relieved attorneys for trustee Anthony, attorneys Cole and Gielegem, filed what we call “an attorney’s fees collection action” seeking to recover roughly \$800,000 in attorney fees allegedly owed by trustee Anthony. (See L.A. Super. Ct., No. LC084204.) The attorney’s fees collection action filed by Cole and Gielegem was assigned to Judge Beckloff, who was then also still presiding over the probate proceeding on the beneficiaries’ section 850 petition (No. BP092979).

In May 2010, trustee Anthony, represented by new counsel, attorney Reginald Mason (hereafter Mason),⁸ made an offer

⁷ Attorneys Cole and Gielegem apparently claimed they were not being paid, or there was a risk that they would not be paid, for their legal services, and that this was the situation because the actions of attorneys for the beneficiaries were exhausting the assets of trust.

⁸ Attorney Mason is currently ineligible to practice law. On July 7, 2016, the Review Department of the State Bar Court of California issued an opinion recommending that Mason be disbarred.

pursuant to Code of Civil Procedure section 998 to settle the attorneys' fee collection action (No. LC084204) filed by attorneys Cole and Gieleghem. Trustee Sheen offered to settle the action for \$500,000.⁹ The section 998 offer included the following provision:

“In connection with any accounting, interim or final, or with any challenge to any payments made to [attorneys Cole and Gieleghem, trustee Anthony] shall take the position that the fees and costs sought by [attorneys Cole and Gieleghem] via this action (A) were authorized by [trustee Anthony] as the Sheen Trustee, pursuant to his powers and authority as Sheen Trustee; (B) were of benefit and value to the Sheen Trust in an amount equal to or exceeding the damages sought by [attorneys Cole and Gieleghem]; (C) were of a reasonable value to the Sheen Trust in an amount equal to or exceeding the damages sought by [attorneys Cole and Gieleghem]' and (D) were due and owing [attorneys Cole and Gieleghem] as alleged”

In June 2010, Judge Beckloff entered a judgment in the attorney's fee collection action in accord with the settlement offer under Code of Civil Procedure section 998. The judgment

⁹ Even before the attorney's fee collection action was filed, trustee Anthony had arranged for approximately \$150,000 to be paid to attorneys Cole and Gieleghem for attorney's fees. Thus, in offering to settle the attorney's fee collection action, trustee Anthony was agreeing to payment of approximately \$650,000 in total attorney's fees.

provided for a prompt, initial payment of \$50,000; a further payment of \$200,000 after the close of escrow for the sale of the duplex property on Spaulding Avenue, and a final payment of \$250,000 on the trial court's approval of an accounting in the ongoing trust probate litigation. The judgment provided that, in connection with any accounting, trustee Anthony would "take the position" that the fees and costs sought by attorneys Gielegem and Cole were "reasonable."

Trustee Anthony (represented by attorney Mason) subsequently filed a series of appeals from the judgment in the attorney's fee collection action (No. LC084204). In December 2012, Division Four of our Court dismissed the appeals after trustee Sheen failed to file a timely opening brief. A motion to vacate the dismissal was later denied in January 2013. (*Cole v. Sheen* (No. B239290).)

The Receiver's Costs in the Section 850 Proceeding

Meanwhile, during a period of time following the February 2008 commencement of the appeal from Judge Chirlin's "attorney file turnover" order (see *Sheen v. Galliani, supra*, No. B206086), trustee Anthony, represented by attorneys Cole and Gielegem, sought to enforce the "file turnover" order. The attorneys affected by the order, i.e., Galliani, Hankin and Marshall, opposed enforcement by claiming that an automatic stay existed by virtue of the appeal. Alternatively, they offered to deposit their legal files with the probate court pending resolution of the appeal.

At some point during all of this, Judge Chirlin apparently recused herself.

