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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ELIZABETH MCCLUTCHEY,

Plaintiff and Respondent,

v.

ROBERT KIMBALL,

Defendant and Appellant.

D060744 & D061886

(Super. Ct. Nos.
37-2008-00082098-CU-BC-CTL &
37-2008-00152351-PR-TR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed in part, reversed in part.

Herronlaw, Matthew V. Herron; BarryFiske and Su Lynn Barry for Defendant and Appellant.

Wingert Grebing Brubaker & Ryan, James A. Mangione and Andrew A. Servais for Plaintiff and Respondent.

I.

INTRODUCTION

Appellant Robert Kimball appeals from the trial court's judgment in favor of respondent Elizabeth McClutchey. This case returns to us after a previous appeal. In the first round of litigation in the trial court, a jury awarded McClutchey damages for breach of contract, based on its finding that the parties had entered into a *Marvin*¹ agreement to treat the assets that they acquired during their long-term relationship as community property. Upon the parties' break-up, Kimball denied McClutchey any interest in the house that they had purchased during their relationship. The jury attempted to redress Kimball's denial of McClutchey's interest in the property by awarding her damages in an amount that was approximately half the value of the house. However, it was undisputed in the trial court that the parties had placed the house into a trust at the time they purchased it and that it remained in the trust at the time of the proceedings in the trial court. Because the trial court's original judgment did not address the fact that the parties' interest in the property was held in a trust, we were compelled to reverse the judgment and remand the matter to the trial court for it "to determine any and all matters related to the internal affairs of the trust," including a determination of McClutchey's interest in the trust. (*McClutchey v. Kimball* (Jul. 14, 2010, D055112) 2010 Cal.App.Unpub. Lexis 5518 (*McClutchey I*).

¹ *Marvin v. Marvin* (1976) 18 Cal.3d 660 (*Marvin*). In *Marvin*, the Supreme Court held that cohabitating, unmarried individuals "may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property" (*Id.* at p. 674.)

On remand, the trial court concluded that McClutchey possessed a half interest in the house, and that her half interest in the property was the sole asset of the trust. The court also found that Kimball had breached various duties as trustee of the trust. The court determined that Kimball's breach of the duty of loyalty to McClutchey entitled her to half of the imputed fair market rental income that the asset could have produced if Kimball had either paid rent during the period of time that he had exclusive use of the property, or had rented it to a third party. The trial court also awarded McClutchey the attorney fees that she incurred in litigating her claims against Kimball on remand.

In this appeal, Kimball takes issue with all of the trial court's orders on remand, and asks us to reverse the judgment in its entirety, or, in the alternative, to review each of the trial court's orders, individually, for error. We conclude that Kimball's contentions in this appeal are without merit, with the exception of his challenge to the award of attorney fees to McClutchey. We therefore affirm the judgment except that portion of the judgment awarding McClutchey attorney fees, which we reverse.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

The background facts of this continuing proceeding are known to the court and the parties. We previously issued an unpublished opinion in *McClutchey I, supra*, D055112. We therefore provide only a limited review of the factual background that pertains to matters that occurred prior to the filing of our previous opinion.

McClutchey and Kimball started dating in the late 1980's and began living together in 1989. In early 1992, they agreed to share all assets that they acquired during their relationship.

Kimball became employed at Qualcomm beginning in 1991. Qualcomm periodically awarded him stock options throughout his employment with the company. During the late 1990's, Qualcomm's stock significantly increased in value, making Kimball's stock options worth several million dollars.

In late 1999, Kimball and McClutchey decided to purchase a residence on Costebelle Way in La Jolla. In order to purchase the Costebelle property with cash, Kimball exercised some of the stock options that he had received through his employment at Qualcomm.

McClutchey and Kimball agreed that both of their names should appear on the title to the Costebelle property. However, they were concerned about McClutchey's name appearing in public records because at the time of the purchase, McClutchey was working as a prosecutor in the San Diego County District Attorney's office. In order to keep McClutchey's name out of the public records, the parties agreed to create a trust that would hold title to the Costebelle property.

