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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MICHAEL HALL,

Plaintiff and Appellant,

v.

DENNIS MCBRIDE,

Defendant and Respondent.

H037941

(Santa Cruz County

Super. Ct. No. PR044213)

Appellant Michael Hall seeks review of an order denying his claim for attorney fees and trustee fees, which were incurred in litigation over a trust of which respondent Dennis McBride was a beneficiary. Hall contends that the lower court abused its discretion in reducing the fee award in light of the baseless nature of McBride's various claims. On the record before us we find no abuse of discretion and therefore must affirm the order.

## *Procedural History*<sup>1</sup>

Hall is the former trustee of the Josephine Bell Living Trust, which his mother-in-law established in February 2007, shortly before she died. Between April 2007 and July 2010 Hall and McBride's sister, Renee Hall, were engaged in marital dissolution proceedings. On July 20, 2009, Hall notified the beneficiaries of the trust that he would resign as trustee effective August 19, 2009. The named successor, Fidelity Investments, had declined to take over because the account was too small; so Hall suggested that one of the family members assume the role of trustee.

In September 2009 McBride filed a petition to remove Hall as trustee, accusing him of mishandling trust funds. (PR044213.) That claim eventually proved unfounded; but at the hearing on his petition, he volunteered to become the successor trustee. After receiving Hall's objection to McBride's conditional appointment, the court rejected McBride's proposal, because McBride was determined to be an inappropriate candidate for management of the trust. Renee Hall had indicated a willingness to serve as trustee, but she had not filed a formal statement to that effect.

McBride sought appellate review of the court's determination that he should not be appointed successor trustee. That appeal (H034980) was dismissed as taken from a nonappealable order. His petition for review by the Supreme Court was denied.

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<sup>1</sup> Hall makes appellate review exceedingly difficult by failing to support each factual assertion with a specific reference to the record, as required by California Rules of Court, rule 8.204. The vast majority of the key facts in Hall's brief are stated with no citation whatsoever, and a few point only to the superior court's summary of the procedural history in its statement of decision or to Hall's own written arguments below. We are left with the trial court's factual summary of the procedural history, which we have repeated here merely for background with no representations of factual accuracy. Supplementing that account are the facts stated in our prior opinion in H035399, H034980, and H036098, of which we have taken judicial notice.

On January 8, 2010, Hall filed an accounting and report indicating that there was \$122,880.16 in a subtrust that the decedent had set up for McBride. McBride then sued Hall for elder abuse, to which Hall successfully demurred on res judicata grounds. In sustaining the demurrer on July 12, 2010, the superior court noted that all of the claims in the action had already been determined at the hearing on McBride's petition to remove Hall as trustee. On July 16, 2010, the court declared McBride to be a vexatious litigant. That designation precluded appellate review of the July 12 order when this court denied McBride leave to pursue the appeal.<sup>2</sup> (H036098.)

Hall's account was also contested, but on March 9, 2010, the court issued a written order finding no breach of fiduciary duty by Hall and approving the amounts Hall had claimed as unpaid costs and attorney fees. (H035399.) McBride's appeal from that order was unsuccessful. (H035399.) On April 2, 2010, the court overruled McBride's objections to the March 9 order, allowed an additional \$3,900 in attorney fees, and appointed Renee Hall as successor trustee.

On April 7, 2010 McBride took a different path in his litigation by filing an action against Hall for civil harassment and requesting a temporary restraining order against him. That case (CV167134) was heard on May 20, 2010 and dismissed, as no evidence supported McBride's allegations. No fees or costs were awarded.

Also on May 20, 2010, the court granted Hall's petition for advance approval of the costs and fees he expected to incur in responding to McBride's appeal in H034980 and from the anticipated order in those May 20 proceedings. Renee Hall was directed to pay Hall's counsel \$7,500 as a retainer and thereafter to replenish the retainer in that

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<sup>2</sup> Judge Almquist had given McBride permission to file the appeal, but that act was of no effect, as Code of Civil Procedure section 391.7 prohibits a vexatious litigant from filing the appeal without obtaining leave from the presiding justice. This court subsequently denied McBride's request and dismissed the appeal in H036098.

amount monthly. That ruling was upheld on appeal in H035399. Renee Hall, however, failed to comply with the order.