In March 2009, Judge Beckloff appointed a receiver to hold the attorneys' files. The receiver ultimately ran up a bill of \$36,000. When Judge Beckloff set an order to show cause as to the allocation of trust assets for the receiver's fees, attorneys Gielegem and Cole (who were by then no longer representing trustee Anthony) advised Judge Beckloff that they had attached everything in the trust with their judgment in their attorney's fee collection action, and that there were no assets left in the trust even to pay administrative expenses.¹⁰

The Renewed Motion for Attorney's Fees and the Current Appeal

In April 2012, the beneficiaries in the section 850 proceeding against Dolores to recover the trust's property (i.e., Charles, Derek and Deryl), joined by trustee Anthony, and also joined by the Galliani law firm and by attorney Marshall, filed a renewed motion for an award of attorney's fees based on either or both (1) the common fund doctrine, and (2) contractual attorney fees owed under the original 40 percent contingency fee retainer agreement between the beneficiaries and the Galliani firm (*ante*). This renewed motion sought attorney's fees for work performed in both the trial court and on appeal which resulted in recovery of the trust's property. Basically, the motion was a refilling of the motion for common fund attorney's fees that had been granted by

¹⁰ The beneficiaries allege that the real property recovered for the benefit of the trust was eventually sold pursuant to a sheriff's execution sale to satisfy the judgment in the attorney's fees collection action. The beneficiaries allege that attorney Cole and an entity controlled by Cole purchased the properties for significantly less than market value.

Judge Bobb in October 2006, but which was later vacated on service/notice grounds by Judge Chirlin in October 2007.

The beneficiaries' refiled attorney's fee motion essentially sought reinstatement of Judge Bobb's common fund attorney's fee order issued in October 2006 which had awarded 40 percent of the value of the property recovered for the trust by virtue of the beneficiaries' successful section 850 proceeding in 2006 (and the ensuing appeal). In the alternative, the motion sought a sum specific amount of \$720,000, based on contingency fee retainer agreement between the beneficiaries and attorneys Galliani and Marshall, and the recovery in the section 850 proceeding. Further, the motion sought a nunc pro tunc order awarding the attorney's fees as of the time of Judge Bobb's order in October 2006, and for a declaration that the Law Offices of Fritzie Galliani, and attorney Evan Marshall, had a "senior lien" for their attorney fees, implicitly meaning in front of attorneys Gielegghem and Cole by virtue of their 2010 judgment in their attorney's fees collection action against trustee Anthony. Further, the motion sought imposition of a constructive trust over the trust's "assets" to accomplish payment of attorney's fees with priority over other any claims for attorney's fees by any other person.

The motion for an award of attorney's fees also explained that attorneys Galliani and Marshall had offered to enter into an agreement with the trustee, still Anthony, under which Galliani and Marshall would share half of any funds they recovered after costs. As we understand matters, attorneys Galliani and Marshall have offered to share any money obtained by virtue of a "priority lien" over attorneys Cole and Gielegghem with all of the beneficiaries of the Sheen living trust (except, of course, for

Dolores Sheen, the actor whose wrongdoing triggered all the events summarized here).

Most importantly, in our view, the beneficiaries renewed motion for attorney's fees — because the trust assets may have been sold to enforce the final judgment in the attorney's fees collection action, and because attorneys Cole and Gielegem may have already gotten their money under the judgment — essentially sought relief compelling attorneys Cole and Gielegem to return monies back into the trust's assets in order that the attorney's fees payable to attorneys Galliani and Marshall are paid first out of the trust's replenished assets. In short, imposition of a constructive trust.

Upon the filing of the beneficiaries' renewed motion for an award of attorney's fees, attorney Gielegem sent a series of communications accusing attorneys Galliani and Marshall of “colluding” with the beneficiaries by offering to share part of their recovery of attorney's fees with the beneficiaries. Further, attorney Gielegem accused attorneys Galliani and Marshall and the beneficiaries of wrongfully trying to take away money that rightfully belonged to attorneys Gielegem and Cole. In this vein, Gielegem demanded that attorneys Galliani and Marshall, and trustee Anthony's new lawyer, Reginald Mason, immediately produce documents which might tend show the alleged “collusion,” and to submit to depositions.

