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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In the Matter of the John W. Metcalfe and  
Lucia O. Metcalfe Trust, dated 12/17/86

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JAMES G. CADMAN, Successor Trustee  
etc., et al.,

Plaintiffs and Respondents,

v.

LEON E. CAMPBELL,

Defendant and Appellant,

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D058781

(Super. Ct. No. 37-2007-00101077-  
PR-TR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Julia Craig Keley, Judge. Affirmed.

In this case the probate court found the former trustee of a decedents' trust made an imprudent and speculative investment in a Las Vegas condominium project which was inconsistent with the needs of the trust's beneficiaries. The probate court surcharged the

former trustee the amount the trust lost in the condominium investment, interest on the loss, and expenses incurred by a successor trustee.

After the former trustee was replaced by an interim trustee, the former trustee moved for an order requiring the trust pay his defense costs, including expert fees. The probate court denied the former trustee's motion. The probate court properly determined the former trustee's right to defense costs was dependent on his success on the merits of the underlying removal and surcharge proceeding. Thus we find no abuse of discretion in the probate court's order.

Moreover, the record fully supports the probate court's eventual factual findings and those findings in turn support the surcharges imposed by the trial court.

Accordingly, we affirm the probate court's surcharge order.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *The Metcalfe Trust*

John W. Metcalfe (John) and Lucia O. Metcalfe (Lucia) signed a declaration of trust in 1986 which was prepared by appellant Leon Campbell, their attorney. A fourth amendment to the trust provided that Campbell would act as successor trustee upon the deaths of the Metcalfes.

A fifth amendment to the trust made the Metcalfes' long-serving housekeeper Alma Aruajo Garcia (Alma) and her minor daughter Alma Alicia Balderas (Alicia) the sole beneficiaries of the trust. The fifth amendment required the trustee provide Alma with distributions of income and principal reasonably necessary to meet Alma's parental

obligations to Alicia, including Alicia's likely educational expenses, including college and graduate studies. The fifth amendment further provided that upon Alicia reaching the age of 25, the remaining trust assets were either to be distributed evenly between Alma and Alicia or used to purchase survivor annuities in favor of the two beneficiaries. Alicia was born in 1991 and will be 25 in 2016.

## *2. Condominium Investment*

Lucia, whose husband John had predeceased her, died in 1997. Campbell then became successor trustee. Campbell did not thereafter inquire of Alma of her needs or of Alicia's needs but instead left it to them to tell him what, if anything, they needed.

In early 2005 Campbell received an e-mail solicitation from Andy Funk, a Los Angeles venture capitalist. Funk offered Campbell the opportunity to invest in a prospective condominium project located in Las Vegas. The project was part of a larger development known as the Cosmopolitan, which, when completed, would include a casino, spa, restaurants, a night club, wedding chapels and two condominium towers. At the time the investment was offered to Campbell, the first condominium tower had been completed and sold out.

In particular, Funk offered Campbell the opportunity to purchase a condominium in the planned, but unbuilt, second tower for a price of \$692,738. Purchasers were required to make three installments of \$69,273.80, pay Funk a finder's fee of \$10,000 and a two percent commission. The balance of the purchase price was due on completion of the second tower. Campbell was interested in the opportunity, conducted an Internet

search of the general contractor who was building the second tower and visited the project site.

In October 2005 Campbell decided to invest in the condominium project on behalf of the trust and, as trustee, executed a purchase agreement for a condominium. At that point the trust had approximately \$620,000 in assets. Campbell paid two deposits on the purchase, totaling \$138,000; he recognized that given the trust's remaining assets and liquidity, the trust would need to obtain a loan to complete the purchase.

### *3. The Beneficiaries' Petition*

In May 2007 the beneficiaries filed a petition in probate court which sought to remove Campbell as trustee and requested appointment of a new trustee with instructions to determine the propriety of the condominium investment. In August 2007 the probate court denied the beneficiaries' pretrial motions to remove Campbell and prevent him from using trust assets to defray his attorney fees. The probate court found that both Campbell's right to continue serving as trustee and right to attorney fees depended on ultimate resolution of the beneficiaries' claims on the merits. However, the probate court also advised Campbell his right to use trust assets to pay his defense costs was subject to the court's determination as to whether he had acted properly. In particular, the trial court advised Campbell that he "acted at his peril" if he used trust assets to finance his defense and it was later determined he acted imprudently.

In October 2008 Campbell agreed to be replaced by an interim trustee, respondent James G. Cadman. However, Campbell reserved the right to thereafter ask the probate

court to order his defense costs be paid by the trust. To that end he filed a petition for an order permitting payment of his attorney and expert fees.

Cadman, the successor trustee, for his part, filed a petition for instructions with respect to disposition of the condominium investment. At that point construction of the condominium tower had stopped and there was some considerable doubt it would be completed.

