Filed 11/17/16 Williams v. McCullough CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GREGORY J. WILLIAMS, Plaintiff and Appellant, v. THOMAS J. McCULLOUGH, as Trustee, etc., Defendant and Respondent.	B269251 (Los Angeles County Super. Ct. No. SP006932) ORDER MODIFYING THE OPINION AND DENYING RESPONDENT'S PETITION FOR REHEARING (CHANGE IN THE JUDGMENT)

THE COURT:

It is ordered that the opinion filed in the above-entitled matter on October 27, 2016, be modified in the following manners:

On page 13, in the second paragraph of part I.A.3, the dollar amounts $46,897.90 and $8,632.25 referenced in that paragraph are corrected to read $47,097.90 and $8,832.25 respectively.

On page 16, the dollar amount $46,897.90 that is referenced in the Disposition is corrected to read $47,097.90.

These modifications constitute a change in the judgment.
Respondent's petition for rehearing is denied.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J. CHANEY, J. LUI, J.

Filed 10/27/16 Williams v. McCullough CA2/1 (unmodified version)

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GREGORY J. WILLIAMS, Plaintiff and Appellant, v. THOMAS J. McCULLOUGH, as Trustee, etc., Defendant and Respondent.	B269251 (Los Angeles County Super. Ct. No. SP006932)

APPEAL from an order of the Superior Court of Los Angeles County, Maria Stratton, Judge. Affirmed in part and reversed in part and remanded.

Mary L. Williams, Joseph Di Giulio; and Howard Posner for Plaintiff and Appellant.

Freeman, Freeman & Smiley, Stephen M. Lowe, and Thomas C. Aikin for Defendant and Respondent.

This appeal is the second time these parties have been before this court litigating the Annabelle Herman Trust (Trust). In the first appeal in 2014, the trustee, Thomas B. McCullough unsuccessfully challenged the trial court's order that reduced his trustee fees. Now the surviving beneficiary, Gregory Williams, appeals the trial court's order, approving McCullough's final Trust accounting, which included payment of attorney fees from Trust assets. Williams claims that the trial court erred by approving McCullough's expenditure of Trust funds to pay attorney fees for assisting him to: (1) administer the Trust; (2) litigate McCullough's Trustee fees; and (3) challenge the trial court's order reducing his trustee fees. Williams also asserts that the trial court erred in accepting McCullough's representation of the opening balance in the Trust account. As we shall explain, only Williams's complaint about the payment of attorney fees incurred to challenge the trial court's order reducing McCullough's trustee fees has merit. Accordingly we reverse the court's order in a limited respect and remand to the trial court to direct McCullough to reimburse the Trust for the attorney fees the Trust paid in McCullough's challenge of the order reducing trustee fees.

FACTUAL AND PROCEDURAL BACKROUND

A. *The Trust and the Trustee*

In February 2004, Anabelle Herman created a family Trust held for the benefit of Herman's sole living offspring, Barbara Goldsmith and upon Goldsmith's death, the Trust was to be distributed to Williams.[1]

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[1] The relevant background facts are taken from this court's opinion in the first appeal. (*Williams v. McCullough* (Oct. 27, 2014, B250028) [nonpub. opn.].)

Shortly after Herman passed away in November 2006, McCullough was appointed as the successor trustee. The terms of the Trust authorized McCullough to receive reasonable compensation for his trustee services and also permitted him to retain legal services to assist him in trust administration, and have those attorney fees paid by the Trust. At the time of Herman's death, the value of the trust estate was approximately $1,000,000 and consisted of a condominium in Hawaii, a four-unit apartment complex in Sherman Oaks and under $200 in a bank account. Because cash was needed to care for Goldsmith, in May 2007, McCullough facilitated the sale of the Hawaii condominium, and in 2008, the sale of the Sherman Oaks property. Goldsmith passed away in October 2011, making Williams the sole remaining beneficiary of the trust.

For approximately five years McCullough served as trustee. While Goldsmith was alive, McCullough paid himself (and other professionals, including lawyers and real estate agents) for services provided to the Trust. During this time, neither Williams nor anyone else requested that McCullough provide an accounting of the trustee services he provided to the Trust or any expenditures McCullough made on behalf of the Trust.

B. *Trust Administration After Goldsmith's Death and Williams's 2012 Petition*

After Goldsmith's death in late 2011, Williams (through his aunt, who is also one of his lawyers) contacted McCullough and requested immediate distribution of the Trust and for information about Trust expenditures. Correspondence between McCullough and Williams's counsel ensued in early 2012, and McCullough retained counsel to assist him both in responding to Williams's request for information and in anticipation that he would have to prepare a formal accounting for the Trust. In early February 2012, McCullough made

a preliminary distribution to Williams from the Trust of $200,000.