On May 14, 2016, attorneys Cole and Gielegem — stating they were “specially appearing” — filed opposition to the renewed motion for common fund attorney's fees. This opposition argued that the probate court had no jurisdiction over attorneys Cole and Gielegem because they were no longer attorneys of record for any party involved in the section 850 proceeding in case.

The opposition to the renewed motion for attorney's fees also included some measure of substantive legal argument against any award of attorney's fees in that Cole and Gielegem pressed that they had obtained a final judgment for attorney's fees in case number LC084204 pursuant to a section 998 offer to compromise from trustee Anthony through his attorney of record in that case, Reginald Mason.

On May 16, 2012, the parties argued the beneficiaries' renewed motion for common fund attorney's fees to Judge Beckloff. After listening to the arguments, Judge Beckloff took the matter under submission. On July 13, 2012, Judge Beckloff issued an order denying any attorney's fees or costs at all on the ground that fixing the amount of any "common fund" award was unworkable because attorneys Galliani and Marshall had "relied on trust property values that [were] six years old." Specifically, Judge Beckloff ruled that "it would be inequitable to the trust beneficiaries to award [attorney's fees as] a percentage of the trust corpus [i.e., the Spaulding Avenue real properties] based on property values from six years ago." Further, Judge Beckloff found that the motion for attorney's fees was a wholly "new motion," not a "renewed motion." As new motion, Judge Beckloff found it was untimely pursuant to California Rules of Court, rule 3.1702.1(b)(1) [motion for attorney's fees in a civil case must be filed in the time for filing a notice of appeal.] Having rejected any attorney's fees and costs, Judge Beckloff ruled it was unnecessary to address the lien priority issues.

In an appeal from that order, we reversed Judge Beckloff's decision to deny an award of attorney's fees. (*Sheen v. Sheen* (July 1, 2014, B243847) [nonpub. opn.].) We ruled that a common fund award to the beneficiaries in the section 850 proceeding was

justified in some measure, and that it was error to find that fixing such an award was inequitable in that the beneficiaries had offered the value of the trust's recovered property as of the time that they prevailed on the section 850 petition against Dolores as the basis for an award of attorney's fees. We did not rule on any other issues, for example, on the propriety of imposing a constructive trust or whether it was appropriate to find a lien priority in favor of the beneficiaries' claim.

On September 11, 2015, following remand, the trial court (now Hon. Daniel S. Murphy) issued an extensive statement of decision denying the beneficiaries' motion for a constructive trust, without prejudice to a "separate proceeding" to determine whether such relief was appropriate. In this regard, Judge Murphy's order decreed: "The court has no authority to place a constructive trust or lien on payments made to an attorney by his client as a result of attorney fees being paid pursuant to a court judgment." Further, Judge Murphy's order expressly found that the legal work of attorneys Galliani and Marshall had benefitted trust, and awarded \$200,000 in attorneys' fees (in specified amounts) to attorneys Galliani and Marshall, payable by the trust.

The beneficiaries appeal.

DISCUSSION

I. The Probate Court's Power to Recover Assets for the Trust

A constructive trust may be imposed to correct a misappropriation of property by fraud, undue influence, a violation of a fiduciary duty, or other wrongful act. (Civ. Code, § 2224; *Tri-Growth Centre City, Ltd. v. Sillardorf, Burdman*,

Duignan & Eisenberg (1989) 216 Cal.App.3d 1139, 1154.)
“The purpose of the constructive trust remedy is to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong” (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 135.) The probate court has the power to impose a constructive trust “ ‘when it may appropriately be applied by statute, common law, court order or rule, or contract.’ ” (*Meyers v. The Retirement Fund of Federated City Employees* (2014) 223 Cal.App.4th 1201, 1210-1212, citing Cal. Law Revision Com., com., 54 West’s Ann. Probate Code (1991 ed.) foll. § 15003, p. 486.)

We agree with the beneficiaries’ general proposition that, if a constructive trust were imposed, then it would “serve to some extent to make [them] whole.” At a minimum, they would be in a better the position than they are in now, which is essentially that of being beneficiaries of a trust that is bereft of any distributable assets. In issuing its most recent order on the beneficiaries’ renewed motion for attorney’s fees and for a constructive trust, the probate court did not disagree with this sentiment. Further, we see nothing in the record to show that the court disagreed with the general principles governing constructive trusts noted above.