McClutchey and Kimball met with an estate planner to create the trust. The estate planner drafted the Costebelle Trust, an *intervivos* revocable trust in which the Costebelle property would be placed. The trust document identifies Kimball as the sole trustee, and identifies McClutchey and Kimball as the settlors of the trust. The instrument states that McClutchey and Kimball " declare that they hold certain property (the "trust estate") in

trust, to be held, administered, and distributed according to the terms of this instrument.' " (*McClutchey I, supra*, at *9.) Both parties executed the trust instrument.

Attached to, and incorporated into, the trust instrument are three "schedules" of assets to be placed in the trust—a community property schedule, a separate property schedule of Kimball's assets, and a separate property schedule of McClutchey's assets. The trust instructs the parties that the schedules are " 'where [you] list all of your assets,' and explains that '[t]he purpose of this section is to give your back-up trustee an idea of what you own.' " (*McClutchey I, supra*, at *10.) The parties listed no assets on the schedule of community property assets. The schedule of Kimball's separate property assets lists a single item: " '1. A portion of the home located at . . . Costebelle Way, La Jolla, California.' " (*Ibid.*) The schedule of McClutchey's separate property assets lists only the same single item: " '1. A portion of the home located at . . . Costebelle Way, La Jolla, California.' " (*Ibid.*)

"Provision 2.2 of the Costebelle Trust establishes that in creating the trust, the parties did not intend to alter the character of the property placed in the trust: 'All community property of the settlors transferred to this trust, and the proceeds of all such property, shall continue to be community property under the laws of California, subject to the provisions of this instrument. All separate and quasi-community property shall remain the separate or quasi-community property, respectively, of the contributing settlor. Nothing in this instrument shall be construed as a gift between settlors and each settlor shall own the trust property to the extent of [his or her] individual contributions to the trust property.' On December 27, 1999, Kimball recorded the grant deed in which he

took title to the Costebelle property as 'Robert Kimball, trustee of the Costebelle Trust dated December 22, 1999.' " (*McClutchey I, supra*, at *10-*11.)

Kimball and McClutchey lived together in the Costebelle residence until April 2005, when they separated and McClutchey moved out. After McClutchey moved out, Kimball had the exclusive use of the Costebelle property and was responsible for paying the taxes and expenses for maintaining the property.

According to McClutchey, between April 2005 and March 31, 2007, Kimball and McClutchey were making good faith efforts to resolve their respective rights in the trust. For this reason, McClutchey made no claim for any credit for Kimball's use of the Costebelle property during that time period. The parties consulted an attorney for advice concerning how to settle their finances. The attorney advised the parties that they should terminate the Costebelle Trust, because the testamentary provisions could cause the survivor to take the entire property in the event that one of them died. The attorney prepared a revocation document, which Kimball executed. McClutchey declined to execute the document until the parties had concluded their global financial settlement. The parties were contemplating a settlement in which Kimball would pay McClutchey \$500,000 to resolve all of her financial claims against him, including her interest in the Costebelle property.

In August 2006, Kimball executed a quitclaim deed in which he transferred " 'all [of] his interest in and to real property' " at the Costebelle address to the "Robert Kimball Living Trust." Around this time, Kimball also communicated to McClutchey that he was prepared to pay McClutchey the amount of money that the parties had contemplated

during their settlement negotiations. However, for a number of reasons, the parties never reached a final financial settlement.

Kimball lived at the Costebelle property with McClutchey's consent until May 2007.² Just before this, in March 2007, McClutchey learned that Kimball was engaged to be married. She suggested to Kimball that she come to the house so that she could pick up some of her belongings and the parties could attempt to resolve their financial matters. At trial, the parties gave differing versions of what occurred on March 31, 2007, when McClutchey arrived at the property. What is clear is that there was a breakdown in the settlement negotiations and that the parties had assumed adversarial positions with respect to the division of the sole Costebelle Trust asset, the Costebelle property.