On August 17, 2010, McBride filed a petition to terminate the trust, along with a request to shorten time. Hall objected to the latter request on the ground that his own fee petition, which he expected to file shortly thereafter, should be heard before ruling on McBride's petition to terminate the trust. On August 30, 2010, the court denied McBride's petition. Renee Hall was again ordered to deposit the \$7,500 retainer with Hall's attorney, this time by September 10, 2010. She was further ordered to comply with her duty to file her First Account and Report of Successor Trustee.

On August 31, 2010, Hall filed his petition in the probate matter (PR044213), seeking compensation for himself as former trustee and for his counsel. On October 4, 2010, Hall was granted attorney fees, trustee fees, and costs in the probate action. McBride appealed from that order, but this court dismissed the appeal after he failed to procure the record. (H036126.) In any event, the order was vacated in November 2010 because the judge who had been handling most of the proceedings, the Honorable Timothy R. Volkmann, had been out of the country during the 10-day period allowed for his response to a Code of Civil Procedure section 170.3 motion by McBride. From this point the Honorable Jeff Almquist, who had sustained the demurrer to the complaint for elder abuse and approved the \$7,500 retainer, presided over the litigation.

During the hearings that followed, Judge Almquist expressed disapproval of the mounting attorney fees incurred by Hall over the course of the litigation; he informed the parties that he was "treating all of Judge Volkmann's rulings as basically being void." At different points he questioned not only the past designation of McBride as vexatious litigant but even Hall's standing to challenge the appointment of McBride as successor trustee, an appointment conditionally made and later retracted by the Honorable Paul P. Burdick in 2009. Judge Almquist expressed curiosity about Hall's role in the creation of

the trust, and he was inclined to terminate the trust as economically inefficient due to its depletion by litigation expenses.

After several continuances, on August 25, 2011 Hall's successive applications for trustee fees and attorney fees were argued before Judge Almquist. By this time McBride stated that he was no longer in favor of terminating the trust. He did, however, vigorously contest Hall's request for trustee and attorney fees.

On December 12, 2011, Judge Almquist issued his order allowing Hall only \$27,256 of his \$77,415.80 claim, for work performed between April 13, 2010 through September 15, 2011. After deducting one \$7,500 payment already made from the trust, the court ordered Renee Hall to pay \$19,656 jointly to Hall and his attorney. Hall's timely appeal followed.<sup>3</sup>

#### *Discussion*

"A trustee is entitled to the repayment out of the trust property for the following: [¶] (a) Expenditures that were properly incurred in the administration of the trust. [¶] (b) To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust." (Prob. Code, § 15684.) "If litigation is necessary for the preservation of the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust; however, if the litigation is specifically for the benefit of the trustee, the trustee must bear his or her own costs incurred, and is not entitled to reimbursement from the trust." (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461.) Thus, recovery of counsel fees for defending against the claims of a beneficiary may be reimbursed if they are incurred in good faith and are for the benefit of the trust. (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1227, 1230; *Donahue v. Donahue*

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<sup>3</sup> McBride also attempted to appeal from the order, but this court again denied him permission to file it, pursuant to Code of Civil Procedure section 391.7. Renee Hall also filed a notice of appeal, but hers was dismissed under California Rules of Court, rule 8.140 for failing to procure the appellate record.

(2010) 182 Cal.App.4th 259, 269.) But the amounts sought must be " 'reasonable' in amount and 'appropriate' to the 'purposes and circumstances of the trust.' . . . To recover fees and costs, trustees must subjectively believe the expense was necessary or appropriate to carry out the trust's purposes, and they must show their beliefs were objectively reasonable." (*Donahue v. Donahue, supra*, 182 Cal.App.4th at p. 268, quoting Rest.3d Trusts, § 88, p. 256.)<sup>4</sup> Accordingly, "[p]robate courts have a special responsibility to ensure that fee awards are reasonable, given their supervisory responsibilities over trusts." (*Id.* at p. 269.)