In addition, the beneficiaries are correct in stating the general proposition that the probate court had a duty to assure that no attorney’s fees were paid to attorneys Cole and Gieleghem which were incurred by a breach of trust, or for litigation not necessary or properly motivated, or pursued in the self-interest of the trustee. (See, e.g., *Estate of Gump* (1982) 128 Cal.App.3d 111, 117; *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1314-1316; *Donahue v. Donahue* (2010)

182 Cal.App.4th 259, 269-270.) Again, we see nothing in the record to suggest that the probate court rejected these principles.

Finally, we recognize the validity of the beneficiaries' general position that a final judgment on the merits that is not void on its face may nonetheless be subject to being unwound on a claim for equitable relief based upon a showing that it was obtained under circumstances of extrinsic fraud or mistake that prevented a fair adversarial hearing. (See Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 215, p. 823.)

However, we note further that “[e]quitable relief against a judgment is ordinarily given in an independent action by the losing party against the successful party to prevent the latter from making use of the benefits of the judgment.” (Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 218, p. 825.) It is true that relief may also be sought by motion, but this avenue should be pursued with caution, taking into account issues of jurisdiction over a particular party and proof. (*Id.* § 219, pp. 826-827.)

With these foundational principles in mind, we turn to what we see as the critical issue on appeal.

II. Jurisdiction to Impose a Constructive Trust

It appears that the critical issues are whether the probate court had jurisdiction in equity giving it the power to impose a constructive trust over attorneys Cole and Gielegem, and, if it did, whether the probate court abused its discretion by ruling that it should defer exercising its jurisdiction in favor of a “separate proceeding.” The opening brief filed by trustee ad litem Charles Sheen fairly summarizes the case history, and demonstrates in our view that substantial evidence may exist

which — if presented at a trial in equity — could support a finding that attorneys Gieleghem and Cole wrongly obtained a judgment for the payment of attorney’s fees against trustee Anthony in his role as the manager of the trust’s assets. Stated in other words, there *may* be a basis in fact and equity for imposing a constructive trust to recover trust property obtained by attorneys Gieleghem and Cole. At a minimum, the record shows that the beneficiaries of the trust have not received, and will not receive, any distribution of trust assets as a result of the legal representation provided by Gieleghem and Cole to trustee Anthony, services for which Cole and Gieleghem have received payment. However, we will not make factual findings of wrongdoing in the first instance on appeal.

Given this state of the record, the critical issue in this case is whether the probate court had recognized judicial power to issue binding orders and judgments, including a constructive trust, as to attorneys Gieleghem and Cole.

The following is the primary substantive argument, in whole, presented in the beneficiaries’ opening brief regarding the issue of the probate court’s jurisdiction over attorneys Gieleghem and Cole for purposes of issuing a constructive trust:

“It is clear that there was a general appearance, both in earlier proceedings where Gieleghem and Cole sought to advance their own interests [references to the record], and in filing opposition to the [beneficiaries’ attorney’s] fees motion on the merits. *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1199; *366-388 Geary St. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1193; *California Dental Assn. v. American Dental Assn.*

(1979) 23 Cal.3d 346, 352. ‘A general appearance by a party is equivalent to personal service of summons on such party.’ C.C.P. § 410.50(a). ‘Jurisdiction of the court over the parties and the subject matter of an action continues throughout the subsequent proceedings in the action.’ C.C.P. § 410.50 (b). Thus, when ‘a tribunal has jurisdiction over the parties and the subject matter, the jurisdiction continues until a final judgment is entered’ *Riley v. Superior Court* (1957) 49 Cal.2d 305, 309.”

In association with this assertion, the beneficiaries cite *Estate of De Barry* (1941) 43 Cal.App.2d 715 (*De Barry*) in support of the proposition that the probate court has “inherent power . . . to entertain and exercise summary proceedings in its discretion against attorneys who are guilty of misconduct in handling the assets of the estate.” (*Id.* at p. 731.)