In October 2007, McClutchey filed a complaint against Kimball alleging breach of express and/or implied contract (a *Marvin* action), and seeking imposition of a constructive trust, declaratory relief, a partition of the Costebelle property, and enforcement of a partnership/joint venture. In October 2008, McClutchey filed a petition in the probate department of the superior court, thereby instituting a second action against Kimball.

A jury trial on McClutchey's breach of contract claims commenced on January 5, 2009. The jury reached a verdict predominantly in favor of McClutchey. The jury awarded McClutchey damages in the amount of \$134,000 for breach of contract for

² Kimball's new wife apparently moved into the property with him at around this time.

property other than the Costebelle property, and also awarded her damages for breach of contract in the amount of \$1,366,000 with respect to the Costebelle property.³

Kimball appealed from the judgment, arguing that the trial court erred in denying his motion for judgment notwithstanding the verdict. According to Kimball, because the parties held the Costebelle property by separate agreement in the Costebelle Trust, the "couple agreed, in writing, to contribute this property to a trust and to have the terms of the trust govern their respective interests, thereby rendering immaterial, as to [the Costebelle] property, the previous oral [*Marvin*] agreement."⁴ In essence, Kimball argued in the prior appeal that he had paid for the Costebelle property with funds that were his separate property, and that McClutchey possessed virtually no interest in the Costebelle property.

In addressing Kimball's prior appeal, we concluded that the trial court had erred in entering judgment and awarding damages in favor of McClutchey for breach of contract related to the Costebelle property, since that property was held in a trust. However, we

³ The total amount that the jury awarded McClutchey was \$1.5 million, which was close to the amount that McClutchey's attorney had asked the jury to award during closing argument. This amount represented approximately half of the value of two real properties that the parties had purchased during their relationship, including the Costebelle property.

⁴ McClutchey filed an unopposed motion to augment the record and a corresponding request for judicial notice with this court in April 2013. In the motion to augment the record, McClutchey seeks to augment the record with certain documents that were filed in the superior court proceedings. In the request for judicial notice, McClutchey asks this court to take judicial notice of Kimball's opening brief in *McClutchey I*. We grant McClutchey's request for judicial notice, as well as her motion to augment the record.

rejected Kimball's contention that he was entitled to judgment with respect to the Costebelle property since questions remained as to what interest, if any, McClutchey held in the property, given the existence of the parties' *Marvin* agreement establishing that at least some portion of the funds used to purchase the property were community property. We remanded the matter to the trial court to determine "what interest McClutchey has in the Costebelle property, whether she is entitled to relief, and if so, what form that relief should take." (*McClutchey I, supra*, at *6.)

After the remittitur issued in *McClutchey I*, McClutchey's original *Marvin* action and her separately filed probate action were consolidated in the superior court by stipulation of the parties.

The trial court held a bench trial in June 2011 with respect to the matters left to be decided on remand after *McClutchey I*. Upon the conclusion of trial, the court issued a statement of decision in which it set forth certain factual determinations and conclusions of law.

Kimball did not object to the trial court's statement of decision, but filed a motion to set aside the judgment and a motion for a new trial. After the trial court denied these motions, Kimball filed a notice of appeal.

In the interim, McClutchey filed a motion for attorney fees in which she requested that the trial court award her the attorney fees that she incurred in litigating her claims against Kimball on remand after *McClutchey I*. The trial court granted McClutchey's request for attorney fees and awarded her \$123,963.

The trial court entered judgment in the matter in March 2012. Kimball filed a notice of appeal from the judgment.

Kimball moved this court to consolidate his two appeals. This court granted the unopposed motion and consolidated case number D061886 with case number D060744.

III.

