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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DELIA BROAD RASKOV, Plaintiff and Appellant, v. DANIEL RASKOV, as Co-Trustee, etc., et al., Defendants and Respondents.	E044285 (Super.Ct.No. INP019362) OPINION

APPEAL from the Superior Court of Riverside County. James A. Cox, Judge. Affirmed in part, reversed in part, remanded with directions.

Best, Best & Krieger, G. Henry Welles, Douglas S. Phillips, and Kira L. Klatchko, for Plaintiff and Appellant.

Orren & Orren, and Tyna Thall Orren, for Defendant and Respondent Daniel Raskov.

Michele Raskov Aronson, in pro. per., for Defendant and Respondent.

There is an ongoing dispute between plaintiff and appellant Delia Raskov (Delia) and her stepchildren, defendants and respondents Daniel Raskov (Daniel) and Michele Aaronson (Michele),[1] over the trusts established by David Raskov (Father) and Delia.[2] Delia was the trustee of the two trusts: The David Raskov Inter Vivos Trust (IVT) and the Raskov Family Trust (RFT). The IVT was created on September 18, 1986 (and amended on October 19, 1990, and January 6, 2003). Father died on July 15, 2003, and both trusts became irrevocable. In 2006 Daniel successfully had Delia removed as trustee of the IVT. The probate court ordered that the IVT pay Delia a $1,500 per month stipend from IVT net monthly income. Regarding attorney fees and costs, the court awarded $120,000 to Daniel and Michele, and $40,401 to Delia, and directed that all fees and costs be paid from the IVT. In April 2007, the probate court noted an ambiguity in whether the attorney fees and costs should be paid from trust income or trust principal and reopened the issue for briefing. Following briefing by both sides, the court ordered that payment be made from trust income.

Simultaneously, the probate court was considering Delia's petition for approval of her account of the IVT. Daniel had filed 13 objections. After the issues were resolved and the account was approved, Delia sought recovery of $66,112.50 in attorney fees

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[1] Although Michelle filed a notice of joinder in Daniel's responding brief, we refer solely to Daniel, who was the primary moving party at the trial level and on appeal.

[2] Pursuant to this court's order of June 16, 2009, we take judicial notice of the records in the parties' other appeals in case Nos. E042666 and E045061.

which she incurred. Following a hearing, the probate court found that she was entitled only to reasonable fees in the amount of $5,000.

Delia has appealed, challenging the probate court's order directing payment of attorney fees from IVT income and the order limiting her recovery of fees to $5,000.

I. PROCEDURAL BACKGROUND AND FACTS

On December 19, 2005, Daniel filed a second amended petition to compel redress for breach of the IVT, to remove Delia as IVT trustee and compel an accounting, to appoint a successor trustee, to construe and reform certain IVT provisions, and to transfer trust property to the IVT (specifically, proceeds from the sale of property in Los Angeles referred to as "L.A. property"). Following trial, the probate court issued a written intended decision on May 10, 2006. For purposes of this appeal, the relevant part of the decision provided: "The court finds that reasonable fees and costs incurred for the prosecution and defense of the various claims in this matter, is not more than $150,000.00 on each side. The court believes that somewhere between Eighty to Ninety percent (80 to 90%) of the litigated claims were incurred as a result of the [L.A.] property issue. In seeking to retain such interest in the [L.A.] property, Delia . . . was representing her own personal interests, and not that of the trust. Accordingly, the court denies 80% of her fees and allows $30,000.00 of her incurred fees (for purposes of seeking instructions on the other trust issues) to be borne by the Trust. On the other hand, eighty percent (80%) of the fees incurred by Daniel . . . and his sister, were incurred in defending and preserving the estate assets. Accordingly, they shall be allowed to recover

$120,000.00 from trust assets for costs and fees. Except as specifically allowed in this paragraph, the parties shall bear their own attorney fees and costs."

Each party filed a proposed statement of decision and a response to the other party's proposed statement. On June 12, 2006, the court issued its final decision. Regarding the attorney fees, the court stated: "Both sides are entitled to recovery of some portion of their attorney fees incurred in this matter from the Trust. The precise amount of fees to be awarded to each side shall be determined after further hearing. Except as specifically[ ]allowed in this paragraph, the parties shall bear their own attorney fees and costs. The court hereby sets a hearing upon the issue of attorney fees . . . ." An order regarding the court's decision was filed on July 21, 2006.