During the months that followed, Williams made additional requests for information, and documents, including information to substantiate fees McCullough had paid himself as the trustee. Williams did not, however, request a formal accounting because he did not want the Trust to incur the cost of its preparation. Nonetheless, Williams would not waive his right to request an accounting.

On August 17, 2012, Williams filed a petition asking the trial court: (1) to review the fees collected, (2) set reasonable trustee fees, (3) order McCullough to reimburse the Trust for unreasonable trustee fees already paid; and (4) order McCullough to provide billing records and accurate information on the gross sales price and net sale proceeds for the Sherman Oaks real property (Williams's 2012 petition).

C. *Litigation of Williams's 2012 Petition*

In January 2013, the parties submitted a stipulation indicating that the only issue to be determined by the court was the reasonableness of McCullough's trustee fees. The court conducted the trial on the petition in late February 2013. The court identified the issues before it as: "(1) whether the Trustee maintained proper and accurate records, (2) whether the Trustee specified and itemized proper specific extraordinary services and the fees paid to him therefor, and (3) whether the fees that the Trustee paid to himself were reasonable within the law, including the custom and practice of the community."

On April 19, 2013, the trial court issued a statement of decision. The trial court found that there was no dispute that McCullough ably performed his duties and that his services benefited the Trust. The court found that McCullough's base fee

for ordinary services of 2 percent of the gross Trust estate value was "at the very high end of reasonable fees and . . . therefore, the bulk of the Trustee's work should be considered not to be extraordinary services." The court further found that the McCullough's hourly rate of $375 for extraordinary services was "excessive" for work such as "obtaining and delivering documents, banking, or managing real estate," that in the court's view did "not require . . . skill and expertise." The court also found McCullough's records, billings and summary of services were incomplete, "confusing and unspecific" and of limited usefulness; the court noted that some of the billing statements from lawyers that McCullough had employed on behalf of the Trust had been destroyed for some unknown reason. The court further found McCullough's records disclosed "numerous irregularities and outrageous billings" for payments to himself such as $525 to retrieve an original will from a law firm and "charges of several thousands of dollars in 2010 for figuring out what his ordinary fee payments should be." The trial court concluded that the $79,079.10 of trustee fees received by McCullough as extraordinary fees were not reasonable in light of the lack of complexity of the tasks he performed.

The court determined that McCullough had paid himself $212,371.40 in trustee fees; but was only entitled to receive $138,675.09, which included $70,348.94 for ordinary services, $26,600 for extraordinary services (reduced from $79,079.10), $3,839.31 in costs and $37,850.84 to the attorneys representing the trustee during the 2007-2011 time period. The court also found that McCullough was entitled to a payment for additional services through December 2012 of $19,854.74. The court ordered McCullough to return to the Trust "all monies he received in excess of the amounts" set forth in the court's order.

Williams submitted a proposed judgment against McCullough and for Williams in the amount of $53,841.73. McCullough objected to the proposed judgment, claiming that the wording did not conform to the statement of decision. McCullough also objected to the statement of decision, claiming it created ambiguities, failed to resolve controverted issues and erred in placing the burden of proof on him. On May 16, 2013, the trial court issued a minute order, which stated, "Statement of Decision stands as the Court's order." In mid-July, 2013, McCullough filed a notice of appeal.

D. *McCullough's Appeal*

In McCullough's appeal (*Williams v. McCullough*, *supra*, B250028), he argued that the trial court erred in reducing his compensation. He complained that: (1) the trial court misplaced the burden of proving the unreasonableness of the trustee's fees on him rather than the trust beneficiary challenging the amount of fees collected; (2) the evidence did not support the reduction of McCullough's fees; and (3) ambiguities in the statement of decision could not be construed against McCullough.

In October 2014, this court concluded the trial court did not abuse its discretion in reducing the amount of fees payable to McCullough as extraordinary services. We held that the trial court properly determined that McCullough had failed to maintain accurate and proper records, failed to itemize extraordinary services and fees properly and that his evidence had established his extraordinary fees were unreasonable. We therefore affirmed the court's decision and remanded the matter with directions to specify the precise dollar amount McCullough was required to reimburse the Trust for excessive fees collected[2]

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[2] We held that the statement of decision was adequate, but nonetheless, contained a mathematical error—McCullough's

and to enter judgment accordingly. This court also awarded Williams his costs on appeal. After remand, the trial court ordered McCullough to pay back $49,173.59 to the Trust for excess compensation he had received.