DISCUSSION

A. *The trial court followed this court's instructions on remand*

Kimball challenges the trial court's determination concerning the parties' respective interests in the Costebelle property. He contends that the trial court "did not consider the express terms of the Trust in contravention of the instructions on remand from the first appeal in these cases." According to Kimball, the trial court "failed to follow the Court of Appeal's direction on remand" because, he asserts, the trial court "did not determine the non-gifted, separate 'individual contributions' made by each party as required by the Trust" Kimball also suggests that the trial court did not account for "any further contributions to the property made by either party" that would have "increase[d] the contributing party's separate portion of ownership under the Trust." Kimball's complaint appears to be that the trial court failed to consider "\$343,272 that Kimball contributed to the property after the parties' relationship terminated."⁵

⁵ To the extent that Kimball's opening brief can be interpreted as rearguing his contention in the prior appeal that the funds used to purchase the Costebelle property were his individual property, alone, such that McClutchey's interest in the Costebelle trust is limited to the minor separate property contributions that she made in paying for certain maintenance for the property, this argument is foreclosed by our opinion in

Kimball is incorrect in arguing that he is entitled to an offset against McClutchey's half interest in the Costebelle property in the amount of \$343,272. The great majority of these expenses can be traced to funds that Kimball paid for the maintenance of the property, such as payments for landscaping services, repairs, insurance, and property taxes. There is nothing in the Trust document that would suggest that payments for maintenance are to be considered a "contribution" to the Trust res, or that the party who pays for such maintenance will have an increased percentage ownership of the property in the Trust. (Cf. Fam. Code, § 2640, subd. (a) [" 'Contributions to the acquisition of property,' as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property *but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property*" (italics added)].) Further, the court gave Kimball a credit for these payments. Kimball has not identified any principle of law that would suggest that it was error for the trial court to credit him for these payments, and not to increase his percentage ownership in the property. He simply asserts in his briefing, without citation to any authority, that these payments should be considered " 'individual contributions' " made to the property. Kimball has

McClutchey I. As we explained in *McClutchey I*, in the absence of any evidence of a separate agreement between the parties or evidence that some or all of the stock options that were exercised to purchase the property were Kimball's separate property, the jury's findings in that case meant that the parties each possessed a half interest in the Costebelle property at the time of its purchase. Kimball admitted at trial on remand that there was no agreement between the parties governing their respective interests in the Costebelle property other than the Costebelle Trust, and also conceded that he could not trace any funds used to purchase the property to stock options obtained prior to the parties' 1992 agreement to share their assets.

thus failed to meet his burden on appeal of demonstrating that the trial court's ruling was incorrect. (See *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [" 'The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error.' [Citation.] The order of the lower court is ' "presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." ' [Citation.]".])

Further, although the record suggests that Kimball also asserted in the trial court that some of these expenses were for "improvements" made to the Costebelle property—as opposed to maintenance of the property—it appears that the trial court gave Kimball a credit for \$39,327 of the \$76,617 that Kimball claimed to have incurred for "improvements." Since Kimball has made no distinction in his briefing on appeal between all of the payments he made for things such as landscaping, repairs, and insurance and the payments he made for what appear to be listed on an exhibit as "improvements" to the property, we must conclude that Kimball has similarly failed to adequately demonstrate any error in the trial court's handling of his payments of these expenses. Further, as to the one "improvement" expense for which the trial court did not give Kimball a credit, i.e., an "office remodel," the court concluded that Kimball had not met his burden to demonstrate that this expense was incurred for something other than his "personal preference" or that the remodel increased the value of the property. Kimball has not attempted to suggest that the trial court's factual conclusions with respect to this expense are not supported by the evidence or that the court made a legal error in not

crediting him for this expense. Kimball is therefore not entitled to a reversal based on the court's determination that each of the parties owns a 50 percent share of the Costebelle property, or that the only remaining property in the Costebelle Trust is McClutcheys 50 percent interest in the Costebelle property.