A hearing was held on the issue of attorney fees. On October 2, 2006, a formal order was filed, which provided: "For the reasons stated on the record at the hearing of August 21, 2006, the court finds that Daniel and [Michele] shall be allowed fees and costs to be paid from the trust in the sum of $120,000.00. After review and reconsideration of the fees allowed to Delia . . . from the trust, the Court believes that her requested fees are excessive, and that the majority of her fees incurred were the result of the [L.A.] property issue. [¶] The Court further believes that most of the issues in this litigation were brought about as the result of the bad faith conduct of Delia . . . as more particularly described in the Court's previous order. Nevertheless, the Court confirms its previous award of $30,000 for defense of the various petitions brought by the Raskov

children, plus $10,401.00 for defense fees on the third party (Kaufman) claim,[3] for a total of $40,401.00, said sum to be paid from the trust."

Subsequently, on October 16, 2006, Delia filed a petition for approval of her account, and Daniel filed a motion under Probate Code section 859[4] seeking an order that Delia be required to pay double the amount of the proceeds she improperly retained from the sale of the L.A. property. Daniel also sought to have Delia reimburse the $120,000 paid by the IVT for attorney fees. Daniel objected to Delia's petition and requested that she be surcharged for the $120,000 in fees. In her reply, Delia asserted the issue of attorney fees had been finally and conclusively adjudicated by the court in its 2006 order. Delia also opposed Daniel's section 859 motion. The section 859 motion was denied. Delia moved for sanctions under Code of Civil Procedure section 128.7, which the probate court granted on February 8, 2007.

On February 27, 2007, Delia filed petitions to both temporarily and permanently remove Daniel and Michele as co-trustees. At the March 29 hearing on these petitions,[5] Delia argued for immediate removal on the grounds that Daniel and Michele were not paying the $1,500 monthly stipend to Delia. Daniel replied that the stipend was not being paid when the monthly trust income was not enough to cover expenses. According to

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[3] An action was filed by Kaufman (*Kaufman v. Raskov*) and Delia hired an attorney to perform legal services without obtaining approval from Daniel and Michelle.

[4] All further statutory references are to the Probate Code unless otherwise noted.

[5] On December 24, 2008, this court granted Delia's motion to augment the record with a copy of the March 29, 2007, reporter's transcript.

Daniel, the expenses included the amount being paid to reimburse the trust principal for the attorney fees paid pursuant to the 2006 orders. Delia argued that such reimbursement was not a legitimate trust expense. Initially, the court agreed. However, Daniel pointed out that the 2006 orders did not specify whether the fees were to be paid from principal or income. Without examining the 2006 orders, the probate court opined that the words of the order were being turned around to say something they did not say. Thus, the court directed Daniel "to pay those attorney's fees out of principal. If I have to clarify that, this is my clarification. And if you have to go back and pay [Delia] income, go back and get her income paid."

After Daniel failed to pay the $18,000 sanction, Delia applied ex parte for an order requiring Daniel to appear for a judgment debtor examination. The court denied the application, stating: "On March 29, 2007, the parties were in court on a status conference with regard to Delia Raskov's petition to remove trustees. During the course of that proceeding, an issue was discussed with regard to a pending contested account (which account was expected/ordered by the court to address the ruling made after trial of late last year). The issue under discussion involved Delia's objection to the Trustees' action of crediting the court ordered attorney fees against trust income rather than principal. At the hearing, this court directed the attorney for the trustees to pay the attorney fees from principal. After making this direction, the court has reconsidered the matter. [¶] The court's original order after trial, with regard to the payment of attorney fees was patently ambiguous. It made no direction as to how the attorney fees were to be apportioned with regard to income/principal. Under reconsideration, the court is of the opinion, that good

cause and good argum[e]nt may be made for the trustees' position that some of the court ordered att[or]ney fees should be paid from trust income. In the trial, the court found that Delia Raskov had acted with bad faith. It was her malfeasance that precipitated the lawsuit. The court ruling provided that she should bear the burden of a portion of attorney fees incurred by her co-trustees. In the court's recent direction to trustees' counsel (that fees be paid from principal), the court placed an undue and unfair burden upon the remainder/principal beneficiaries (Daniel Raskov and his sister) and unduly benefited the income beneficiary who was found to have acted in bad faith (Delia Raskov). [¶] Accordingly, this court finds that the imposition of the sanction upon Daniel Raskov is patently unjust, provided the direction to pay all attorney fees from principal is allowed to stand. While the court is of the opinion that the sanction order was justified, it nevertheless should be adjusted within a future determination of how the attorney award is to be apportioned between income and principal, [i.e.], it could be credited against any dispos[i]tion of the fees that would come from the interest of Delia Raskov. The court desires to reserve this question until the hearing on the amended account."