E. *McCullough's First and Final Account, and Petition for Settlement and Final Distribution*

In mid-February 2015, McCullough filed "First and Final Account and Report" and Petition for Settlement and Final Distribution covering the remaining period of the trust administration from March 15, 2012, through December 15, 2014.[3] In the petition, McCullough represented that the opening the value for the Trust assets as of March 15, 2012, was $199,115.62. The accounting also disclosed that between mid-March, 2012 through late 2014, McCullough had paid a law firm approximately $140,000 in legal fees out of the Trust account for services provided to the Trust. Williams filed objections to McCullough's final accounting and petition. Williams asserted complaints, including that (1) McCullough had misstated the beginning balance in the Trust accounts; and (2) McCullough had failed to provide sufficient support for payment of attorney fees or establish that the legal services benefited the Trust.

On August 14, 2015, at trial, Williams limited his objections to: 1) the opening account balance was incorrect;

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additional fees for the period ending December 2012, totaled $24,468.52, rather than $19,854.74 as provided in the statement of decision.

[3] McCullough's final accounting covered March 15, 2012 through December 15, 2014 of Trust transactions and expenditures because all other matters related to the Trust administration had been previously resolved in connection with Williams's 2012 petition.

2) the trustee should not have used trust funds to hire lawyers to defend him against the contentions of the beneficiary; 3) Williams should be able to recover attorney fees from the trust.[4] On October 29, 2015, the trial court issued a minute order, in which the court overruled Williams's objections to McCullough's account report and petition. The court approved the "First and Final Account and Report of Trustee." The court found that McCullough had acted reasonably in retaining lawyers to assist him to respond to inquiries for information from Williams and to assist McCullough in preparing informal accountings when Williams refused to execute a waiver of accounting. On December 22, 2015, Williams filed a notice of appeal.[5]

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[4] Williams subsequently withdrew his request for attorney fees.

[5] On April 1, 2016, more than five months after its ruling, the court signed an "Order Approving First and Final Account and Report of Trustee." (Capitalization omitted.) Although the notice of appeal was filed before the final order was entered (but after the minute order setting out the contents of the order was entered), we treat the notice of appeal as filed after the entry of judgment. (See Rule of Court, rule 8.104(d)(1) ["A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment"]; *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 906.)

DISCUSSION

I. *The Trial Court Erred In Ruling That McCullough Was Entitled To Have The Trust Pay All Of The Attorney Fees*

Williams argues that the trial court erred when it overruled his objections[6] to the Trust paying attorney fees McCullough incurred in connection with: (1) responding to Williams's questions and requests for information about the administration of the Trust; (2) litigating Williams's 2012 petition objecting to McCullough's trustee fees; and (3) challenging the order which found that McCullough had overcharged the Trust for his services. Williams argues that payment of attorney fees from the Trust assets was improper because the fees served to benefit only McCullough. As we shall explain, Williams is partially correct—the attorney fees incurred in connection with the unsuccessful challenge of the trial court's order reducing McCullough's trustee fees should not have been charged to the Trust because that challenge did not benefit the Trust.

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[6] He also complains that the trial misallocated the burden of proof to him to demonstrate errors in the accounting. We disagree. McCullough carried the initial burden on accounting, to identify Trust assets and report income and expenditures in Trust accounts while Williams shouldered the burden to demonstrate the merit of his objections to the accounting and petition. (See *Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1390 [the burden of proof in any hearing on objections to an accounting is on the objector].) Here the court explained to Williams's counsel that he had the burden of proof on his objections; the record does not demonstrate that the court wrongly imposed the burden of proof.

A. *Governing Legal Principles*

In general, a trustee is empowered to do all " 'acts necessary and expedient to collect, conserve and protect the property of the trust, to maintain and defend the integrity of the trust . . . and to employ such assistants as may be necessary for said purposes.' " (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1126; see also Prob. Code, §§ 16247, 16243 [authorizing the trustee to hire and pay (or seek reimbursement for having paid) attorneys to assist in trust administration]; *Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 235.) And if litigation is necessary for the preservation and administration of the trust, the trustee is entitled to reimbursement for those expenditures from the trust, including attorney fees; however, if the litigation is specifically for the benefit of the trustee, the trustee must bear his or her costs and fees incurred, and is not entitled to reimbursement from the trust. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 270.) In addition, a trial court may also deny attorney fees where the trustee acts negligently, where expenses were incurred for litigation that was not reasonably necessary or properly motivated, and where the litigation is pursued based on the self-interest of the trustee. (*Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1314-1316.) We review the trial court's orders on these matters for abuse of discretion. (*Donahue v. Donahue*, *supra*, 182 Cal.App.4th at pp. 268-269; *Kasperbauer v. Fairfield*, *supra*, 171 Cal.App.4th 229, 234.)