#### *4. Probate Court's Order*

In May 2010 the probate court heard the respective petitions on the merits. Shortly before the hearing, the probate court denied Campbell's ex parte request for an order requiring the trust to pay his expert, who was unwilling to testify unless he was paid in advance.

At the hearing the beneficiaries' expert testified Campbell's performance as trustee was deficient in a number of respects. He criticized Campbell for failing to consult with the beneficiaries about their needs and for making the condominium investment, which he found imprudent and speculative. The expert noted that the cost of the condominium exceeded the value of the trust's assets, that the deposits Campbell made were subject to the senior lien held by a construction lender, and that Campbell had failed to investigate the potential tax consequences to the trust of the investment. The expert noted that the solicitation from Funk indicated that the investment was only suitable for "accredited" investors, that is investors with sufficient net worth and income to tolerate the risk of the investment. The expert did not believe the trust was an accredited investor. The expert

also criticized Campbell's payment of both a \$10,000 finder's fee and a commission, and the fact that the \$130,000 in deposits did not earn interest pending completion of the project.

The beneficiaries' expert was also critical of Campbell's other investment choices. He noted that when Lucia was alive the trust portfolio consisted of a conservative bond portfolio and that over time Campbell had invested 90 percent of the portfolio in equities.

The probate court found Campbell failed in a number of respects to discharge his duty as trustee. The court found that his failure to consult Alma and Alicia with respect to their needs may have effectively deprived Alma, a domestic worker, of the opportunity to obtain medical insurance, transportation, and make family visits and may have deprived Alicia of opportunities to improve her education and development. However, the probate court also determined that it was not possible to quantify the damage caused by this failure.

The probate court found the investment in the condominium was a violation of the prudent investor rule and was therefore a breach of trust. The court noted that although Campbell invested more than 20 percent of the trust's assets in the condominium, the trust did not have the resources itself to complete the transaction and Campbell could not be certain financing to close the purchase would be available to the trust or that, if it were available, the income from the condominium would be sufficient to service the financing. The probate court found that, in the alternative, holding the investment for resale was very speculative. The probate court found that although the investment might be

appropriate for a much larger trust, it was not appropriate for the relatively modest Metcalfe trust. In reaching this conclusion, the probate court expressly looked at the entire trust.

By way of a separate order the probate court surcharged Campbell a total of \$216,842.02. This amount was composed of \$55,519.65 in direct losses on the condominium investment; the \$10,000 finder's fee paid to Funk; \$56,573.58 in lost interest on those items; \$58,748.79 in attorney and expert fees Campbell incurred before he was replaced as trustee and \$35,000 in attorney fees incurred by Cadman as successor trustee.

Campbell made a motion for a new trial on the grounds he had not been able to present a fiduciary expert. The probate court denied the motion and Campbell filed a timely notice of appeal.

## DISCUSSION

### I

We review the probate court's rulings prior to the hearing on the merits for abuse of discretion. (Prob. Code<sup>1</sup> section 17206: "The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition."; *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 911.) We also review, for abuse of discretion, the means by which a probate court chooses to remedy a breach

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<sup>1</sup> All further statutory references are to the Probate Code unless otherwise indicated.

of trust. (§ 16440, subd. (a); *Uzyel v. Kadisha*, *supra*, 188 Cal.App.4th at p. 911.) "An abuse of discretion occurs only if the reviewing court, considering the applicable law and all of the relevant circumstances, concludes that the trial court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.]" (*Uzyel v. Kadisha*, *supra*, 188 Cal.App.4th at p. 911.)

We review the probate court's factual determinations under the familiar substantial evidence standard of review. (*Borrisoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 531.)

## II

Campbell contends the probate court erred in failing to permit him to use trust assets to pay his expert at trial and in thereafter surcharging him for the attorney fees and costs he incurred prior to his replacement as trustee. We find no abuse of discretion or error in these rulings.

### A. *Additional Background*

At the August 2007 hearing on the beneficiaries' request that Campbell be removed as trustee and prevented from using trust assets to finance his defense, the probate court gave Campbell a fairly explicit warning with respect to attorney fees: "The trustee acts at his peril.

"If it turns out—that's one of the difficult issues. Whenever we talk about attorney fees in advance of trial, we don't know what the trial court was all about and we don't know the outcome. If Mr. Campbell is not successful and it turns out that there are

substantial losses to this trust as a result of his actions, then he's not going to collect his attorneys fees."

Thereafter the probate court entered an order which in part stated: "Petitioners' motion for an order prohibiting Respondent, Leon E. Campbell, from using trust assets for any purpose, including attorneys fees, is denied."

At the time Campbell was replaced as trustee by Cadman on October 28, the probate court entered a stipulated order which in part stated: "Mr. Campbell retains his right to petition to the court for a payment of his trustee's fee and attorney's fees incurred on or after October 23, 2008."