Trial on Delia's petition for approval of account was heard during the summer of 2007. One issue discussed was whether the probate court's prior order directing payment of attorney fees applied to IVT principal or income. The court commented: "I never—frankly, I think my [2006] attorney fees ruling was in error. I think I—I erred when I made that ruling. But I never specifically indicated how the attorney's fees should be—or the—the net income should be provided or how the payment of attorney's fees whether

it should come from principal or income. So I think I have an opening here to correct the error that I made." According to the probate court, when Delia pressed the issue of paying her stipend, the court recognized the unfairness of taking the entire award from trust principal and leaving the stipend unaffected, as that would amount to making Daniel and Michele, the principal/remainder beneficiaries, pay all of their own attorney fees, even though the dispute that led to the litigation was primarily Delia's fault. The court stated its tentative view was that half of the $120,000 in fees awarded to Daniel should be paid by trust income. The court directed the parties to submit briefing on this issue.

A hearing was held on July 13, 2007. The court issued its order noting that it had previously ruled that certain attorney fees should be paid by the IVT, that Delia's bad faith precipitated the dispute, which resulted in the attorney fees, and that the court "failed to specify how the $120,000 was to be paid or allocated between income and principal, which failure resulted in a dispute over the amended account." Recognizing that payment of the $120,000 from IVT's principal would penalize Daniel and Michele, the court determined the amount "is the responsibility of [Delia], and may be attributed entirely to trust income, including the amounts payable to her in the monthly stipend, until the entire amount of $120,000 is recovered to the trust." The court also ordered "that the trust shall receive interest at 4% on the unpaid amount and that each monthly allocation shall be applied first to accrued interest." The sanction of $18,000, plus interest of 10 percent against Daniel, was credited against the principal sum and deemed satisfied. The court's order was entered on August 24, 2007, and notice was served on September 12, 2007, and Delia appealed.

As previously noted, Delia's petition for approval of her account was filed in October 2006. Daniel responded with 13 objections. The objection that raised the challenge to the largest dollar value encompassed Daniel's motion for double damages under section 859. The denial of Daniel's section 859 motion effectively barred his objection. On April 5, 2007, Daniel notified Delia that seven objections were going to be withdrawn and that he wanted to resolve the remaining objections. Daniel received no response. By the time of the hearing on Delia's account, there were only six remaining objections. Ultimately, Delia was found to owe the trust $25,655.52 and to be entitled to credits of $20,328.26. She was ordered to pay the difference in 60 days. As a result of Daniel's actions, it was discovered that $41,256.51 in distributable income had not been distributed. This amount was distributed in equal thirds to the beneficiaries, with no set-offs against anyone's share.

On July 3, 2007, Delia filed a petition for recovery of attorney fees incurred on her petition for first and final account. The petition requested $66,112.50 in fees and $3,988.58 in costs. Following a hearing on August 10, the probate court commented that Delia had spent "a lot of money from the trust . . . defending herself from the actions that were found to be in bad faith." The court observed that Delia had spent a great deal of money on her previous account, an account the court had found inadequate, that most of Daniel's objections were previously ruled on or were withdrawn early in the proceedings, and that consequently, "I don't know why—how you could have spent $66,000 in defending claims that had—that were withdrawn long before the case—the hearing was ever heard on the account." The court described the issues that were actually contested as

"very simple and uncomplicated" and characterized counsel's fee request as "absolutely outrageous." The court found that Delia was entitled to reasonable fees in the amount of $5,000. Delia also appealed from the this order.

II. ORDER CLARIFYING PAYMENT OF ATTORNEY FEES FROM IVT

In 2006 the probate court ordered the IVT to pay for the attorney fees incurred by both Daniel and Michele ($120,000) and Delia ($40,401) regarding their petition to remove Delia and restore property to the IVT; however, it failed to specify whether payment should come from trust principal or trust income. Because Daniel and Michele are principal beneficiaries while Delia is an income beneficiary, the parties disagreed on which source (trust principal or trust income) should provide the necessary payment. When this ambiguity was brought to the probate court's attention, the court clarified its prior order directing payment of the $120,000 from IVT's income, "including the amounts payable to [Delia] in the monthly stipend, until the entire amount of $120,000 is recovered to the trust." The court also ordered "that the trust shall receive interest at 4% on the unpaid amount and that each monthly allocation shall be applied first to accrued interest." The sanction of $18,000 plus interest of 10 percent against Daniel was credited against the principal sum and deemed satisfied. Delia argues that (1) the trial court erred in "reconsidering" its 2006 orders regarding payment of attorney fees, and (2) the 2006 orders are not ambiguous. In her reply brief, she references the applicable section of the Probate Code under which she claims direct payment of the attorney fees from trust principal.