As we explain next, we abstractly agree with the beneficiaries’ position that the probate court has “inherent power to conduct summary proceedings against an attorney who is guilty of misconduct in handling the assets of an estate,” but we find the beneficiaries have jumped a step in equating such “inherent power” with the issue of whether the probate court has jurisdiction over the attorney, particularly an attorney who has been relieved as a party’s attorney of record in a probate proceeding by court order, such that the probate court may impose a constructive trust over the attorney.

In *De Barry*, Barry, the executrix of a decedent, retained a lawyer, Coyne, for the purpose of seeking to recover unpaid royalties from a failed oil and gas drilling venture, and to pursue

litigation for damages to the drilling property caused by the oil company involved in the drilling under an existing lease. (*De Barry, supra*, 43 Cal.App.2d at pp. 719-720.) During the course of the ensuing proceedings, a dispute arose over whether attorney Coyne had wrongly refused to repay \$15,000 to the estate that he had received for legal fees pursuant to a stipulation with Barry, the executrix. (*Id.* at pp. 724-725.) Before the dispute over Coyne's fees was finally addressed by the probate court, the executrix resigned, and Coyne's representation ended, and a new lawyer came into the case to act as executrix. (*Ibid.*) Thereafter, the court ordered Coyne to restore to the estate the sum of \$15,000. (*Id.* at p. 718.) Coyne appealed, and the Court of Appeal affirmed the order. In affirming the order, the Court of Appeal rejected Coyne's contention that the probate court was "without jurisdiction" to order him to return money to the estate for the following stated reasons:

"[Coyne] urges the proposition that the probate court was without jurisdiction to order [him] to repay to the estate the moneys he had taken from its coffers. . . . But all of [cases cited by Coyne] are readily distinguishable in this: that in each of them the party who finally prevailed was a stranger to the estate and was entitled to a trial before a law court. As to Coyne and the legatees, all of them were 'interested parties' and as such they were amenable to the orders of the probate court as recipients of assets of the estate without judicial authorization. [¶] Not only does the probate court have the power to determine the distribution of an estate and to control the conduct of interested parties with reference to their receipts of distributable shares and other payments made by the estate, but it is an inherent power of the court to entertain and exercise summary

proceedings in its discretion against attorneys who are guilty of misconduct in handling the assets of the estate. [Citations.] Whether the court will exercise its summary powers is a matter within its discretion. (*Ibid.*) . . . [¶] But it could not be contended that Coyne was the victim of a summary proceeding. Far from it; he created the issues of his own pleading and he submitted his person to the jurisdiction of the court by appearing, pleading, giving his testimony in full and by demanding judgment in his favor. He was thereby given his day in court and had the privilege of presenting all evidence available to him to establish the affirmative of his contentions. At the trial all of the facts surrounding his services and the moneys deducted by him from the funds of the estate were fully developed. He thus nominated the probate court to determine the validity and merit of his objections to the accounts. That court having ruled upon them, [Coyne] is in no position now to question the jurisdiction of the probate court to adjudicate the issue. [Citation.]” (*De Barry, supra*, 43 Cal.App.2d at pp. 730-731.)¹¹

¹¹ In *Estate of Linnick* (1985) 171 Cal.App.3d 752, the Court of Appeal explained that the extensive discussion in *De Barry* concerning the probate court’s authority to order an attorney to restore funds to a decedent’s estate had largely been abrogated by the enactment of former section 851.5, which provided the procedure for the hearing of a petition by a decedent’s estate concerning any claim involving property allegedly wrongly possessed by another. (*Estate of Linnick, supra*, at pp. 759-760.) Since the time of *Linnick*, former section 851.5 has been repealed and reformulated into other Probate Code sections. However, nothing in the parties’ briefs before us in the present appeal suggest to us that a petition or complaint procedure is not available, subject to whatever defenses are relevant, to seek

De Barry is interesting, but we see a number of distinguishing factors as between attorney Coyne there, and attorneys Cole and Gielegem in the beneficiaries' current matter. Attorney Coyne remained the attorney of record for the executrix at the time that the dispute over his fees was first tendered to the probate court. Here, attorneys Cole and Gielegem were relieved as attorneys of record for the trustee before they sought their attorney's fees, and they did not receive payment for their billed attorney's fees "without judicial authorization" as did attorney Coyne in *De Barry*. Attorneys Cole and Gielegem received payment for their billed attorney's fees by way of obtaining a court judgment in their attorney's fee collection action at a time that the trustee was represented by an attorney, Mason. That judgment became final when an appeal from the judgment was abandoned.