B. *McCullough's Attorney Fees*

McCullough claimed a total of $137,432.09 in attorney fees for services provided to the Trust. He grouped the fees into four categories: (1) $32,401.61 incurred responding to Williams's questions and requests for information about the administration

of the trust, before the parties stipulated to limit the issues in Williams's 2012 petition to the reasonableness of McCullough's trustee fees; (2) $57,932.58 for litigating Williams's 2012 petition to determine McCullough's trustee fees; (3) $8,832.25 incurred in "Objecting to the Proposed Order/Statement of Decision;" and (4) $38,265.65 to represent McCullough in the unsuccessful appeal of the trial court's order reducing his trustee fees.

1. *Fees Incurred Responding To Inquiries About Trust Administration Prior To Stipulation Narrowing The Issues In Williams's 2012 Petition*

During the time that McCullough served as trustee from 2006 until Goldsmith's death in late 2011, no beneficiary (or anyone else) had requested an accounting or information about the Trust's administration. Thus, in the months after Goldsmith's death, Williams's inquiries about the Trust administration required McCullough to retrieve, review and compile information from the prior five years relating to the Trust, while also responding to Williams's counsel's request for immediate final distribution of the Trust's assets. McCullough hired counsel to assist him in responding to Williams's counsel's numerous questions and requests concerning the Trust accounts and transactions. And when Williams declined to execute a waiver of accounting, counsel also assisted McCullough in preparing informal accountings and an anticipated formal accounting. Counsel also assisted McCullough in responding to the Williams's 2012 petition seeking, in addition to the trustee fee determination, orders for McCullough to provide billing records and accurate information about the sale of the Sherman Oaks real property.

The expenditure of trust funds for attorney fees incurred in responding to requests for information and objections from

beneficiaries as well as in preparing for a Trust accounting are recognized as part of trust administration. (*Kasperbauer v. Fairfield*, *supra*, 171 Cal.App.4th at p. 235 ["Preparing the accounting and responding to the beneficiaries' objections to that accounting are aspects of trust administration," and attorneys hired to assist in those tasks are entitled to reasonable fees paid from trust assets.].) Moreover, employing legal counsel to demonstrate the appropriate expenditure of trust assets benefits the trust. (See *Estate of Trynin* (1989) 49 Cal.3d 868, 874 [services that do not directly benefit the estate in the sense of increasing, protecting, or preserving it are nonetheless compensable if the estate's attorneys in performing the services were acting in consonance with the fiduciary duties imposed upon them].) Here McCullough's counsel resolved Williams's inquiries about the management of the Trust assets and worked to narrow Williams's 2012 petition to the issue of reasonable trustee fees. These services benefited the Trust. Consequently, the $32,401.61 of attorney fees incurred responding to questions and requests for information about the administration of the Trust, preparing the informal accountings and narrowing the issues were properly imposed upon the Trust.

2. *Fees Incurred to Determine Reasonable Trustee Fees*

Williams's 2012 petition proceeded to trial on his request to set reasonable trustee fees, to determine whether McCullough had previously charged reasonable fees, and to seek repayment of any unreasonable trustee fees already paid. Although the litigation of the trustee fee benefited McCullough personally, it also provided some benefit to the Trust because the fee order provided clarity and certainty to the Trust's finances and resolved questions about the tasks and services McCullough performed for the Trust. (See *Hollaway v. Edwards* (1998)

68 Cal.App.4th 94, 97 [defense of allegations against trustee benefited trust by eliminating questions regarding whether the trustee had properly administered trust].) Consequently, the court did not abuse its discretion in ordering that $57,932.58 in attorney fees incurred to determine the reasonable trustee fee be paid from Trust assets.

3. *Fees Incurred in Challenging the Court's Fee Decision*

In ruling on Williams's 2012 petition, the court found that McCullough's trustee fees for "extraordinary" services were excessive in light of the work he completed. The court further found McCullough's records, billings, and summary of services were incomplete and inadequate, and that his records disclosed "numerous irregularities and outrageous billings" for payments to himself. The trial court, therefore, concluded that the $79,079.10 trustee fees received by McCullough as extraordinary fees were not reasonable, and ordered McCullough to reimburse the Trust for extraordinary services fees in excess of $26,600.