An award of attorney fees rests in the sound discretion of the trial court. (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 234.) "'The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust.' [Citation.] Consequently, where the trust is not benefited by 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 assets." (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1230.)

We begin with Delia's reference to sections 16320 to 16375, which sections she maintains direct payment of attorney fees from trust principal. According to Delia, section 16371, subdivision (a)(4), requires a trustee to pay from principal the expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property. (*Thomas v. Gustafson* (2006) 141 Cal.App.4th 34, 36-37, 44-45 [award of attorney fees payable one-half from trust income and one-half from trust principal reversed pursuant to section 16371, subdivision (a)(4)].) That section, in relevant part, provides: "(a) A trustee shall make the following disbursements from principal: [¶] . . . [¶] (4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property." (§ 16371, subd.(a)(4).)

Under the facts of this case, we disagree with Delia's claim that the answer is simply found in section 16371, subdivision (a)(4). To begin with, we, like the trial court, note that it was Delia's mismanagement of the IVT (specifically the L.A. property) that created the need for Daniel and Michele to take legal action. Section 16370, in relevant

part, provides: "A trustee shall make the following disbursements from income . . . [¶] . . . [¶] (b) Except as otherwise ordered by the court, one-half of all expenses for . . . judicial proceedings, or other matters that involve both the income and remainder interests." (§ 16370, subd. (b).) Furthermore, section 16421 provides: "The remedies of a beneficiary against the trustee are exclusively in equity." Given this statutory authority, coupled with the facts of this case, we find that sections 16370 and 16421 trump section 16371. As Daniel points out, the L.A. property was an income-producing asset of the IVT. Thus, its loss affected both the IVT principal and the income. But for Delia's breach of her fiduciary duties as a trustee regarding the L.A. property, Daniel and Michele would not have had to initiate legal action to seek her removal and the recovery of trust property.

Regarding Delia's claim that the 2006 orders were not ambiguous, she argues that the court's action amounted to an "impermissible collateral attack." We disagree. The fact that this case is on appeal evidences the ambiguity in the order. Daniel and Michele contend the payment should be made out of income (§ 16370) while Delia contends it should come out of principal (§ 16371). The trial court was correct to clarify its prior order, and we reject the claim that it amounted to an impermissible collateral attack. (*Kasperbauer v. Fairfield*, *supra*, 171 Cal.App.4th at p. 237 [a final judgment can be set aside upon a showing of mistake]; see also *Estate of Beard* (1999) 71 Cal.App.4th 753, 775 [equitable relief from a final order may be granted on theory of extrinsic mistake].)

It is the duty of the probate court to supervise the administration of trusts. "Proceedings in the probate court 'concerning the internal affairs of the trust' are

commenced with the filing of a petition.'" (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427, citing §§ 17200, subd. (a), 17201.) "To preserve the trust and to respond to perceived breaches of trust, the probate court has wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters presented' by the section 17200 petition. [Citation.]" (*Schwartz v. Labow*, *supra*, at p. 427.)

Here, the award of attorney fees resulted from Daniel and Michele's successful removal of Delia as trustee of the IVT, along with remedying her actions regarding the L.A. property. In reaching its decision, the probate court stated its belief "that most of the issues in this litigation were brought about as the result of the bad faith conduct of Delia . . . ." Nonetheless, we note that the court failed to award mandatory double damages as required by section 859, which provides: "If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a . . . trust, the person **shall** be liable for twice the value of the property recovered by an action under this part. The remedy provided in this section **shall** be in addition to any other remedies available in law to a trustee, guardian or conservator, or personal representative or other successor in interest of a decedent." (§ 859, bolding added.) That the probate court refused to award section 859 damages suggests that it looked to the award of attorney fees against Delia's interest in the IVT as adequate remedy. In fact, when clarifying its 2006 orders, the court stated that payment of the $120,000 in attorney fees "is the responsibility of [Delia], and may be attributed entirely to trust income, including the amounts payable to her in the monthly stipend, until the entire amount of $120,000 is recovered to the trust." As noted by our colleagues in the Fifth District,

"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 the trustee in opposing the proceeding against that beneficiary's share of the trust estate." (*Rudnick v. Rudnick* (Dec. 2, 2009, F056587) ___ Cal.App.4th ___ [2009 Cal.App. Lexis 1938].)

Delia is responsible for misappropriating IVT property and forcing the litigation to remedy her wrong. Neither Daniel nor Michele should bear the cost of such litigation. Accordingly, Daniel and Michele were correct to seek reimbursement of the $120,000 in attorney fees from the IVT income, and the probate court correctly clarified its ambiguous 2006 orders.