B. *Breaches of trust and damages*

Kimball contends that the trial court's judgment should be reversed "as to the breaches of trust and the damages awarded." Kimball maintains that McClutcheys does not have the "capacity" to allege that he breached his duties to her as a beneficiary because as a settlor of the Trust, she could have revoked or modified the trust at any time. Kimball further argues that because of the revocable nature of the trust, the only duties that he owed to McClutcheys are those imposed by the Trust agreement and, he asserts, there is no evidence that he breached the terms of the Trust agreement. Kimball contends that the Trust agreement specifically authorizes the acts that he undertook that form the basis of some of the court's findings of breaches of trust. As a result, he asserts, the trial court erred in assessing against him a surcharge for half of the fair market rental value of the property from the time that he refused to acknowledge that McClutcheys had any interest in the Costebelle property (i.e., March 31, 2007) until the time of the trial court's order.

Although the trial court made a number of findings with respect to various breaches of trust by Kimball, such as his failure to account, his failure to convey McClutcheys interest in the trust to her, and his encumbering the property with a loan, it is clear that the trial court's surcharge order is based on the court's finding that Kimball

committed a breach of trust by breaching his *duty of loyalty* to McClutchey. At the beginning of its order imposing a surcharge, the court cites *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 907 (*Uzyel*) for the proposition that "[d]amages for a breach of the duty of loyalty should be based on what would have occurred if the trustee had complied with the duty of loyalty (i.e., but for the breach of the duty of loyalty)." Because the surcharge is based on a breach of the duty of loyalty and the court's finding that Kimball breached his duty of loyalty is unassailable, we need not consider the other breaches of trust that the trial court found Kimball committed (including those that are based on actions that Kimball contends were authorized under the terms of the Trust).⁶

Despite Kimball's argument to the contrary, it is clear that Kimball did owe McClutchey, who was both a settlor and a beneficiary of the Trust, a duty of loyalty, as codified in Probate Code⁷ section 16002. (See *Estate of Giralдин* (2012) 55 Cal.4th 1058, 1069 (*Giralдин*) [pursuant to § 15800, during the time the trust is revocable, a settlor has the rights afforded beneficiaries and a trustee's duties are owed to the settlor].)⁸

⁶ Kimball's only challenge to the trial court's finding that he violated his duty of loyalty to McClutchey is his assertion that he owed her no duties as a beneficiary because the trust was revocable during the applicable period.

⁷ Further statutory references are to the Probate Code unless otherwise specified.

⁸ Section 15800 provides: "Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and the person holding the power to revoke the trust is competent:

Further, there is substantial evidence to support the trial court's finding that Kimball committed a breach of trust by breaching his duty of loyalty to McClutchey when he, in knowing disregard of the fact that she possessed some interest in the Costebelle property, openly denied her such interest and deprived her of any use of or benefit from the property after March 31, 2007. The duty of loyalty requires a trustee to administer the trust solely in the interest of the beneficiaries, or, in the case of a revocable trust, in the interest of those who hold the power to revoke. (§§ 16002, subd. (a), 15800, subd. (b); *Giraldin, supra*, 55 Cal.4th at p. 1069.) The purpose of the duty of loyalty "is to protect the best interests of the beneficiaries. The duty of loyalty requires a trustee to subordinate his or her interests to those of the beneficiaries in every regard. [Citation] A trustee's motive in administering the trust is of paramount importance, and ensuring that the trustee will act in the sole interests of the beneficiaries rather than with some other motive is the principal object of the duty of loyalty. [Citation.]" (*Uzyel, supra*, 188 Cal.App.4th at p. 905.)

Although McClutchey agreed to allow Kimball to have the exclusive use of the property for the time period between the couple's separation in 2005 until March 31, 2007, while the parties were attempting to resolve their financial affairs, the evidence demonstrates that as of March 31, 2007, it was clear that Kimball refused to acknowledge that McClutchey had any interest in the property. On that date, Kimball assumed exclusive use of the trust asset, and effectively repudiated McClutchey's interest in the

" (a) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division.