As we have noted, shortly before the hearing on the merits, the probate court, with a different judge presiding, denied Campbell's request that the trust advance funds to his expert.

#### *B. No Conflict in Orders*

Contrary to Campbell's argument on appeal, nothing in the probate court's earlier statements was in conflict with its May 2010 order denying his request that the trust pay his expert fee. From August 2007 onward the record is clear that Campbell was on notice his right to attorney fees was subject to his ultimate success on the merits.

Moreover, there can be no dispute a trustee has no right to recoup his attorney and expert fees unless he is successful in defeating a beneficiary's petition challenging his administration of the trust: "[A]n estate may not be charged with fees incurred in unsuccessfully contesting a trustee's surcharge. [Citation.] A trustee is not entitled to

attorney fees and expenses of litigation where it is determined that the trustee breached the trust, unless the court otherwise orders as provided in subdivision (b) of section 15684 where the trustee's actions resulted in a benefit to the trust. [Citations.]" (*Estate of Gump* (1991) 1 Cal.App.4th 582, 605.)

Here, the probate court expressly found a breach of trust and by implication a lack of benefit to the trust. As we explain further, these findings are fully supported by the record. Thus the probate court did not abuse its discretion in denying Campbell's request for expert fees before the hearing on the merits and imposing a surcharge for the amount Campbell incurred prior to his replacement as trustee.

### III

Next, Campbell contends the probate court erred in finding that he violated the prudent investor's rule. Again we find no error.

The prudent investor's rule is set forth in section 16047, which in part provides: "(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

"(b) A trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust."

The record here fully supports the probate court's finding the condominium investment violated the prudent investor rule. Before the beneficiaries brought their petition, Campbell had invested more than 20 percent of the trust's assets in two noninterest earning deposits on the condominium and obligated the trust to invest an additional 10 percent of the trust's assets in the condominium. In addition the investment required the trust obtain substantial financing to complete the transaction and then depend upon the vagaries of the Las Vegas rental market to service the loan.

We note that in 2005, when Campbell made the investment, Alicia was 14 years old, a time during which preparation for her higher education should have been well under way and her financial needs secured by way of an investment in secure and liquid assets. In this regard we note that instead of the conservative bond portfolio maintained by the Metcalfes, Campbell had placed the overwhelming bulk of the trust's assets in riskier equities.

In sum, the record shows Campbell invested a substantial amount of the trust's assets in a highly speculative investment at a time when, if he had made any inquiry into the beneficiaries' needs, he would have understood that Alicia would need access to liquid assets. Thus, this record fully supports the probate court's conclusion that, *considering the portfolio as a whole*, and in particular its modest size, the condominium investment was not prudent.

#### IV

The second condominium tower was not completed and the record shows that by virtue of participating in a class action against the developers, Cadman was able to recover \$83,027.95, limiting the trust's loss to \$55,519.65. Campbell contends that his investment in the condominium did not proximately cause this loss. Again, we find no error.

First, there is no question that, but for the investment in the condominium, the trust would not have experienced the loss. Moreover, there is nothing in the record which shows that Cadman could have mitigated the loss by doing anything other than participating in the class action litigation. Thus, the record fully supports the probate court's finding that Campbell's investment was the proximate cause of the loss. This aspect of the record also supports the probate court's implied finding that Campbell's conduct did not benefit the trust within the meaning of section 15684, subdivision (b).

#### V

Finally, Campbell challenges the probate court's award of lost interest and the expenses Cadman incurred in participating in the probate court's proceeding.

We note interest at the legal rate on the trust's losses is expressly authorized under sections 16440 and 16441. Here, it is clear the trust did not earn any interest on the amount of the condominium investment from the time the investment was made in 2005 until Cadman was able to recoup some of the investment in the class action litigation.

Thus, the probate court had the authority for including lost interest in its calculation of the amount of the trust's losses and a reasonable basis for doing so.

Although the probate court did not award the beneficiaries any of their attorney fees, it did surcharge Campbell the \$35,000 in legal fees and expenses he incurred in participating in the probate court proceedings. Although on appeal Campbell contends there was no need for Cadman to participate in the proceedings in light of the representation and participation of the beneficiaries, the necessity and usefulness of Cadman's participation was a matter within the probate court's discretion. (§ 17206.) Here, Cadman, by virtue of his participation, was able to recover for the trust a substantial amount of the condominium investment and provide the court with a disinterested perspective on the underlying dispute between Campbell and the beneficiaries. Given those circumstances, the probate court could reasonably conclude that the amounts expended by Cadman benefitted the trust and were attributable to Campbell's breach of trust.

DISPOSITION

The probate court's order imposing surcharges on Campbell is affirmed.

Respondents to recover their costs of appeal.

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BENKE, J.

WE CONCUR:

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McCONNELL, P. J.

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IRION, J.