In the current matter, we are not convinced by the beneficiaries' arguments that their claims against attorneys Cole and Gielegem fall under the *De Barry* model. Cole and Gielegem were relieved by court order as attorneys of record for trustee Anthony before the beneficiaries filed their renewed motion for attorneys' fees and a constructive trust. Cole and Gielegem have never been served with process for an action for relief from the judgment that they obtained in their attorney's fee collection action. We agree with the beneficiaries that Cole and Gielegem defended against the beneficiaries' motion for attorney's fees, but disagree that such a defense, assuming it constituted a "general appearance" in the section 850 proceeding, thereby necessarily subjected them to a possible constructive

recovery of property allegedly wrongly possessed by another and under the possible authority of the probate court.

trust within the framework of that proceeding. While it is correct that a party who seeks affirmative relief in an action or opposes a motion on the merits may be deemed to have made a general appearance in the action (see *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, and cases cited therein), the beneficiaries' arguments do not demonstrate a legal basis for the probate court to have granted equitable relief in the form of a constructive trust against attorneys Gielegghem and Cole.

The problem with the beneficiaries' argument is that there simply has never been an action presented against attorneys Cole and Gielegghem alleging a cognizable legal and factual basis for requiring them to return property that they obtained by the 998 judgment in their collection action. We find the probate court's reasoning sound, and adopt it here for purposes of this appeal.

As the probate court stated: "Assuming for argument sake that [this] court had authority to issue a constructive trust or lien, *there is no cause of action or petition currently pending against attorneys Gielegghem and Cole.* Attorneys Gielegghem and Cole are not parties to this action, and [the beneficiaries' motion for attorney's fees based on the common fund doctrine] against the trust does not confer jurisdiction over attorneys Gielegghem and Cole. Rulings and/or orders concerning attorneys Gielegghem and Cole will need to be addressed in a separate proceeding.

"*Epstein v. Abrams* [(1997)] 57 Cal.App.4th 1159 [*Epstein*], which is cited by the beneficiaries in their objections, is distinguishable from the present case. In *Epstein*, an attorney appealed the court's approval of a settlement, and the appellate court reversed the settlement. In the present case, the appeal on the '[attorney's fees] collection case' was

abandoned, and this ‘collection case’ judgment appears to be final.

“*Skelly v. Richman* [(1970)] 10 Cal.App.3d 844 [(*Skelly*)], is also distinguishable. In *Skelly*, an attorney filed a lawsuit for inducement of breach of contract. In the present case, neither the beneficiaries nor attorneys Galliani and Marshall have filed any cause of action against attorneys Gielegem and Cole.

“*Bluxome St. Assocs. V. Fireman’s Fund Ins. Co.* [(1988)] 206 Cal.App.3d 1149 [(*Bluxome*)], is another case that is distinguishable from the present case. In *Bluxome*, a party appealed a ruling concerning lien priority involving a malpractice settlement. In the present case, the appeal on the ‘collection case’ was abandoned, and this ‘collection case’ judgment appears to be final.

“The court could find no authority for the court to place a constructive trust or lien on payments made to an attorney by his client as a result of fees being paid pursuant to a lawful court judgment. As stated previously, the cases cited by the beneficiaries are distinguishable from the present case.”
(Italics added.)

We can find no fault with the trial court’s ruling — in the context of equity — that a constructive trust is not appropriate in the absence of a pending cause of action or other proceeding, and in the absence of proof at trial of wrongdoing justifying the imposition of a constructive trust. We find this particularly true, as did the trial court, where the subject of the proposed constructive trust is money obtained by a final judgment that is facially valid.