In making severe cuts to Hall's claim the court determined that some of those expenditures did not benefit the trust, and some of the amounts were disproportionately "exorbitant." On appeal, Hall contends that Judge Almquist's reduction of his claim constituted a "manifest abuse of discretion." His argument reflects the applicable standard of review. The court's determination regarding compensation for trustee services "rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in absence of a manifest showing of abuse." (*Estate of McLaughlin* (1954) 43 Cal.2d 462, 465; *Estate of Gump* (1991) 1 Cal.App.4th 582, 597.) "In reviewing for an alleged abuse of discretion, we cannot substitute our opinion and thereby divest the

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<sup>4</sup> Restatement 3d of Trusts, section 88 states, "A trustee can properly incur and pay expenses that are reasonable in amount and appropriate to the purposes and circumstances of the trust and to the experience, skills, responsibilities, and other circumstances of the trustee." The comments to this entry are particularly instructive: "The comprehensive powers of a trustee (§ 85) include the power to incur and pay expenses in the course of trust administration, but the exercise of this power is subject to the trustee's fiduciary duties (§ 70). Implicit in a trustee's fiduciary duties is a duty to be cost-conscious." (Rest. 3d Trusts, § 88, comm. a.) Expenses that are considered "proper and reasonable" are those that, "in the exercise of fiduciary judgment (see § 87), are reasonable and appropriate in carrying out the purposes of the trust, serving the interests of the beneficiaries, and generally performing the functions and responsibilities of the trusteeship." (*Ibid.*, comm. b.) Such expenses include those for "reasonable counsel fees" incurred in litigation "as appropriate to proper administration or performance of the trustee's duties." (*Ibid.*, comm. (d).)

superior court of its discretionary power, but rather we must determine whether the trial court exceeded "the bounds of reason, all of the circumstances before it being considered . . ." (Smith v. Krueger (1983) 150 Cal.App.3d 752, 757.)

The first attorney fee claim addressed by the court was for approximately \$20,000 for counsel's combined work on H034980 and H035399. The court allowed \$2,960 for H034980 (appeal #1) and \$7,500, the amount of the retainer, for H035399 (appeal #2). Although this seems like a drastic reduction, we cannot say that it is outside the bounds of reason for either appeal. "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" (Serrano v. Priest (1977) 20 Cal.3d 25, 49; Cates v. Chiang (2013) 213 Cal.App.4th 791, 807.) By the same token, the legal services under scrutiny were not those performed before the very court that was evaluating their worth, but were addressed to the Court of Appeal on both occasions. We also recognize that the \$7,500 retainer was to be replenished as necessary and that this court affirmed the challenged orders in full in H035399. Nevertheless, given the standards by which we review the court's assessment, we are unable to conclude as a matter of law that \$7,500 was inadequate to compensate for the fees Hall incurred in defending against the meritless appeal in H035399.

The trial court denied in full all of the fees claimed for the civil harassment case (CV167134). This ruling was correct; at the time of the original ruling Hall was denied any fees for that litigation, as it was brought against him individually and had no bearing on the administration or preservation of the trust. Hall's subsequent claims for those fees in his petitions were properly denied.

The court also denied fees for McBride's action against Hall for elder abuse, which extended to appeal #3, H036098. The trial court stated that the complaint in that case had been brought against Hall individually, without naming either the trust or Hall in his capacity as trustee. The court further found that the elder abuse case had "no bearing on

the trust and its administration." Hall takes issue with the second point, because it "directly controverts [Judge Almquist's] own express findings in the Elder Abuse Case," in which the demurrer was sustained on res judicata grounds. Hall argues that Judge Almquist sustained Hall's demurrer on that occasion because the issues were "fundamentally the same as in the trust action." He also complains that Judge Almquist "ignore[d] the fact that included in the Elder Abuse Case was a separate motion to have [McBride] declared a vexatious litigant."

However, Hall has provided an insufficient record to permit us to determine the extent to which Hall's defense to the allegations of elder abuse was necessarily for the benefit of the trust or, notwithstanding the demurrer ruling, for protection of his own individual interests. We therefore must presume that the court reached the right conclusion in denying fees for that action. (Cf. *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 ["It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error"].)

It is apparent from the trial court's statement of decision that the reduction in fees was not attributable entirely to the court's view of the identified actions as being for protection of Hall's own interests as an individual defendant or as a creditor. That was the court's view of the elder abuse and civil harassment cases, and of the cost of compelling Renee Hall to file a proper account after she succeeded him as trustee. But the fees for the first two appeals (H034980 and H035399) were reduced because the amounts "violate[d] the sense of proportionality that must apply, and provided no real benefit to the trust." Although we upheld the order approving a charge to the trust for defending the May 20, 2010 orders (H035399), the trial court believed that it should not have taken approximately \$20,000 to represent Hall in that appeal and secure a dismissal in H034980. And in addressing the attorney fee claim for general trust administration, the court reasoned that although McBride was a "frustrating" and indisputably litigious

opponent, the issues presented were not so complex as to justify the "shockingly disproportionate" amount of fees generated by Hall's legal counsel for general trust work.