McCullough decided to challenge the court's decision. After that, the Trust paid McCullough's lawyers a total of $46,897.90, which included $8,632.25 to object to both the court's statement of decision and the proposed order, and $38,265.65 to McCullough's lawyers to prosecute an unsuccessful appeal of the decision. In our view, the Trust should not have been required to pay the attorney fees incurred in pursuing McCullough's unsuccessful challenge to the court's ruling that McCullough overcharged the Trust and kept inadequate records. (*Metzenbaum v. Metzenbaum* (1953) 115 Cal.App.2d 395, 401-402 [attorney fees and litigation costs incurred in the trustee's *unsuccessful* defense of an action brought by the beneficiary are not recoverable].)

Nonetheless, the trial court here reasoned that McCullough's attorney fees incurred in challenging the order were properly charged to the Trust because there had been no finding that McCullough had engaged in "malfeasance" or acted with "ill intent" as the trustee. McCullough's intent is relevant, but it is not dispositive; the governing standard is whether the fees incurred served to benefit the Trust. (*Donahue v. Donahue*, *supra*, 182 Cal.App.4th at pp. 269-270 [the underlying principle that guides the trial court in allowing attorney fees for the administration of a trust as well as incidental litigation out of a trust estate is that such fees provide a benefit and service to the trust]; see *Estate of Gump* (1991) 1 Cal.App.4th 582, 605 [unless the challenged actions resulted in a benefit to the trust, the trust may not be charged with fees where the trustee mismanaged assets or breached his or her duties]; see also *Estate of Cassity* (1980) 106 Cal.App.3d 569, 572-575 [trustee entitled to reimbursement of legal expenses in defending his accounting even though he committed breaches of trust because actions served the trust].)

McCullough failed to show that the fees incurred to challenge the decision reducing his fees benefited the Trust in any way. He did not demonstrate that his challenge was a necessary part of the administration of the Trust. (See *Conservatorship of Lefkowitz*, *supra*, 50 Cal.App.4th at p. 1314 [if it is not reasonably necessary for the trustee to engage in litigation, he or she should not be reimbursed for the fees incurred].) And where, as here, the Trust did not benefit from the 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's assets. (*Estate of Moore* (2015) 240 Cal.App.4th 1101, 1106.) If McCullough's had succeeded in overturning the trial court's order reducing his fees, he would have been

personally enriched, while the Trust's assets would have been depleted. McCullough's challenge to the trustee fee decision was motivated by self-interest, not the best interest of the Trust.

Also lacking merit is McCullough's argument that unless trusts are responsible for *all* attorney fees incurred on behalf of the Trust, no qualified person will agree to serve as a trustee. We disagree. People willingly serve as trustees because they earn a fee for their trustee service and because they know that they can retain lawyers to assist them in administering the trust at the trust's expense. Prohibiting payment for defense of slipshod work and excessive charges is not likely to discourage competent trustees from servicing.

We thus conclude that the trial court abused its discretion in ordering the trust to pay $46,897.90 in attorney's fees incurred by McCullough in challenging the fee order.

II. *The Court Properly Overruled Williams's Objection To The Opening Balance Of The Trust*

Williams asserts that the trial court erred in accepting McCullough's figure of $199,115.62 as the "opening balance" of the Trust account on March 15, 2012. Williams contends that the opening balance of the account must be $210,578.99. He claims it was undisputed during the litigation of his 2012 petition that the Trust's balance of cash assets on December 31, 2012 was $210,578.99, and thus McCullough is collaterally estopped from asserting a lower opening balance for the final accounting. We disagree.

In support of the final accounting, McCullough presented documentary evidence showing that the balance of the Trust accounts totaled $199,115.62 on March 15, 2012. In the litigation of Williams's 2012 petition a Trust account summary showed that from "February 8, 2012 through December 31, 2012" the value of the property in the Trust accounts was $210,578.99.

Nonetheless, other documents and McCullough's testimony clarified that $210,578.99 was the amount of money in the accounts only on *February 8, 2012*. Thus, the $210,578.99 figure represents the value of the Trust *prior* to the final accounting period which commenced on March 15, 2012. Accordingly, the trial court did not err in overruling Williams's objection to the opening balance in the Trust accounts.

DISPOSITION

The order approving the final account is reversed, and this matter is remanded to the trial court to enter a new order directing McCullough to reimburse the Trust a total of $46,897.90 for the attorney fees the Trust paid to challenge the order reducing McCullough's trustee fees. The order is affirmed in all other respects. Appellant is awarded costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.