" (b) The duties of the trustee are owed to the person holding the power to revoke."

trust.⁹ Kimball refused to provide her with her share of the profits from any beneficial use of the asset. This is an obvious breach of Kimball's duty of loyalty to McClutchey.

Kimball also takes issue with the trial court's imposition of a surcharge against him as the remedy for the finding that he committed a breach of trust by violating his duty of loyalty. "The remedy for a breach of trust should be adapted 'to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee.' [Citation.] The goals of the remedy are not only to compensate the beneficiaries for their loss, but also to deter the trustee in question and other trustees from committing similar acts. [Citation.]" (*Uzyel, supra*, 188 Cal.App.4th at p. 907.) We review for an abuse of discretion the means by which a probate court chooses to remedy a breach of trust. (§ 16440, subd. (a); *Uzyel, supra*, at p. 911.)

The trial court determined that the appropriate remedy for Kimball's violation of the duty of loyalty he owed to McClutchey was to award McClutchey the reasonable and fair market value of her share of the rental value of the Costebelle property during the time in which Kimball had the exclusive use and possession of the property and denied her any benefit from the asset. We see no abuse of discretion in the court's decision to impute the fair market rental value of the home, and to award McClutchey 50 percent of the imputed rents for the time period during which Kimball denied her any use of, or profits from, the Trust asset. If Kimball had been properly acting pursuant to his duties

⁹ McClutchey did not seek any surcharge for the period of time between the couple's separation in 2005 and March 31, 2007, and the court did not order Kimball to pay any surcharge to McClutchey for this period of time.

as trustee for McClutcheys benefit, even if he had rented the property to himself, he should have been paying McClutcheys her share of the rent during that time.

Finally, Kimball complains that he was "entitled to repayment for expenditures from, at least, April 2005 when the parties terminated their relationship and Kimball undertook all payment related to the home on his own." Thus, although the trial court awarded Kimball the expenditures that he incurred for maintenance, repair, insurance and property taxes for the property as offsets from the rent he owed to McClutcheys for the period from March 31, 2007 through trial, Kimball contends that he should have received offsets for the expenditures that he incurred for those same items from April 2005, when the parties separated, until March 31, 2007. In making this claim, Kimball appears to ignore the fact that he was the only one who benefited from the use of the Costebelle property during that time period, and the fact that even though McClutcheys was entitled to an interest in the property at that time, the parties agreed that Kimball would retain exclusive use of the property and that he would be responsible for taking care of the property. The trial courts order simply reflects the parties' agreement. We conclude that the trial court did not err in determining that Kimball was not entitled to any offsets for his expenditures toward maintenance of the property for the time period during which he had exclusive use of the property and received all of the benefits of the property.

C. *Attorney fees*

1. *The trial courts award of attorney fees must be reversed*

Kimball challenges the trial courts award of \$123,963 in attorney fees to McClutcheys. The trial court awarded these fees on the ground that the "post-appeal

litigation was compelled by respondent's wrongful refusal to acknowledge petitioner's interest in the trust" and based on the court's belief that the court's "broad equitable powers include the discretion to make an award of attorney fees."

As a general matter, trust beneficiaries must ordinarily pay their own attorney fees in challenging the trustee's conduct, even when they are successful. (*Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 473.) Thus, in order for the trial court's award of attorney fees to have been proper, there must be some authority that would permit the trial court to award attorney fees to McClutchey and to hold Kimball personally responsible for those fees.

Although the trial court believed that it had the authority, under its broad equitable powers to administer the trust, to require that Kimball pay McClutchey's attorney fees, the authorities on which the trial court relied in asserting that it had such authority do not stand for the proposition that a court may impose an attorney fee award against a trustee, individually. Rather, those cases stand for the proposition that a court has broad equitable powers to award costs and attorney fees *out of the trust property*, pursuant to its power to administer the internal affairs of a trust. (See *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 98 [affirming a reimbursement *to be paid by the trust* for attorney fees that a trustee incurred in successfully defending against removal action by cotrustee]; *Rudnick v. Rudnick* (2009) 179 Cal.App.4th 1328, 1333 (*Rudnick*) [when a trust beneficiary instigates an unfounded proceeding against the trust in bad faith, a probate court has the equitable power to charge the reasonable and necessary fees incurred by a trustee in opposing the proceeding against that beneficiary's *share of the trust estate*].)