III. ORDER AWARDING $5,000 IN ATTORNEY FEES TO DELIA

Delia challenges the probate court's award of attorney fees regarding her petition to approve her account of the IVT.

A. Background Facts

In her motion for attorney fees, Delia requested costs of $3,988.58 and fees for approximately 176.3 hours of work at $375 per hour. The probate court denied the request, awarding only $5,000. Delia challenges the court's award, contending that she was required to render a full account of all trust property and she was required to defend such account, including the several objections submitted by Daniel and Michele.

According to the record before this court, in November 2006, Daniel filed 13 objections to Delia's account. Specifically, they include: (1) the 1998 Cadillac, or proceeds thereof, should be an asset of the IVT; (2) Delia misrepresented the fact she

held two outstanding notes on the L.A. property, and thus, should return $25,000 plus interest and $29,000 plus interest that she took as credit against the L.A. property proceeds; (3) Delia should return $1,500 she claims she was entitled to as her August 2006 monthly stipend; (4) $9,188.00 of Delia's claimed chargeable expenses for the L.A. property should be rejected; (5) Delia should pay $23,996.50 to the IVT to make up for interest lost by her maintaining approximately $300,000 in an account without generating interest; (6) Delia should provide background information to explain the increased value of property located on Long Beach Boulevard; (7) Delia should provide backup to support the request for $2,000 for payment of funeral expenses; (8) Delia should refund to the IVT all payments to Nancy Hallowell for accounting work to assist in preparation of these accountings; (9) Unclaimed funds concerning the sale of property in San Bernardino County should not be listed as an asset of the IVT; (10) Delia should return the $5,000 retainer paid to Wendy Sharpe for legal services on the *Kaufman v. Raskov*[6] matter; (11) time is needed to determine the status of a loan in the amount of $50,000 made by Father to Barry Broad (Delia's son) prior to Father's death; (12) time is needed to review the 2004 and 2005 tax returns for accuracy and submit a report; and (13) Delia should be assessed section 859 damages regarding the L.A. property and be required to reimburse the IVT for the $120,000 in legal fees the IVT was ordered to pay to Daniel and Michele. On or about May 3, 2007, Daniel filed his notice of withdrawal of the following objections: (1), (6), (8), (9), (11), (12), and (13).

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[6] As previously noted, Delia retained Sharpe for legal services without obtaining the approval of Daniel and Michelle.

As for the other objections, they were resolved, as follows:

(2) $54,000 plus interest: Delia moved for judgment on the pleadings and the motion was granted.

(3) $1,500 August 2006 monthly stipend: The objection was sustained and payment was disallowed.

(4) Chargeable expenses for the L.A. property: The parties stipulated to adjust the amount so that Delia would have a $15,597.55 credit instead of $17,597.55 credit.

(5) Surcharge to Delia for failure to invest money in interest-bearing account: The probate court surcharged Delia $2,986 for not placing money in interest-bearing account, and $19,269.52 for not getting a higher rate of return. The income from the surcharge was to be split between the three beneficiaries so that each would get a credit of $6,576.09.

(7) Funeral expenses: Upon further explanation, the objection was withdrawn.

(10) Payment to Wendy Sharpe: The objection was withdrawn after the probate court concluded that the expense should be borne by the IVT.

On August 3, 2007, the probate court ruled that Delia owed the IVT $25,655.52, less credits of $20,328.26, resulting in an amount due of $5,327.26. Delia argues that she incurred legal fees in the amount of $66,112.50[7] responding to discovery and document

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[7] We find it interesting that during the same time period Delia's counsel charged fees in the amount of $66,112.50, Daniel's counsel charged approximately $35,000 and stated that "he spent less time on all case activities put together than Delia's attorneys claimed to have spent on the accounting alone, even though Daniel's attorney did not

[footnote continued on next page]

demands, defeating Daniel's section 859 motion, responding to the objections, bringing a motion for judgment on the pleadings, preparing for trial, and settling several of the disputes prior to trial. Nonetheless, the probate court allowed only fees of $5,000 to cover the preparation of the actual account. The court expressed its belief that the objections and responses thereto were uncomplicated and that the request for $66,112.50 was unreasonable. It also stated that it was not reviewing the fee request under section 15684, but was instead applying section 17211.[8]

Regarding attorney fees, the following discussion occurred between the probate court and counsel:

"MR. WELLES: I'm saying trustees in suing her spent $35,000 out of trust monies, used the trust monies to sue her and she had to the right to defend herself. She did defend herself and the net result of the trust was a $5,000 recovery for the trust. So effectively she was successful in defending against $700,000 in claims which [the] trustee brought against her.