We cannot find an abuse of discretion in the court's ruling. As the appellate court stated in *Donahue v. Donahue, supra*, 182 Cal.App.4th at page 274, "The trial court's assessment of reasonableness depends not simply upon what fees were reasonably incurred in representing [the trustee], but also upon whether such fees were reasonably and prudently incurred for the trust." Relying in part on *Donahue*, Judge Almquist likewise reasoned that "the right to reimbursement is also bounded by the concepts of reasonableness, proportionality and benefit to the trust."

Hall also takes issue with the court's disallowance of his request for \$1,250 in trustee fees. This claim was to compensate Hall for his time in addressing "the numerous matters that have taken place from and after April 13, 2010 (the date that the court formally accepted [Hall's] resignation), including all of the actions enumerated above." The court did not explain its ruling, but we can infer that the court rejected this claim because Hall was no longer trustee after April 13, 2010. In his initial request Hall stated that he had already drawn \$1,433 from the trust on December 3, 2007, but he did not identify any reimbursable expenses attributable to administration of the trust between that date and the date he was discharged from service. His declaration submitted with his claim listed activities between April 19, 2010 and July 20, 2010, which he represented to pertain to the elder abuse action, McBride's unsuccessful efforts to obtain a restraining order, his "various appeals," his successful petition for the \$7,500 retainer, his success in having McBride declared a vexatious litigant, "Renee Hall's failures to abide by court orders, and other matters." Hall suggested that \$100 per hour was a reasonable fee for his 12.5 hours claimed during this period, "especially considering the voluminous amount of uncompensated time" he had provided during his service as trustee. He did not elaborate on that general reference to uncompensated service.

Again we find no abuse of discretion. The court could have rationally concluded that the time Hall spent after being discharged as trustee was expended primarily to protect his own interests in the litigation rather than to benefit the trust.

Hall further challenges the court's denial of his request that Renee Hall post a bond to cover his fee request. The court ruled that a bond was unnecessary, as McBride had waived such a requirement and "the funds on hand are sufficient to pay any current claims against the trust." Hall contends that the court failed to apply correctly Probate Code section 15602, which states, "(a) A trustee is not required to give a bond to secure performance of the trustee's duties, unless any of the following circumstances occurs: [¶] (1) A bond is required by the trust instrument. [¶] (2) Notwithstanding a waiver of a bond in the trust instrument, a bond is found by the court to be necessary to protect the interests of beneficiaries or other persons having an interest in the trust. [¶] (3) An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court." Subdivision (b) of this statute qualifies the third exception by allowing the court to excuse the filing of a bond if it finds "compelling circumstances." (Prob. Code, § 15602, subd. (b).) A "compelling circumstance" is deemed to exist if all adult beneficiaries of the trust waive the filing of a bond by that trustee.

Unquestionably Renee Hall is a trustee described by exception (3) to subdivision (a) of Probate Code section 15602, as she was not named in the trust but appointed by the court. The trial court, however, noted that McBride, presumably the only adult beneficiary, had waived the bond requirement. It also reasoned that a bond was unnecessary because there was "clearly plenty of money in the trust to pay [Hall's] claim." While we might have reached a different conclusion as to the need for a bond in this case,<sup>5</sup> the trial court was within the bounds of its discretion in ruling that the

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<sup>5</sup> Unquestionably the interests of both trustee and beneficiary are adverse to those of Hall. As noted earlier, Renee Hall filed a notice of appeal from the December 12, 2011

circumstances before it met the conditions for excusing a bond under subdivisions (a) and (b) of the trustee bond statute.

*Disposition*

The December 12, 2011 order is affirmed. In the interests of justice, the parties shall bear their own costs on appeal.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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order, but her appeal was dismissed. McBride also sought review, but this court denied him permission to file his appeal. The appellate record includes a letter written by Renee Hall indicating that she would not be paying the amount ordered and requesting that he refrain from further requests pending her challenge to the "void" ruling.