Nothing in these cases suggests that a probate court's equitable powers and authority over the administration of the trust permits it to impose a judgment against a trustee individually for litigating an action involving the trust. Indeed, *Rudnick, supra*, at page 1334, footnote 2, makes clear that a beneficiary may be entitled to have his or her attorney fees paid, albeit, *out of the assets of the trust*:

"[B]ased on the probate court's equitable powers alone, it has been held that beneficiaries who have incurred attorney fees, either to vindicate their position as beneficiaries [citation] or for the benefit of the trust [citation], are entitled to have those fees *paid by the trust*." (Italics added.)

The other cases that McClutchey cites in support of the court's award of attorney fees similarly demonstrate that the probate court's general equitable powers regarding trust administration permit the court to reimburse a party for attorney fees out of the trust's (or estate's) assets. (See *Estate of Reade* (1948) 31 Cal.2d 669, 672; *Estate of Kann* (1967) 253 Cal.App.2d 212, 223; and *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 458-459.) In none of these cases did a court impose an award of attorney fees against a trustee, personally, such that the trustee would have to pay those attorneys fees out of his or her own pocket.

There is a provision of the Probate Code that appears to permit a court to impose an attorney fee award against a trustee, personally, under certain circumstances. Section 17211, subdivision (b), which neither party cites and the court did not rely on in awarding attorney fees in this case, provides: "If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and

other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded shall be a charge against the compensation or other interest of the trustee in the trust. The trustee shall be personally liable and on the bond, if any, for any amount that remains unsatisfied."¹⁰ Even if McClutchey's action against Kimball can be construed as a "contest" of the trustee's account, it is clear that the trial court did not make the findings that would be necessary to support an award of attorney fees to McClutchey under this provision—i.e., (1) that Kimball's opposition to McClutchey's contest was without reasonable cause, or (2) that Kimball acted in bad faith in opposing McClutchey's contest. As a result, the imposition of an attorney fee award in favor of McClutchey and against Kimball personally, as opposed to out of the Trust property, cannot be affirmed as being made pursuant to section 17211, subdivision (b).

McClutchey has provided no authority, and we have found none, that supports the idea that a probate court's general equitable power to administer a trust extends so far as to permit the court to impose an attorney fee award on a trustee as an individual, as opposed to allowing for attorney fees to be paid out of the trust. Indeed, the very existence of section 17211, subdivision (b), which gives the court the authority to impose an attorney fee award on a trustee, personally, when the court makes the requisite findings, suggests that the court's equitable powers to administer a trust do not extend this far.

¹⁰ Subdivision (a) of section 17211 gives the court discretion to award attorney fees to the trustee when a beneficiary contests the trustee's account without reasonable cause and in bad faith.

Because the probate court's equitable powers to administer the internal affairs of the Costebelle Trust do not permit the court to award attorney fees to McClutchey and make Kimball personally liable to pay them, we must reverse the trial court's attorney fee award.

2. *There is no basis for this court to award McClutchey attorney fees for the appeal*

In her briefing on appeal, McClutchey asks this court to award her the attorney fees that she has incurred in defending against Kimball's appeal, as a form of sanctions for his taking a frivolous appeal. Although we have ultimately agreed with McClutchey on a number of matters with respect to Kimball's appeal, we do not agree that his appeal is frivolous. We therefore deny McClutchey's request for attorney fees or other sanctions related to this appeal.

IV.

DISPOSITION

The judgment is affirmed with the exception that the portion of the judgment awarding McClutchey \$123,963 in attorney fees is reversed. The parties are to bear their own costs on appeal.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.