[footnote continued from previous page]
enter the case until in February 2007, and needed to learn its complex history from scratch."

[8] In relevant part, section 17211 provides: "(a) If a beneficiary contests the trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. . . . [¶] "(b) 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 COURT: Well, . . . some of those claims were . . . withdrawn as objections very early in the proceedings. [¶] . . . [¶] So I don't know . . .how you could have spent $66,000 in defending claims that . . . were withdrawn long before the . . . hearing was ever heard on the account. [¶] . . . [¶] How could you possibly . . . those fees sound absolutely outrageous to me, Mr. Welles. [¶] . . . [¶]

"MR. WELLES: This is part of the problem, Your Honor. . . . [S]everal claims which were already litigated . . . they were pursued and kept pursuing and pursuing and we had to bring a motion for judgment on pleadings on one of the claims and in which we were successful. [¶] . . . [¶] . . . I'm talking about . . . the motion for judgment on the pleadings on the accounting in which they tried to relitigate the issue of the deeds on [the L.A. property] . . . which were clearly litigated in the prior trial. [¶] . . . [¶] . . . They were very aggressive in their claims against my client on the accounting. They refused to respond to discovery. We had to take the deposition of Daniel Raskov. And you could see by the amount they spent $35,000, it's not unreasonable for us as the party defending those claims which they brought . . . to spend $66,000 in defending it particularly with the result that we achieved in the trial, which was basically . . . coming out having to owe $5,000. . . . [¶] . . . [¶]

"THE COURT: Well, just looking at your billings I was prepared to knock off about 86 hours of your billings that you were charging that I thought were excessive. Assuming I was going to grant your petition, I was going to delete 86 hours worth of your work.

"MR. WELLES: Well, . . . at least $35,000 the amount . . . the trustees spent would be certainly a reasonable fee and I think that the fees that we spent and the time we spent was absolutely appropriate.

"THE COURT: Mr. Murphy, did . . . your clients spend $35,000 of trust principal in—

"MR. MURPHY: No, Your Honor. [¶] . . . [¶]

"THE COURT: Well, . . . I assume this is going to go on ad infinitum . . . . I think in these types of litigations, with the way these people are going, I don't think probably anybody should be paid any attorney's fees, otherwise we're going to keep litigating this forever. [¶] . . . [¶] . . . [I]f I recall correctly, I made a finding at the time of the hearing that the objections were made in good faith. [¶] . . . [¶] So I think with that finding I don't think Mrs. Raskov is entitled to . . . these attorney's fees she's asking for. . . . I do believe she's entitled to a reasonable fee for preparing and presenting the account, and I stated that probably $5,000 is a reasonable fee for doing that. And . . . I think the trust should pay her that. But all of these fees defending the . . . very simple and uncomplicated objections to the account, because . . . they were simple and uncomplicated, and to claim $66,000 in fees for probably a . . . 10-minute hearing, which . . . I don't know, it just . . . I'm just flabbergasted by it."

The court stated that it was denying fees to Delia under section 17211. Delia's counsel responded that that was not the basis for her request for recovery. Instead, Delia

was requesting fees pursuant to section 15684[9] and the cases of *Estate of Beirach* (1966) 240 Cal.App.2d 864 and *Estate of Raphael* (1954) 128 Cal.App.2d 92, which provide that if she has a successful defense against a surcharge claim, she is entitled to recover her fees. The court replied that it did surcharge Delia. Delia's counsel agreed but noted that it was only for a few claims. In response, the court noted that the other claims were withdrawn months before the hearing. Delia's counsel continued to argue that Delia was entitled to fees for defending against the claims. Daniel's counsel responded: "[W]e have no objection to the court's ruling. The only point that I do want to address, Your Honor, is the $700,000 . . . only $5,000 for the benefit of the trustees. Mr. Welles continues to say that over and over again, but what he fails to acknowledge, . . . the $20,000 in income that Delia is receiving as a credit from the 28,000 that she was found to owe. . . . [T]hat 20,000 income was found by Dan's effort alone. It was undistributed income that sat in the trust while she was the trustee. The only reason why she's getting paid is . . . Dan identified it in the account, brought it to the court's attention and she got the payment. [¶] So in addition to 28,000 for the trust, he also identifies approximately $60,000 in income for the benefit of the beneficiaries. So he benefited the trust by [$]28,000 and he benefited the beneficiaries by [$]60,000 by identifying that income that the trustee in her own account didn't identify. And therefore, . . . to subtract the income from the amount owed is clearly improper."

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[9] Section 15684 provides: "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."

Remaining firm on its ruling, the probate court warned Daniel that if this case comes back on an objection to attorney's fees, it would apply the same standard.