In light of our conclusion that Judge Murphy did not err in ruling that a constructive trust is not presently available to the

beneficiaries, we do not reach their arguments concerning the issue of the “priority of liens” as between (1) an award of attorney’s fees under the common fund doctrine; and (2) the attorney’s fees which attorneys Cole and Gielegem recovered by the 998 judgment in their “collection action.”

III. The Attorney’s Fees Award as to the Trust

The beneficiaries, joined by trustee ad litem Charles, contend the probate court erred in awarding only \$200,000 for common fund attorney’s fees (the focus of the arguments is mostly on the \$160,000 awarded to the Galliani law firm), and in including a provision in its order that those fees “shall be paid by the [trust].” The beneficiaries question how it is that Judge Bobb could have awarded \$720,000 to the beneficiaries for the Galliani law firm’s attorney’s fees in 2006,¹² and yet the probate court’s most recent order in 2015 only awards \$160,000 for attorney’s fees for the Galliani law firm’s legal work in the section 850 proceeding. We find the beneficiaries have failed to establish error.

¹² What Judge Bobb actually did was to make an award of attorney’s fees based on a 40 percent contingency fee agreement between the Galliani law firm and the original trustee, Eugenia Ringgold, with the understanding that the 40 percent fee award would be measured against “the proceeds of the entire judgment” in the section 850 proceeding. The beneficiaries have always maintained that value of the property that they recovered for the trust by the section 850 proceeding amounted to \$1.8 million. Judge Bobb’s order did not specifically fix the value of the “entire judgment” entered in the section 850 proceeding.

“‘Arguments should be tailored according to the applicable standard of appellate review.’ [Citation.] Failure to acknowledge the proper scope of review is a concession of a lack of merit. [Citation.]” (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.)

As a general rule, a trial court’s determination of reasonable attorney’s fees is reviewed under the abuse of discretion standard. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) The abuse of discretion standard in the attorney’s fees context may have two focuses. First, a trial court may be found to have abused its discretion when an attorney fee award is “not supported by the evidence.” (See, e.g., *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549-550.) The beneficiaries’ opening brief does not offer any meaningful argument in challenge to Judge Murphy’s assessment of a reasonable hourly rate for Galliani’s and Marshall’s legal services (\$400 per hour), nor have the beneficiaries challenged Judge Murphy’s determination that 500 hours was a reasonable amount of time for the section 850 proceeding. The beneficiaries’ argument is not tailored to, and does not acknowledge, this aspect of the standard of review.¹³ For this reason, we decline to reverse the award of \$200,000.

Second, the scope of a trial court’s discretion regarding attorney’s fees is framed by the law applicable in a particular case, meaning that judicial action which “transgresses” the

¹³ The beneficiaries’ position has consistently been that they are entitled to a contingency fee based recovery of fees measured against the value of the property recovered by their section 850 proceeding. Such a claim is distinct from any attack on the amount of fees under Judge Murphy’s hourly rate ruling.

applicable principles of law in a case “ ‘is outside the scope of discretion and we call such action an “abuse” of discretion.’ [Citation.]” (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 25.) Accordingly, keeping in mind this focus on the abuse of discretion standard, the issue before us is whether Judge Murphy’s decision to apply an hourly fee calculation transgressed the law concerning “common fund” attorney’s fees. Here, the beneficiaries’ arguments do not persuade us that a fee award based on an hourly rate calculation is necessarily disallowed under the law governing common fund attorney’s fees. Stated in other words, the beneficiaries’ arguments to not persuade us that the hourly rate attorney’s fee award fixed by Judge Murphy was outside the scope of his discretion in equity in measuring the amount of fees which should be awarded. That risk-taking factors may be considered in determining reasonable attorney’s fees does not mean that they are mandated in all cases. Here, we have not been persuaded that Judge Murphy acted improperly in fixing the amount of fees under an hourly rate approach.

DISPOSITION

The probate court’s order is affirmed. Each party to bear its own costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.