B. Delia's Contentions

Delia argues that the probate court erred, as a matter of law, in failing to apply section 15684 and award to her compensation for her faithful service to the IVT. She maintains that because the court "did not explain whether [her] defense benefited the IVT, it is difficult to know upon what evidence, if any, it relied in making its decision." Thus, she asserts that the court's comments suggest that it did not want to grant fees because "it felt that the litigation had gone on too long." Alternatively, Delia notes that the court stated it had reviewed the billings and decided that if it had granted the fee petition it would have eliminated 86 (of the 176.3) hours of time billed (at $375 per hour) in defending against the objections. Nonetheless, the court denied the fee request outright. Thus, Delia claims that by denying fees under section 17211, the court erred in refusing to consider the propriety of awarding fees under section 15684, refusing to take into account evidence demonstrating the reasonableness of the fees, taking into account facts and evidence outside the scope of the motion at bench, and punishing Delia for any prior conduct by forcing her to pay for the defense-related expenses that she had no choice but to incur.

C. Analysis

"[T]he Probate Code is studded with provisions authorizing the trustee to hire and pay (or seek reimbursement for having paid) attorneys to assist in trust administration. For example, section 16247 empowers the trustee 'to hire persons, including . . .

attorneys . . . or other agents . . . to advise or assist the trustee in the performance of administrative duties.' Section 16243 provides, 'The trustee has the power to pay . . . reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the . . . administration . . . and protection of the trust.' And section 15684, subdivision (a) provides in part, 'A trustee is entitled to the repayment out of the trust property for . . . [¶] [e]xpenditures that were properly incurred in the administration of the trust.'" (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97, see also *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 213 ["Under California law, a trustee may use trust funds to pay for legal advice regarding trust administration . . . ."].)

"Attorneys hired by a trustee to aid in administering the trust are entitled to reasonable fees paid from trust assets. Preparing the accounting and responding to the beneficiaries' objections to that accounting are aspects of trust administration." (*Kasperbauer v. Fairfield*, *supra*, 171 Cal.App.4th at p. 235.) An award of attorney fees lies within the probate court's discretion, which will not be disturbed absent a showing of abuse. (*Id*. at p. 234.) To the extent the probate court limited the award of fees to preparation of the accounting solely, excluding fees incurred for responding to the objections, it abused its discretion. However, the fees incurred in responding to the objections must have benefited the trust, not Delia personally, and Delia must have acted properly. (*Estate of Beach* (1975) 15 Cal.3d 623, 644.) As Daniel aptly notes, "Expenses incurred in Delia's defense against claims based on (a) her conversion of [IVT] property

and (b) attorney fees incurred by the [IVT] to recover the converted property hardly qualified as this kind of expense."

To support her claim that she is entitled to recover $66,112.50 in attorney fees, Delia argued at the trial level and on appeal that she successfully defended against 98 percent of the claims against her, reducing $700,000 worth of objections to a net recovery of only $5,327.26 for the IVT. In response, Daniel charges Delia with distorting the facts. We agree with Daniel.

A determination of whether all of the $66,112.50 in fees (incurred by Delia in response to Daniel's objections to her account) should be paid by the IVT depends on the nature of the objections. Turning to those objections, we note the following objections affected Delia primarily: (1) the 1998 Cadillac, or proceeds thereof, should be an asset of the IVT; (3) Delia should return $1,500 which she claims she was entitled to as her August 2006 monthly stipend; (5) Delia should pay $23,996.50 to the IVT to make up for interest lost by her maintaining approximately $300,000 in an account without generating interest; (11) Time is needed to determine the status of a loan made by Father, prior to his death, to Barry Broad (Delia's son) in the amount of $50,000; (12) Time is needed to review the 2004 and 2005 tax returns for accuracy and submit a report; and (13) Delia should be assessed section 859 damages regarding the L.A. property and required to reimburse the IVT the $120,000 in legal fees the IVT was ordered to pay Daniel and Michele. Of these, Daniel withdrew the following objections: (1), (11), (12), and (13). Thus, two objections that were personal to Delia remained.

Nonetheless, even if we consider these objections, they were resolved as follows: Objection (3), $1,500 to Delia, was sustained and payment was disallowed; and Objection (5) Delia was surcharged $22,255.52 for her failure to place IVT money in an interest bearing account.

The objections that primarily affected the IVT include: (2) Delia misrepresented the fact she held two outstanding notes on the L.A. property, and thus, should return $25,000, plus interest, and $29,000, plus interest, which she took as credit against the L.A. property proceeds; (4) $9,188.00 of Delia's claimed chargeable expenses for the L.A. property should be rejected; (6) Delia should provide background information to explain the increased value of property located on Long Beach Boulevard; (7) Delia should provide backup to support the request for $2,000 for payment of funeral expenses; (8) Delia should refund to the IVT all payments to Nancy Hallowell for accounting work to assist in preparation of these accountings; (9) Unclaimed funds concerning the sale of property in San Bernardino County should not be listed as an asset of the IVT; and (10) Delia should return the $5,000 retainer paid to Wendy Sharpe for legal services on the *Kaufman v. Raskov* matter. Regarding these objections, Daniel filed his notice of withdrawal of the following objections: (6), (8), and (9). Thus, only four objections affecting the IVT required further legal assistance.

Regarding those four remaining objections that affected the IVT, Daniel contends that objection (2) regarding the $54,000, was an issue that was resolved in 2006 when the probate court found that Delia was entitled to the monies. As Daniel correctly points out, "From that point on, the matter was res judicata, a point that could have [been] made in

one sentence at the time of the accounting hearing." More importantly, Delia's counsel stated this in the fall of 2006 and, as Daniel asserts, presumably the fees for saying it were included in the $8,062.50 they requested at that time. To the extent Delia's counsel spent any time drafting/revising his prior arguments, such efforts were duplicative and not entitled to reimbursement. As for objection (4) regarding the chargeable expenses for the L.A. property, the parties stipulated to a resolution. Regarding objection (7), funeral expenses, upon further explanation, the objection was withdrawn. Objection (10), payment to Wendy Sharpe, was determined to be a proper expense of the IVT.

Delia claims credit for obtaining "an additional income award of approximately $13,000." However, as Daniel points out, such "award" was the result of Daniel's efforts in scrutinizing the amended account and discovering $41,256.51 in trust income that Delia had failed to distribute during her tenure as trustee. The parties stipulated that the $41,256.51 should be distributed as lump sum payments in equal shares to the three beneficiaries.

To the extent Delia's counsel charged her for discovery regarding her petition for approval of account, we agree with Daniel's observation and find such fees to be unnecessary. As Daniel points out, the fee petition is silent on "why discovery was needed in defense of Delia's account, as to which she would have had all the relevant records."

Overall, Delia did not successfully defend 98 percent of the claims as she claimed. Applying section 17211, the probate court clearly found that Delia's opposition, or defense, to Daniel's contest, was without reasonable cause. (§ 17211, subd. (b).)

However, considering the above, it appears that a small percentage of the work performed in defending against Daniel's contest did relate to properly managing the IVT's assets. Accordingly, we agree and disagree with the probate court's order.

As we have already stated, the majority of the defenses against Daniel's objections benefited Delia, not the IVT. (§ 15684, subd. (b).) Thus, we do not agree with Delia's contention that she is entitled to reimbursement for all of the legal fees she has incurred. However, to the extent that Delia's legal fees were properly incurred in the administration of the IVT, she is entitled to reimbursement. (§ 15684, subd (a).) By outright denying reimbursement to Delia for those fees and limiting her recovery solely to fees incurred in preparing the account, the probate court abused its discretion. Thus, we must reverse the award of attorney fees and remand for further consideration. Recognizing the determination of the amount that should be awarded will not be easy, we provide the following observations to guide the probate court.

First, we, like the probate court, find that $66,112.50 in legal fees to defend Delia's account against Daniel's objections was excessive, given the facts that (1) Delia's counsel has extensive knowledge and experience with the IVT and the prior litigation; (2) Daniel's counsel's total fees were roughly $35,000 and involved more than just filing objections; and (3) less than 15 percent of the objections raised by Daniel required more than a mere telephone call and/or production of supporting documentation. Second, the billings of Delia's counsel are presented in a very general manner; more specificity is required. Third, to the extent that the defense of Delia's account is the result of her negligent or improper management of trust assets, the probate court may disallow

ordinary and extraordinary compensation, expenses, and attorney fees. (*Estate of Gump* (1991) 1 Cal.App.4th 582, 597-599.)

In sum, the probate court's decision to award $5,000 in attorney fees solely for preparation of Delia's account amounted to an abuse of discretion. Accordingly, we must remand the case to allow the probate court to re-evaluate its decision to award only $5,000 of the claimed $66,112.50 in attorney fees. On remand, the probate court should consider the above observations of this court.

IV. DISPOSITION

To the extent the probate court only awarded to Delia the amount of $5,000 for reimbursement of her attorney fees, it abused its discretion. Accordingly, we reverse the award of $5,000 to Delia and remand for further evaluation consistent with the view expressed in this opinion. In all other respects, the order is affirmed. Each party shall bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

GAUT
J.